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DECISION-MAKING AS WE AGE

Indiana Powers of Attorney and Advance Planning
By Christopher Michael Ripley

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We live in a strange, new world in large part due to social media. Our lives are an open book – literally. One only needs to go on Facebook, Twitter, or Instagram to gather personal information about our friends and colleagues. What food we like, music, and politics are all on full display. Likewise, it is not uncommon to see posts about disease, sickness, and death. We take the journey of healing with our friends, family, and co-workers as they battle through illness or the loss of loved ones. Posts and retweets are our medicine. The only thing that stops our lives from being completely transformed into reality TV are privacy settings.

On most social media platforms, privacy settings allow you to select certain approved friends or followers. Some social media settings even allow you to block access to certain parts of your page. Despite these safeguards, in 2020 the Federal Trade Commission received 1.4 million reports of identity theft, double the number from 2019. With data breaches at an all-time high, and so much of our information floating over the internet, it is not surprising that the concept of privacy appears to be nonexistent. Also, the COVID-19 pandemic has redefined the concept of privacy. Now we openly ask others in the presence of strangers: “Have you been vaccinated?” or “Have you taken the shot?” Currently, debates are taking place all over the country about whether vaccinations should be mandatory and the legality of such mandates.

**OLD WINE IN A NEW BOTTLE**

Fights over the constitutionality of mandatory vaccination laws are not new. On February 20, 1905, the Supreme Court, by a 7-2 majority in the case *Jacobson v. Massachusetts*, examined the legality of a
mandatory vaccination statute. The city of Cambridge, Massachusetts, fined residents who refused to receive smallpox injections. The law provided as follows:

Whereas, smallpox has been prevalent to some extent in the city of Cambridge, and still continues to increase; and whereas, it is necessary for the speedy extermination of the disease that all persons not protected by vaccination should be vaccinated; and whereas, in the opinion of the board, the public health and safety require the vaccination or revaccination of all the inhabitants of Cambridge; be it ordered, that all the inhabitants of Cambridge who have not been successfully vaccinated since March 1st, 1897, be vaccinated or revaccinated.

The law carved out an exception for children who presented a certificate, signed by a registered physician, that they were unfit subjects for vaccination. In Jacobson, a resident refused to comply with the law and was charged criminally. He argued that the law violated the Constitution of the United States that provided “no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” The resident was found guilty of violating the statute and the matter was heard by the Supreme Court.

The court held that the sections of the Constitution relied upon by the resident had never been regarded as the source of any substantive power conferred on the government of the United States, or on any of its departments. The court found that the authority of the state to enact a statute for the general health and safety of its residents was well within its police powers. The court distinctly recognized the authority of a state to enact quarantine laws and ‘health laws of every description.’

The court further held the compulsory vaccination law did not infringe upon the resident’s right to liberty. The court found the liberty secured by the Constitution of the United States does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. The court reasoned that since the vaccination law was used as a means of protecting a community against smallpox, it found no court, much less a jury, would be justified in disregarding the action of the legislature. The court held the mandatory vaccination law was constitutional. Ultimately, the court ruled a community had the right to protect itself against an epidemic of disease which threatened the safety of its members.

PRIVACY LAWS IN THE WAKE OF COVID-19

The Office for Civil Rights (OCR) released a bulletin about the coronavirus. The OCR advised the Health Insurance Portability Accountability Act (HIPAA) permits a covered entity to disclose the protected health information (PHI) of an individual who has been infected with, or exposed to, COVID-19, with law enforcement, paramedics, other first responders, and public health authorities without a HIPAA authorization to prevent or control spread of the disease.

The Equal Employment Opportunity Commission (EEOC) has also provided guidance to employers when dealing with COVID-19 and its impact on sensitive employee
makers to consider six factors prior to deciding whether to mandate COVID-19 vaccinations:

- Necessity and proportionality explained by a legitimate public health authority
- Sufficient evidence of vaccine safety
- Sufficient evidence of vaccine efficacy and effectiveness
- Sufficient supply
- Public trust
- Ethical processes and transparency of decision-making to determine the need for mandatory vaccinations

This tug of war between public health officials, the private sector, and objectors as it relates to mandatory vaccinations will likely be on full display in the upcoming months. Stay tuned.

information. The EEOC has advised employers may exclude from the workplace employees who refuse to be vaccinated. However, employers cannot discriminate against those who cannot receive COVID-19 vaccines because of an underlying disability or religious belief. In education, many colleges and universities will require mandatory vaccinations for students that return for classes in fall 2021. Locally, Valparaiso University will require vaccinations for all students returning to school for the fall semester.

Many states are attempting to implement legislation that would protect privacy rights. In Indiana, lawmakers offered a bill that would prohibit state and local units of governments from requiring "vaccination passports," or requiring employees to prove they have received the COVID-19 vaccine. The proposed House Bill 1405 prohibits governments, not private businesses, from requiring proof of vaccinations. This leaves the door open for the private sector to fashion regulation that may require proof of vaccination passports. Earlier in the year, Senate Bill 74, which would have prevented companies from mandating vaccinations, did not gain traction.

In Illinois, lawmakers angled to pass legislation that would only require people to take vaccines approved under the Food and Drug Administration’s emergency-use authorization. Proponents of the legislation cited the protection of individual rights. In Wisconsin, the governor vetoed two bills that prohibited public health officials from requiring individuals to get a COVID-19 vaccine. Consistent with the tone set out in the Jacobson decision, the governor cited safety measures that must be available to state and local officials during an ongoing pandemic.

One could argue a new world is here. However, the Jacobson case appears to demonstrate there is nothing new about what is occurring today. Fights about the legality of mandatory vaccination are as old as grandma’s apple pie. What is relatively new is the delicate balancing act public officials must undertake, under the watchful eye of social media, between ensuring the safety of a community, as identified in Jacobson, and preserving individual rights.

On April 13, 2021, the World Health Organization prepared a policy brief regarding mandatory vaccination and the ethical issues that should be considered. The policy brief urges government and/or institutional policymakers to examine varying ethical considerations before implementing mandatory vaccination programs. The World Health Organization advised policy makers to consider six factors prior to deciding whether to mandate COVID-19 vaccinations:

- Necessity and proportionality explained by a legitimate public health authority
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This tug of war between public health officials, the private sector, and objectors as it relates to mandatory vaccinations will likely be on full display in the upcoming months. Stay tuned.
Among many other issues, the COVID-19 pandemic has emphasized the need for advance planning. Sudden medical crises and the need to stay indoors have forced many Hoosiers to rely on agents like never before. While the pandemic is a unique and largely unanticipated situation, elder law attorneys have been concerned about the Silver Tsunami for years now. The need for advance planning is acute today and will continue long after COVID-19 is under control.

1. Introduction. Having powers of attorney is now as valuable to Hoosier clients as having wills. Fortunately, this is an area where the Indiana legislature has provided extensive planning opportunities. The
modern Indiana Power of Attorney Act can be found at Indiana Code § 30-5-1-1 et. seq. This recodification originated in 1991.3

Since then, the Indiana legislature has continued to innovate in this area. This is a success story of cooperation between legislators, attorneys, Hoosiers, caregivers, medical professionals, title agencies, and financial institutions in balancing the interests of all involved.

As the needs of Hoosiers change and technology advances, the Indiana legislature continues to add options to further empower agents to meet the modern needs of their principals. Powers concerning retirement benefits were added in 2005.4 The insurance transaction powers were amended that year as well. The Indiana legislature incorporated transfer on death powers in 2009.5 Digital asset provisions were added in 2016 at the same time similar additions were made to Indiana Code trust, guardianship, and estate administration provisions. Provisions for electronic powers of attorney were added in 2018 with 2019 amendments.6 Practitioners would be well-served to continue monitoring these innovations and consider reviewing and improving their form documents on at least an annual basis.

2. Creation. The Indiana Code sets forth the essential elements of a valid power of attorney.9 A valid Indiana power of attorney must be in writing, name the attorney in fact, and set forth the power of the attorney in fact to act on the principal’s behalf.10 In addition, a valid Indiana power of attorney must be signed by the principal in the presence of a notary public or signed at the principal’s direction in the presence of a notary public with a designation by the notary that the signature was at the principal’s direction.11

The principal must have capacity to execute the power of attorney. Capacity is not specified in the Indiana Power of Attorney Act, but the courts have articulated standards for such capacity:

We presume that every person is of sound mind to execute a will until the contrary is shown. To rebut this presumption, a party must show that the testator lacks mental capacity at the time of executing his will to know: (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) their desserts, with respect to their treatment of and conduct toward him.12
Based on this test, a prospective principal should be able to discuss as proof of capacity\(^1\) the following categories of information.\(^4\)

1. The extent and value of their property;
2. Their obligations to any dependent(s);
3. The powers being given to the agent(s);
4. The health care decisions that the agent(s) may make;
5. The obligation of the agent(s) to account for their actions;
6. The possibility that agent(s) may decrease the value of their assets or act against their interests; and
7. The authority to revoke the power of attorney.

Client capacity is a critical consideration and must not be overlooked, particularly because the issue involves ethical concerns as explained in Indiana Rules of Professional Conduct 1.14. Lawyers are called upon to maintain as normal a client-lawyer relationship as reasonably possible given the client’s capacity.\(^1\) They are furthermore permitted to take protective action as reasonably necessary.\(^4\)

Attorneys must always start at the same place: “Who is the client?” The attorney’s loyalty must be clear and undivided.\(^1\) This is essential when attorneys are working with an individual and his or her agents. The principal is the client in most situations. This duty often needs to be clarified to family members and should always be confirmed in writing.

3. Recording. It is important to prepare financial powers of attorney in a form ready for recording if the power of attorney includes the power to execute a document that may need to be recorded.\(^6\) Generally, this will relate to powers of attorney concerning real estate.\(^7\) The executed document must reference the book and page number or instrument number for the recorded power of attorney.\(^8\)

4. Immediate or Springing Powers. Powers of attorney in Indiana can be drafted to confer authority effective immediately, effective at a later date or effective upon the occurrence of an event, such as the principal’s incapacity.\(^9\) Determining whether the principal has become incapacitated may require review by a physician, psychologist or judge and access to medical records.\(^20\) From a practical standpoint, it can be important for the principal to have a long-running association with a treating physician to ease review of the capacity issue and detect changes over time. Powers of attorney often include or are associated with authorizations for access to medical records under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

5. Co-Agents and Successive Agents. A principal can (and often should) designate co-attorneys in fact\(^21\) and successor attorneys in fact.\(^22\) The selection of co-agents and successor agents implicates the same factors as the selection of an agent in the first place. The selection of co-agents adds the issue of the agents being able to cooperate as well.
as potential benefits from that cooperation. Different people bring different skills and perspectives that can synergize. The Indiana Code designates co-attorneys in fact as able to act independently unless the power of attorney sets forth otherwise.23 This issue must be considered carefully, since requiring co-attorneys in fact to act together can delay action or result in delegations of authority.24

6. Customization. There is no statutory form power of attorney in Indiana. That said, practitioners use a variety of powers of attorney generally following similar forms. The most basic Indiana powers of attorney establish the principal, the agent(s), refer to the agent’s powers by citation to statute, establish when the agent’s powers take effect, refer to additional issues, such as designation of a preferred guardian, and include a signature and date section for the principal and a notary jurat.

An Indiana power of attorney can be extensively customized.25 Statutory powers can be incorporated by reference.26 One result of the option to incorporate powers by reference is the scope of powers in an Indiana power of attorney is often not fully set forth in the document itself. This situation can create some issues when agents are confused about the extent of his or her authority. This is an excellent reason for the agent to have an ongoing working relationship with an attorney who can and should adjust the scope of existing powers and include new powers to meet the clients’ individual needs. Here are some major areas for customization.

6.1. Financial Powers. Real Estate. The Indiana powers of attorney statutory power confers broad authority concerning real estate. The statutory power includes selling, exchanging, leasing or conveying interests in real property and powers related to mortgages and loans, real property management, improvements to real property, execution of documents, litigation, hiring agents, land use, and zoning.27

Banking. This is a conventional power included in Indiana powers of attorney. The statutory power confers broad authority including opening and closing bank accounts, writing checks, making disclosures to banks, receipt of bank notices and acting upon them, use of safe deposit boxes, borrowing money, use of financial instruments such as promissory notes, use of negotiable instruments, and obtaining letters of credit.28

Gifting. This is one of the most critical powers in the event of long-term care planning. Ind. Code § 30-5-5-9(a)(2) provides the agent the authority to “[m]ake gifts on behalf of the principal to the principal’s spouse, children, and other descendants or the spouse of a child or other descendant, either outright or in trust, for purposes the attorney in fact considers to be in the best interest of the principal,” subject to the restriction “[t]he attorney in fact or a person that the attorney in fact has a legal obligation to support may not be the recipient of gifts in one (1) year that total more than the amount allowed as an exclusion from gifts under Section 2503 of the Internal Revenue Code.”29

If long-term care planning requires re-titling assets between spouses, the statutory language can create a significant obstacle and may force a guardianship proceeding and a petition to conduct estate planning pursuant to Ind. Code § 29-3-9-4.5.30

Granting agents broad gifting authority can be dangerous. It cannot be overstated that these documents grant a large measure of power to the agent. A rogue attorney in fact can cause irreversible damage. Misconduct can be difficult to unwind with banks and financial planners. The wrongdoer may be judgment proof. Legal remedies are time consuming, potentially expensive, limited, and often a poor substitute for the wrong having never occurred in the first instance. Being able to trust agents is essential. At the same time, oversight is essential. Any agent who rejects review and oversight should not have the role.

Estate Transactions. This is a particularly important power to be deliberate about. Ind. Code § 30-5-5-15 delineates powers can be conferred on an attorney in fact including participation in estate proceedings, trust and estate powers (not including the authority to create a will), the creation of living trusts, and beneficiary powers.31 Subsection (b) provides:

"Granting agents broad gifting authority can be dangerous."
This time a year ago, my initial pandemic shock and fear transformed to a state of constant anxiousness:
Are my sniffles COVID or allergies?; Is my family safe?; How will I manage sharing 1100 square feet with my husband?; Who the heck is buying all the toilet paper?

Sleep ranged from nothing to a few hours a night. Body exhausted but brain wound tight. Activities that normally soothed my roving mind were ineffective. Books with a chapter or two read languished on the nightstand. Piles of Scientific American, National Geographic, and Bon Appetite collected dust. Jigsaw puzzles provided brief respite.

Work proved a panacea. Learning new technologies and training modalities revved my mind. The Indiana Public Defender Council presented 47 webinars totaling 60 CLE hours reaching 3,205 non-unique viewers between April and December 2020. Via virtual platforms, our team interacted with more defenders than ever, providing immediate help, encouragement, and engagement. The team met the demand and appreciated the interactions.

The newness soon waned in the wake of social and political unrest and the rampant spread of COVID. Worried about clients stuck in jails and prisons, unable to distance. Concerns for family, friends, and co-workers increased too.

I bumbled along until the fall when I became enthralled by the vitriol spewed from 24-hour news stations. I had been blissfully unaware that I had access to constant news streams until I learned I had Hulu. Damn you, Hulu. Elusive sleep became non-existent sleep. Emotions moved from anger and fear to sadness and defeat. Many at 2.30 a.m. wide-eyed, staring at the television. Workday fueled by coffee, kombucha, and sugar. Sluggish and zinging all at once.
Then, MALAISE.
(noun)

*a condition of general bodily weakness or discomfort, often marking the onset of a disease, a vague or unfocused feeling of mental uneasiness, lethargy, or discomfort.*

Eliot got it wrong: February is the cruelest month. The extremes of holiday merry-making apparent. Days short and shivering. Brown snow piles in parking lots. The only frivolity a groundhog snickering, swiftly returning to his underground snug. I needed to do something to get me to spring and out of malaise.

Answer: Microbes.

Creating a starter and baking sourdough bread was a pandemic thing. Instagram-worthy. 200-year-old starters over-nighted around the world. Hands near and far stretching and shaping. Ovens blazing 500 F, 260 C, or gas mark 9. Halls and houses perfumed by fresh-baked bread.


A year into this strangeness, I concocted my first starter. Filtered water, organic rye flour, and time. Flour, air, and my hands awash with yeast, a.k.a microbes. Combine and wait 24 hours to let the microbes awaken and feast. Thereafter twice-a-day feedings. Henry, my starter’s name, was on the same feeding schedule as Vasily, my cat.

The collective wisdom said after two days there would be bubbles and a dirty sock smell. No bubbles. No dirty sock smell. Did I create a dud? Was it too hot? Too cold? I lost faith in Henry. I started another starter.

I did not toss Henry. I did not have the heart to do it. Another Weck jar. AP flour and tap water this time. Nothing fussy. Stella was born. I sat her on the counter next to Henry. The next morning Stella bubbled and smelled. Henry bubbled, too. Oh, me of little faith. He was just lonely.

I maintained a twice a day feeding schedule. Rubber band around jars to measure their rise a fall. I marveled at their activity. Their quirks. Their possibility.

H and S were ready to make bread 10 days later. A beginner with a beginner recipe. No-knead. Lots of time. High heat. Simple ingredients squished and pulled. Growing. Smelling of earth. No different than a thousand years ago. First loaves wonky. It did not matter. I grinned for hours. I slathered it with Irish butter and flakey sea salt.

Many tries since early April. Lessons. Loaves shared. One tossed. Thank goodness for microbes.
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When it comes to serving Indiana, we’re all IN. We traverse the crossroads to the county seats of our referral clients all over Indiana, from Adams County to Vanderburgh. If a client of yours has been in an accident and needs honest, experienced, and trusted representation, don’t compromise on expertise due to proximity. Tony Patterson, Paul Kruse, and John McLaughlin will meet you where you are, be it rural county or small town Main Street. We’re all IN for you.
SUPREME COURT ADDRESSES SELF-REPRESENTATION, PUNTS ON BAIL

During April and May, the Indiana Supreme Court decided cases involving self-representation and searches on community corrections. The justices also vacated a significant Court of Appeals opinion addressing bail.

SELF-REPRESENTATION REQUEST NOT INTELLIGENT OR UNEQUIVOCAL

In *Wright v. State*, 168 N.E.3d 244 (Ind. 2021), a divided Indiana Supreme Court rejected a challenge to the denial of a defendant’s request to represent himself. Although his waiver was knowing and voluntary, the court held it was (1) not unequivocal because his “acknowledged preference for either private counsel or his original attorney indicates no strong autonomy interest,” and (2) not intelligent based on his “limited experience navigating the legal system, . . . deficient knowledge of criminal law and procedure, and . . . no apparent defenses or trial strategy,” especially considering the state’s “much stronger interest in ensuring a fair trial in this capital-turned-LWOP case.” *Id.* at 266-68.

Justice Geoffrey Slaughter dissented, reasoning (1) an “intelligent’ waiver focuses only on whether the
defendant knows the dangers and disadvantages of representing himself: ‘a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation,’” id. at 273 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)), (2) the request was unequivocal, quoting at length from the transcript including “I would like no attorney” and “I wish to go pro se” and (3) “Supreme Court precedent does not permit today’s ‘tailoring’ test, ‘the severity of a potential punishment’ cannot authorize the State’s interests to eclipse the defendant’s.” Id. at 277-

Justice Mark Massa concurred in the result reached by the majority on equivocation because the trial court had “sifted through all of Wright’s various assertions—both written and oral—on more than one occasion, and concluded that what he ultimately wanted was to hire his own private counsel, or at least have his old counsel back.” Id. at 270. But he took issue with many other aspects of the majority opinion, agreeing with Justice Slaughter it tillled “new constitutional soil in suggesting the standard for waiving the right to counsel varies depending on the seriousness of the case.” Id.

**WAIVER OF SEARCH AND SEIZURE PROTECTIONS**

*State v. Ellis*, 167 N.E.3d 285, 286 (Ind. 2021), reiterated and clarified agreements “to allow community corrections to search the defendant’s person or home to ensure compliance” are generally enforceable as long as they are “clearly expressed.” There, the court held “a waiver of the ‘right against search and seizure’ clearly informs the defendant that a search may be conducted without reasonable suspicion. . . . Additional language discussing reasonable suspicion is unnecessary.” *Id.*

**BAIL ISSUES UNRESOLVED**

Last May in *Yeager v. State*, 148 N.E.3d 1025 (Ind. Ct. App. 2020), vacated, 168 N.E.3d 277 (Ind. 2021), the Court of Appeals reviewed bail set at $250,000 cash for a defendant charged with four Level 3 felony offenses. The defendant had no criminal history besides underage drinking, lived in the area his whole life, lived in the same house (which he was buying) for twelve years, had a job to which he could return, and had a good relationship with his family (who also lived in the area and was supportive of him). *Id.* at 1026. The pretrial director recommended he be released to pretrial supervision. Considering “substantial mitigating factors showing that he recognize[d] the court’s authority to bring him to trial” and without evidence he “pose[d] a risk to the physical safety of the victim or the community,” the Court of Appeals held the trial court abused its discretion in denying his request to reduce bail. *Id.* The case was remanded with instructions that he “be released to pretrial supervision with the added condition of electronic monitoring.” *Id.*

More than six months after hearing oral argument last November, the Indiana Supreme issued an order

“Indiana Supreme issued an order granting transfer, vacating the opinion, and dismissing it as moot because the trial court had recently resolved the case through a plea agreement.”
granting transfer, vacating the opinion, and dismissing it as moot because the trial court had recently resolved the case through a plea agreement. *Yeager v. State*, 168 N.E.3d 277 (Ind. 2021)

Chief Justice Rush dissented and would have instead denied transfer to “leave valuable Court of Appeals precedent intact.” *Id.* at 278. Although agreeing with much of the Court of Appeals’ reasoning, she believed the proper remedy was to remand to the trial court “with instructions to reduce Yeager’s bail and allow the trial court to impose, within its discretion, any other conditions deemed necessary to ensure Yeager’s appearance as set forth in Indiana Code section 35-33-8-3.2.” *Id.* The justices appear to be waiting for issues concerning bail and Criminal Rule 26 to percolate a bit more before wading in; they will likely have the opportunity again soon.

The online supplement to this article discusses several opinions from the Court of Appeals regarding issues on topics including denial of bail for murder, a fatal charging error in a drug case, the sufficiency of evidence for “moderate bodily injury,” and a case invalidating Indiana Code section 35-50-5-11.5, enacted in 2020, which severely restricted a defendant’s ability to depose a child under age 16 who is an alleged victim of a sex offense.

The full texts of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions. A more in-depth version of this article is available at inbar.org.
SB 368 RESULTS IN LONG-AWAITED JUVENILE JUSTICE REFORMS

By Joel Weineke

The first two words of the bill’s synopsis were: “Juvenile justice.” The result of Senate Bill 368 was a modest yet significant step forward for juvenile justice. If the bill were a Beatles song, it might be titled: “The Long and Winding Road.”

Senate Bill 368, as introduced by Senator Karen Tallian (D), had eight bold aspirations: (1) data tracking of youth held in jails pre-trial; (2) a prohibition against holding youth in jails pre-trial, unless specific judicial findings were made; (3) eradication of the direct-file process, whereby kids can skip the juvenile justice system altogether; (4) adjustments to the waiver process by increasing the minimum age for waiver from 14 to 16 for most offenses, and from 12 to 14 for an act that would be murder if committed by an adult; (5) redefining possession of marijuana and related offenses as status delinquent acts; (6) detailed procedures for juvenile competency assessment, services for attainment, and transition where competency cannot be attained; (7) automatic expungement of delinquency records for low-level felonies and misdemeanors; and (8) abolition of life without parole sentences and a judicial modification procedure for persons who committed their offense when they were still a child.

On April 14, when the final unanimous vote transformed SB 368 into an enrolled act, all but three of the original components of the bill had been shed. Still left: protections for juvenile arrestees; juvenile competency
of Child Services, the state agency that already funds many treatment services in the juvenile justice system. System capacity improvement was not specifically addressed by the bill, but the December 31, 2022, effective date will allow child and adolescent psychologists and psychiatrists to train on competency evaluations, and program proposals for competency attainment services could be made.

To respond to concerns of impact on the child, the bill included age-appropriate timelines based on a sliding scale taking into

**“the Prison Rape Elimination Act (PREA) was enacted into federal law, and the 'youthful inmate' standard was promulgated in 2012”**

Stakeholders, led by efforts of the Children's Policy and Law Initiative of Indiana (CPLI), gathered several times over the course of a three-year period beginning in 2018 to discuss the necessary components of a juvenile competency statute. Their work focused on three areas: the competency process shouldn’t be more arduous or onerous than delinquency proceedings; the capacity for evaluation and services needed to be improved, and the funds must be available for evaluation and attainment of services. The latter concern was ultimately answered by SB 368 requiring juvenile courts to fund evaluation, and competency attainment services would be paid for by the Indiana Department

consideration the seriousness of the allegations and the setting where competency attainment services would be delivered. The legislature included priorities favoring treating children with the fewest restrictions on freedom necessary, in the setting which least interfered with the family considering the nature of the case and best interests of the child. Additionally, a pathway to services for those unable to attain competency in a timely manner was articulated, with 90 days of leeway allowed to transition the child to those services and a requirement for dismissal of unresolvable delinquency proceeding to prevent children from lingering under the weight of delinquency allegations.

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procedures; and automatic expungement, which had been significantly dialed back from its original form. To get these important provisions across the finish line, Senator Tallian joined with key bipartisan contributions from Senator Jean Breaux (D), Senator Susan Glick (R), and Representative Wendy McNamara (R).

The provisions for automatic expungement are great improvements designed to give more reality to the perception juvenile-delinquency history should not result in reverberating consequences reaching into adulthood. But this piece is about the historical underpinnings of the two other provisions, and here is a glimpse of that story:

**JUVENILE COMPETENCY PROCEDURES**

Prior to SB 368, the Indiana Supreme Court held in *In re K.G.*: “although juveniles alleged to be a delinquent have the constitutional right to have their competency determined before they are subjected to delinquency proceedings, the adult competency statute is not applicable to reaching that determination.” The four consolidated cases culminating in this holding had initiated as early as 1999, but practitioners and judicial officers working with delinquency proceedings had been confronted with these issues long before.

*In re K.G.* filled the gap of a juvenile competency statute by pointing to Indiana Code section 31-32-12-1, which permitted juvenile courts to order mental or physical examinations and treatment for an alleged delinquent child. However, several questions still remained, the most difficult being: how, when, and by whom should competency be evaluated; what are the appropriate efforts toward competency attainment in the context of a child and the rehabilitative-focused juvenile justice system; and what do we do with a child who is alleged to have committed a serious delinquent act or repetitive delinquent acts, but is unlikely to ever attain competency. Moreover, Indiana Code section 31-32-12-2 permitted confinement for “not more than fourteen (14) days” for the ordered treatment and examinations, but competency evaluation and then services towards competency attainment cannot be completed in 14 days.
The statute has lots of “moving parts”—too many to summarize and analyze in this short article—and any complex statute will likely require revisions as it is implemented. Nevertheless, the General Assembly’s willingness to receive, refine, and enact the stakeholder’s important effort will help ensure only those children who truly can know and understand the process and purpose of juvenile court, as well as communicate with their advocate to present a defense, will be treated as delinquent children.

PROTECTION FOR JUVENILE ARRESTEES

The protections for juvenile arrestees, which are in the first section of the bill and by no means second in importance, also have been long in the making. Prior to the introduction of juvenile courts and juvenile laws, children who violated criminal law and were old enough for prosecution were treated the same as adults. “Indiana made no special provision for separate confinement for children pending trial[.]” Arguably, this intermingling of children with adults in the confinement setting has motivated reforms to create a juvenile justice system more than anything else. It was the impetus for the creation of the institutions which led to the Indiana Boys School and the Indiana Girls School and was a major motivating factor for Indianapolis Police Court Judge George W. Stubbs to create the first juvenile court, which quickly became a model for statewide legislative reform in 1903. A century later, in 2003, the Prison Rape Elimination Act (PREA) was enacted into federal law, and the “youthful inmate” standard was promulgated in 2012, preventing children from being placed in a “housing unit” with “sight, sound, or physical contact with any adult inmate . . . .” In areas outside of the prison or jail housing units, sight and sound separation, or direct staff supervision during the comingling of youth and adult inmates was required. When complying with sight and sound separation, best efforts must be made to avoid placing the youthful inmates in isolation to comply with the separation.

Indiana had long separated children charged with delinquent acts from adult inmates and soon after the announcement of the youthful inmate PREA standard, Indiana

Continued on page 32...
It’s the season of law license renewal, also known as attorney registration, which makes for a timely discussion on the multiple aspects of license maintenance.

LICENSE RENEWAL

It should be etched into our memory that we must annually renew our law license by October 1. Deadline failure results in late fees and possible administrative license suspension. Of course, rules always have exceptions. The due date is January 30 for any lawyer under temporary admission, i.e. pro hac vice. In addition to a late fee, the temporarily admitted lawyer is automatically excluded from temporary admission. Continued representation in the matter constitutes unauthorized practice of law.¹

Every lawyer licensed in Indiana has an affirmative duty to keep their Roll of Attorneys contact information up-to-date. This includes both postal and electronic addresses, telephone number, and name change.² Although any change should happen within 30 days of its occurrence,³ annual registration is an opportune time to review contact accuracy. The consequences of failing this task can be harsh. The rule states: “The names and addresses so filed shall be effective for all notices involving licenses as attorneys and/or disciplinary matters, and a failure to file same shall be a waiver of notice involving licenses as attorneys and/or disciplinary matters” (emphasis added).⁴ Each year a few lawyers miss the license renewal notice from the Supreme Court Clerk. The argument that late fees should be waived because the lawyer did not receive renewal notice lacks persuasiveness if their contact information was not current.
IOLTA MAINTENANCE

Maintenance on the lawyer’s IOLTA certification also occurs during this time. Modifications such as new account number, new bank, or career move to an IOLTA exempt status are certified during attorney registration. Failure to annually complete the IOLTA certification by October 1 also results in late fees even if the lawyer timely renewed their law license. Prof. Cond. R. 1.15(g) establishes eight categories of exemption from maintaining an IOLTA account. Most of the exemptions are obvious, such as the lawyer is a judge, government-employed lawyer, or law educator. Other grounds for exemption can generate review by the Supreme Court Clerk and the Disciplinary Commission as to their genuineness. These include a claim that the lawyer is not engaged in the private practice of law that involves holding client or third-party funds in trust, or a claim that IOLTA compliance would work an undue hardship on the lawyer.

If a lawyer is delegating license and registration renewal to a non-lawyer employee, remember that Prof. Cond. R. 5.3 places responsibility on the lawyer to ensure that the employee’s conduct is compatible with the professional obligations of the lawyer. Blaming an employee for license renewal errors might not reach a sympathetic ear. Even in a situation where a loyal employee appeared to be protecting her employer from license regulation and IOLTA oversight, the unwitting lawyer still received a stayed suspension and probation.

LICENSE STATUS MAINTENANCE

Attorney registration is also a time to evaluate whether a change of license status should occur. If one intends to

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remain active or part time, then active status is the selection.

Retired and inactive statuses are not synonymous. While inactive status is viewed as temporary, retired status is viewed as permanent. Both status changes can be accomplished through the portal and both require a supporting electronic signature affidavit. A lawyer must be in good standing to change license status. Retired status requires that the lawyer be at least 65 years of age. The retirement affidavit requires an affirmation that the lawyer does not intend to return to the practice of law. The affidavit must be submitted by October 1 to avoid incurring an annual fee for another year.8

Similarities between retirement and inactive status are that neither allows one to engage in the practice of law and neither requires continued CLE compliance.9 Inactive status does require the lawyer to pay one-half of the annual registration fee.10 Retired status has no annual fee. However, if a lawyer chooses to un-retire, then the lawyer must pay the annual fee for past years in retired status, including delinquent fees, as well as the annual fee currently due, and a $200.00 reinstatement fee.11

If an inactive lawyer wants to take on a single matter, for example an estate, then the lawyer must change the license status to active via the portal and pay the corresponding fee. Going back and forth from active to inactive is not a red flag for license regulators and is not an unusual occurrence. Inactive status also requires renewal each subsequent year on or before October 1.12

Inactive status is most common for situations where a lawyer takes a temporary step away from the practice of law. Military deployment, faculty sabbatical, or a medical episode are examples of reasons to take one’s license inactive. Many lawyers winding down their career but who want to keep the license in a ready state for return to active status are known to choose inactive status.

An exception to the prohibition against practicing law while inactive or retired is the pro bono publico license.13 This limited license allows an inactive or retired lawyer to practice in pro bono service, however one cannot hold themselves out as an active member of the bar of Indiana. The pro bono publico license is administered through the State Board of Law Examiners. It cannot be acquired through the portal.

**ATTORNEY SURROGATE MAINTENANCE**

When a solo practitioner dies, disappears, becomes disabled, or disbarred (commonly called the 4 D’s), the law practice is wrapped up through the attorney surrogate process.14 It can be likened to a receivership. Designation of an attorney surrogate is not mandatory for a solo. Absent a solo practitioner’s designation, a local court has jurisdiction to name an attorney surrogate to all pending actions, and close out trust accounts.15

One should keep in mind that an attorney surrogate must be a lawyer who is active in good standing. If the designated attorney surrogate is retired or inactive, then they are ineligible to serve in that role.16

With all this information at hand, you should now be able to check under the hood and prep your law license for another one-year run. ☑

Footnotes:
1. Admis. Disc. R. 3(2)(c), (e), and (f).
3. Id.
4. Id.
10. Admis. Disc. R. 2(c).

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When I was in active practice with my old law firm, the guiding principles for our practice group were embodied in what was referred to as the Ten Commandments of Client Responsiveness. One of the most important tenets was the client was always right. That approach dictated if there were any disagreements between a client and one of us lawyers, we lawyers were to swallow our pride, stifle our defenses, admit any errors, and immediately set about making things right. An ounce of early prevention is worth a pound of later cure. That approach came to be known among some of us in my group as the Marge O’Laughlin Rule. Here’s how that came to be:

Marge O’Laughlin was not always the iconic, influential, unforgettable character she became by the time she reached the end of her extraordinary career in public service on behalf of the citizens of Indiana. Many are familiar with the details of her distinguished history. Marjorie H. O’Laughlin was the Indianapolis City Clerk (first elected with Richard Green Lugar in 1967 and reelected in 1971), Indiana Clerk of Courts (elected in 1978 and reelected in 1982), Indiana State Treasurer (elected in 1986 and reelected in 1990), and Treasurer of the Marion County Health & Hospital Corporation after she finished two terms as Indiana Treasurer. Groundbreaking political/policy leader and elected official, brilliant financial strategist, principled public servant and force for good, and mentor/example to hundreds of women and men in Indiana. How many of you were sworn in as brand-new lawyers by Mrs. O’Laughlin when she was Indiana Clerk of Courts? And every lawyer reading this account who took the lawyer’s oath from her will no doubt recall the impressive manner in which she would recite those stirring words and phrases from memory, requiring nary a note or a prompt, guiding each new lawyer’s entry into the profession.

As I said, Mrs. O’Laughlin’s public service began when she was elected City Clerk, and her office was down the hall from Mayor Lugar’s suite in the City-County Building. This was in 1969. I and six other college students had all managed to land summer jobs with the mayor. We were long on eagerness and energy, but short on experience and discretion. Mitch Daniels and Paul Mannweiler were two of these upstarts, men whose names are easily recognized today because of the ways in which they managed to turn their lives around and ultimately make significant contributions to our city and state. At the time, though, their potential was less clearly in view. We were kids.

The clerk’s conference room was on the Mayor’s Suite on the 25th floor of the City-County Building, and all the college interns went into the conference room for an impromptu meeting the first week of the summer. Nothing nefarious. Nothing kinky. Or so we thought.

But after a few minutes, the door burst open and Mrs. O’Laughlin swooped into the room and exploded at us for being in her conference room without permission. I can still hear the door crashing against the wall, followed by her piercing voice. All of us were stunned and all ran out of the room like lemmings — save one. Me. Probably because I was at the far end of the conference room and completely paralyzed in
the face of a raging public official, a future in prison flashing in front of my eyes. I thought I was going to pass out.

So, I stayed. I listened. And then I apologized. Took responsibility even though another intern was supposed to have signed up for the conference room and groveled as no person has groveled in all of human history, as Mrs. O’Laughlin, with her words, beat me like you beat whipped cream over persimmon pudding. I went home that night and vomited uncontrollably for three straight hours.

The next day, there was a note in my message box when I walked into the office. Mayor Lugar wanted to see me at 9 a.m., I was sure it was to send me back to Bedford and end my hope of a successful law school career at Michigan. I counted the minutes and knocked on the Mayor’s personal office door at exactly 9 a.m. To my surprise, there was Mrs. O’Laughlin with the mayor — saying she wanted to apologize and to compliment my professionalism directly to both me and the mayor. Again, I almost passed out, but this time from relief.

Sixteen years later, Marge O’Laughlin was elected Treasurer of the State of Indiana. During the transition, she met with our senior partner and told him she wanted our firm to be her counsel in dealing with a state board she was required to chair, but only if Charlie Richardson was her assigned lawyer. And she repeated the story of how I apologized on the spot and took responsibility in 1969.

Taking responsibility is so important. Marge O’Laughlin knew that. And she taught me by her example in the meeting with Mayor Lugar.

But let me give you another example, this one also involving Indianapolis’ best, Charles Whistler. Whistler Plaza in downtown Indianapolis commemorates Chuck’s immeasurable contributions to our city before his untimely death in 1981. We lost so much so soon.

Chuck was representing a plaintiff who was seeking both compensatory and punitive damages against five defendants. I had been helping on the case and actually took the deposition of one of the lesser defendants. When it came time for trial, Chuck had me do that defendant’s examination in the same City-County Building where I had stumbled in 1969. The questioning went something like this:

Isn’t it true, Mr. Defendant, that you and the other defendants are liable for my client’s loss? Answer: Yes.

Isn’t it true, Mr. Flagrantly Guilty Defendant, that you hurt my client bad, really bad? Answer: Absolutely.

Isn’t it true, Mr. Helplessly Culpable, At-My-Mercy Defendant, that you were reckless, negligent, and oblivious to what you were doing to my client? Answer: I couldn’t have said it better.

So how does that burden of complete legal responsibility make you feel, Mr. Liable Defendant? Answer: Like I should die. Worse probably than how your poor client must feel. I am so sorry for what we have done, and I am completely responsible.

At that point the judge called a recess. I stood up, puffed out my chest, turned to Chuck and proudly said, “Did you see what I just did — he admitted everything! Can’t you just make me a partner right now since I am obviously spectacularly Perry Mason?”

Chuck turned to me and said: “You dip weed. Don’t you realize the jury will never give us punitive damages? No one EVER punishes someone who takes responsibility like he did.”

Chuck was right. We got the minimal compensatory damages against that defendant, and I didn’t make partner until later.

Every lawyer remembers times when he or she has inadvertently stumbled or made matters worse or injected unwelcome complications into an already knotty set of problems. Perfection, of course, is always the goal, but only that—a goal, since there is no strategy known to humankind that can promise such a result every time. When you find you have messed up, I recommend you follow the examples of these two wise Hoosier leaders — Marjorie O’Laughlin and Charles Whistler — by taking responsibility, admitting the error, owning it, and fixing it — as soon as possible. In the words of American author and businessman, Arnold Glasow, “A good leader takes a little more than her share of the blame, a little less than her share of the credit.”
In April 2021, the Indiana Supreme Court issued two civil opinions and granted transfer in two civil cases. The Indiana Court of Appeals issued 18 published civil opinions. The full texts of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions. A more in-depth version of this article is available at inbar.org.

**INDIANA SUPREME COURT**

Continuity of ownership is essential for either the de facto merger exception or mere-continuation exception to apply

A newly created operating entity, New Entity, entered into a strict foreclosure agreement under Chapter 9.1 of Indiana’s Uniform Commercial Code with an old business that had defaulted under previous debt obligations.

After finalizing the agreement, the New Entity assumed the old business’s essential liabilities, and importantly the old business’s shareholders owned no equity in the New Entity. A pipe-installation company which had not been paid for its services sued the old business, and upon learning the old business had no assets, filed a proceeding supplemental against the New Entity claiming the foreclosure agreement amounted to a de facto merger.

In *New Nello Operating Co., LLC v. CompressAir*, 2021 WL 1571842, __N.E.3d__ (Ind. 2021) (Slaughter, J.), a unanimous Supreme Court held that continuity of ownership is essential for either the de facto merger exception or mere continuation exception to apply. While the general rule in Indiana is that the buyer does not normally take on the seller’s liability in an asset purchase, there are four exceptions to this rule including the de facto merger and mere continuation exceptions. The court held that for either of these exceptions to exist, continuity of ownership between buyer and seller must also exist.
Store manager cannot be held liable where the manager lacked control over the property where the injury occurred

A customer brought a personal injury suit against a discount store and its manager in the United States District Court for the Northern District of Indiana under diversity jurisdiction. The discount store argued for removal, alleging fraudulent joinder and that the manager was only included in the suit to defeat federal diversity jurisdiction. The U.S. District Court issued an order seeking the Indiana Supreme Court’s guidance on whether the manager could be held liable as a defendant when the manager had no direct involvement in the customer’s injuries.

In Branscomb v. Wal-Mart Stores East, L.P., 165 N.E.3d 982 (Ind. 2021) (David, J.) a unanimous Supreme Court held that the manager cannot be held liable where the manager lacked control over the property where the injury occurred. The court held only the employer controlled the property since it possessed the intent to control the premises. Further, the court noted even had the manager controlled the property, the manager would still not be liable. The court held no duty was owed by the manager to the store patron since the employer’s duty to keep the premises safe for its own employees is nondelegable. This standard applied even though the customer was not an employee.

SELECT COURT OF APPEALS DECISIONS

- **Poppe v. Angell Enterprises, Inc.**, 2021 WL 1522499, at *2 (Ind.Ct.App. 2021) (Najam, J.) (“Here, it was not a condition on the premises that caused the Poppes to be injured but a random criminal act that [store] could not have prevented. Accordingly, we hold that [store] had no duty to protect the Poppes from being struck by an intoxicated driver.”)

- **ResCare Health Services, Inc. v. Indiana Family and Social Services Administration**, 2021 WL 1398167, at *6 (Ind.Ct.App. 2021) (Riley, J.) (“ResCare voluntarily undertook the obligations and costs of participating in Indiana’s Medicaid program when it signed the Provider Agreement, and it cannot establish a takings claim because it is now dissatisfied with the outcome of the reimbursement rate determinations.”)

- **Axelrod v. Anthem, Inc.**, 2021 WL 1378567 (Ind.Ct.App. 2021) (Shepard, S.J.) (finding former employee failed to establish judgment was unfairly procured due to witness tampering, juror tampering, or misconduct during discovery)

- **Schaefer v. Estate of Schaefer**, 2021 WL 1287549, at *6 (Ind.Ct.App. 2021) (May, J.) (“the value of any personal property owned by Kenneth by virtue of the exercise of his option to purchase pursuant to [the will] that exceeds the $277,500 he paid was a gift or a legacy and is subject to abatement for the payment of the Estate’s debts, charges, and legacies.”)

- **Riddle v. Khan**, 2021 WL 1245033, at *5 (Ind.Ct.App. 2021) (Darden, S.J.) (“Whether M.R. took or continued to take the medications Dr. Khan had recommended prescribing for her was beyond his purview. Dr. Khan’s acts were not part of a continuing wrong that extended the statute of limitations period as to him.”)
Potential kink in governmental immunity shield

A trial court granted summary judgment in favor of the Indiana Department of Transportation (INDOT) based on its governmental immunity against a personal injury claim from a motorist who drove through a puddle of water on Interstate 74, hydroplaned, wrecked, and was injured. The Indiana Court of Appeals reversed in part and remanded. See Staat v. Ind. Dept. of Trans., 164 N.E.3d 135 (Ind. Ct. App. 2021). INDOT is immune from liability of losses resulting “from a condition that is both ‘temporary’ and ‘caused by weather.’” Id. at 139 (citing Bules v. Marshall Cnty., 920 N.E.2d 247, 250 (Ind. 2010)). In Staat, the Court of Appeals, however, held that genuine issues of material fact existed regarding
whether the road’s condition in this instance had stabilized prior to the accident and whether INDOT had notice of puddling on the road. Judge Elizabeth Tavitas issued a separate concurring opinion wherein she concurred in the result but disagreed with the majority’s interpretation of Catt v. Bd. of Comm’rs of Knox Cty., 779 N.E.2d 1 (Ind. 2002), as noted in her dissent in Ladra v. State, 162 N.E.3d 1161 (Ind. Ct. App. 2021). The Indiana Supreme Court has granted transfer vacating the Indiana Court of Appeal’s opinion.

**INDIANA COURT OF APPEALS**

Lake Imaging, LLC v. Franciscan Alliance, Inc., – N.E.3d –, 2021 WL 1747894 (Ind. Ct. App. May 4, 2021) (Indiana’s Medical Malpractice Act is “broad enough to include an indemnification claim by one healthcare provider against another healthcare provider, if the claim is based on the alleged medical negligence of the latter.” The court acknowledged its “holding means that healthcare providers with a right to indemnification in situations like this will often have to sue before they have actually suffered a loss, in order to satisfy the medical-malpractice statute of limitations.”).

National Collegiate Athletic Association v. Finnerty, – N.E.3d –, 2021 WL 1747828 (Ind. Ct. App. May 4, 2021) (holding a second discovery motion that is deemed repetitive of a prior motion may not extend the time to appeal the issues raised in the original motion) (Judge Tavitis issued a dissenting opinion).

AO Alfa-Bank v. Doe, – N.E.3d –, 2021 WL 1991701 (Ind. Ct. App. May 19, 2021) (holding a trial court does not have subject matter jurisdiction to address a motion to quash a subpoena issued by a court in another state until the foreign subpoena is first properly domesticated pursuant to the Uniform Interstate Depositions and Discovery Act, see Indiana Code Chapter 34-44.5-1).

Service Steel Warehouse Co., L.P. v. United States Steel Corp., – N.E.3d –, 2021 WL 1748068 (Ind. Ct. App. May 3, 2021) (calling into question an opinion from a previous panel in City of Evansville v. Verplank Concrete & Supply, Inc., 400 N.E.2d 812, 820 (Ind. Ct. App. 1980) (requiring on-site construction to be a subcontractor under the statute), the Indiana Court of Appeals held an off-site fabricator on a construction project is a subcontractor under Indiana’s mechanic’s lien statute because Indiana’s “legislature did not intend subcontractor status to be limited only to those who perform their physical labor at the construction site”).

Arrendale v. American Imaging & MRI, LLC, – N.E.3d –, 2021 WL 1940803 (Ind. Ct. App. May 14, 2021) (a non-hospital facility – such as a diagnostic imaging center – can be held vicariously liable for the negligence of an independent-contractor physician under Restatement (Second) of Torts § 429 (1965)).

The full texts of all Indiana appellate court decisions, including those issued not-for-publication, are available via Casemaker at inbar.org or the Indiana Courts website at in.gov/judiciary/opinions. A more in-depth version of this article is available at inbar.org.
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passed into law protections for children sentenced to prison terms. But despite the firmly established separate system for juvenile justice in Indiana, and despite the youthful inmate standard of PREA, Indiana persisted in housing children charged with crimes in county jails pre-trial, which often led to comingling with adults or isolation because youth in many counties are so infrequently charged with crimes that often there is only one housed in the jail at a time. Moreover, county jails are ill-equipped to care for children, and lack the educational and other aspects we would expect from any other parent or institution providing for custody and care of a child.

Congress passed the Juvenile Justice Reform Act (JJRA) of 2018,\(^7\) which reauthorized and amended that Juvenile Justice and Delinquency Prevention Act of 1974,\(^8\) a landmark piece of legislation introduced by Indiana Senator Birch Bayh. The JJRA required, among other things, states ensure the removal of youth awaiting trial from adult facilities except where it had been found after a hearing and in writing that holding the youth in an adult jail was in the interest of justice. States were given until the end of 2021 to comply with that and other provisions of the JJRA, or risk certain Title II grant funding, which is utilized by the Indiana Criminal Justice Institute in our state.

Senator Breaux offered the needed juvenile arrestee reforms in the 2020 legislative session (SB 336) but was unable to get a hearing. However, Senator Mike Young, chair of the Senate Corrections and Criminal Code Committee, agreed to find time to hear the language this year if reintroduced. Both Senators Breaux and Tallian offered the language in separate bills this session and agreed to have it go forward as a part of the package in SB 368.

Nelson Mandela is credited with stating “there can be no keener revelation of a society's soul than the way in which it treats its children.”\(^9\) Currently, many efforts for juvenile justice reform are moving along under the umbrella of the Commission on Improving the Status of Children, the Juvenile Detention Alternatives Initiative, and the work of Representative McNamara and Senator Michael Crider (R) to bring the Council of State Governments to Indiana to review aspects of our juvenile justice system. SB 368 is a foretaste of improvements yet to come.

Footnotes:
2. Frank Sullivan, Jr., Indiana as a Forerunner in the Juvenile Court Movement, 30 Ind. L. Rev. 279, 280 (1997).
3. Id.
5. 28 CFR §115.14(a).
6. 28 CFR § 115.14(c).
8. 34 U.S.C. §§ 11101 et seq.
Continued from page 13

In exercising powers of amendment or revocation, or powers to expend or withdraw property passing by trust, contract, or beneficiary designation at the principal’s death, including specifically bequeathed property, joint accounts, life insurance, trusts, and retirement plans, the attorney in fact shall take the principal’s estate plan into account to the extent the estate plan is known to the attorney in fact.32

The exercise of this power is subject to a good faith safe harbor provision.33 Here is an area where an agent could cause significant problems. Any change to the principal’s estate plan should be made with the utmost deliberation. Ultimately, a guardianship and a petition to conduct estate planning pursuant to Ind. Code § 29-3-9-4.5 may be the better route both for estate beneficiaries and the attorney in fact. The attorney in fact who makes radical changes to the principal’s estate plan can expect conflict once the estate beneficiaries learn what was done.

6.2. Additional Elder Law Powers. The Indiana Power of Attorney Act specifically contemplates agents having powers beyond the specific enumerated powers.34 Unless those additional powers are prohibited or restricted by law, the language of the power of attorney should control.35 As a practical matter, third parties are unlikely to rely on the general language of Ind. Code § 30-5-5-19 as the sole support for actions not specifically allowed by the power of attorney document.

Practitioners would be well advised to include specific long-term care planning powers. It can be useful to add powers concerning the creation and funding of pre-need funeral plans or trusts, the creation and administration of Qualified Income Trusts (also called Miller Trusts), and generalized public benefits planning (including Social Security, Medicare, and Medicaid). Failure to add specific provisions for long-term care planning can result in losing the ability to act in a crisis.

6.3. HIPAA Authorizations. Serving as an attorney in fact often requires the ability to access the principal’s medical records and confer with health care providers. There are situations where non-agents or potential successor agents should have access to the principal’s medical records. This often occurs when less than all of the principal’s children are designated as attorneys in fact. Practitioners often incorporate HIPAA authorizations into health care powers of attorney. Practitioners should consider stand-alone HIPAA authorizations as well. These facilitate records access and limit the documents that need to be provided to health care providers.

6.4. Health Care Powers. Powers of attorney can include provisions concerning health care.36 The statutory powers include authority to contract with health care providers, to consent or refuse health care,37 to facilitate the admission or release of the principal from a medical facility, to access medical records, to make anatomical gifts, to request an autopsy, and to coordinate disposition of the principal’s remains.38 The statutory powers do not stop principals from directing his or her own health care.39 Health care powers should be aligned with a representative appointment under Ind. Code § 16-36-1.

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7. Jurisdictional and Scope Issues. If the principal moves from one state to another, it is worth considering whether to replace the existing power of attorney with a new document using the new state’s language. Although not strictly necessary, this may make it easier to deal with institutions in the new state.

If the principal owns property in multiple jurisdictions, the situation becomes more complicated. Limited powers of attorney may be used. Alternatively, the agent could seek to use a power of attorney created in one state in other jurisdictions. The Indiana statutes provide for the validity of powers of attorney executed under the laws of another state. The Full Faith and Credit Clause of the Constitution of the United States supports this position. Both the Full Faith

and Credit Clause and Ind. Code § 30-5-9-9 concerning refusal to accept the power conferred upon an agent under a power of attorney (including the provision of treble damages, attorney’s fees, and prejudgment interest) should be referred to if a financial institution refuses to recognize an out-of-state power of attorney.

The statutory powers under Ind. Code § 30-5-5 include expansive language allowing for the application of the powers to after-acquired property whether located in Indiana or elsewhere.

8. Concerns as We Age.

Approximately one-half of the baby-boom generation will need long-term care at some point in their lives. Most of these individuals will need the support of an agent along the way. The reality of human life is that we all exist in complex networks of mutual support. The Indiana power of attorney is a means to facilitate that support as our needs change. The simple reality is most Hoosiers can benefit from a power of attorney. In the absence of pre-planning, incapacitated Hoosiers are left with health care surrogates and guardianships. Although these are essential backstops, they may not reflect the principal’s desired planning and, in the case of a guardianship, involves the court’s removal of the principal’s autonomy.

8.1. Post-Signing Work. The work is not done when the documents are signed. Documents left in a drawer are worthless. Health care providers will not honor documents they do not have. Principals should discuss their planning with their designated agents. Agents cannot be expected to act on powers they have never seen. Principals should review their documents every few years. Both client situations and the statutes change over time. Periodic reviews and updates are essential to fit the planning to the client’s situation at each stage of life.

The best outcomes emerge in situations where: 1) principals act early; and 2) the principals have a team. The attorney-client relationship is just one facet of the larger support system needed by the principal. Family members, tax planners, investment planners, physicians, and caregivers are all part of this larger team. These relationships should be cultivated and maintained over time.

8.2. Issues with Agents. Selecting a prospective attorney in fact should include a candid and open
Unfortunately, some situations involve a rogue agent misapplying the principal’s resources for his or her own benefit”

Attorneys in fact can request judicial review and settlement of the attorney in fact’s accounting. Attorneys in fact can further limit claims against them (excepting fraud, misrepresentation, and inadequate disclosure in relation to the accounting) through the submission of an accounting.

8.3. Disputes. Third parties may refuse to act under a power of attorney and provide a statement setting out the basis for why the power of attorney is not valid under Indiana law or the requested action is beyond the scope of the powers granted under the power of attorney.

Family disagreements over the care of an aging loved one arise for many reasons. The most frequent reason is lack of communication. Disagreements can stem from provision of care and use of the principal’s resources. In cases where the dispute is severe, a guardianship proceeding may be needed. This provides the benefits of court oversight and the intervention of a guardian ad litem. It is important to note that the appointment of a guardian does not invalidate a power of attorney.

Unfortunately, some situations involve a rogue agent misapplying the principal’s resources for his or her own benefit or even taking ownership of the principal’s property outside of permitted gifting. Care should be taken in selection of agents to avoid individuals who are vulnerable to financial pressures and in establishing oversight on accounts. In the event of wrongdoing, it may become necessary to involve
and reasonable attorney’s fees in allowance of treble damages, costs, and reasonable attorney’s fees in addition to the Senior Consumer Protection Act.\

9. Conclusion. This discussion is only an introduction to the issues implicated by modern Indiana powers of attorney. Powers of attorney are essential to Hoosiers as they age. The Indiana Code provides a strong basis for principals working with attorneys to create customized documents to meet their needs and goals.

Footnotes:

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4. Ind. Code § 30-5-5-4.5.


6. Ind. Code § 30-5-5-7.5.


8. Ind. Code § 30-5-11-1 et seq.

9. Ind. Code § 30-5-4-1.

10. Id.

11. Id.


13. Ind. R. Prof. Conduct 1.14(a),(6).


15. See Ind. R. Prof. Conduct 1.7[1], 1.14[3],[5].


18. Ind. Code § 30-5-3-3(e).


22. Ind. Code § 30-5-4-4.

23. Ind. Code § 30-5-4-7.


25. Ind. Code § 30-5-5-1(d).


27. Ind. Code § 30-5-5-2.


29. Ind. Code § 30-5-5-9(a),(2).

30. Pursuant to Ind. Code 29-3-9-4.5, a guardian, upon notice and authorization by the court following consideration of the factors in subsection (b), may make gifts, exercise transfer on death and pay on death powers, transfer property, act upon a power of appointment, create, amend, or revoke revocable trusts, exercise rights of election or change of beneficiaries for insurance policies, retirement plans, or annuities, surrender insurance policies or annuities, exercise elections in relation to the protected person’s spouse’s estate, or renounce or disclaim estate interest.


32. Ind. Code §30-5-5-15(b).

33. Ind. Code § 30-5-5-15(c).

34. See Ind. Code § 30-5-5-19.

35. Ind. Code § 30-5-3-1.


37. See Ind. Code § 30-5-5-17 concerning authority to consent to or refuse health care and language to be included in an Ind. Code § 16-36-1 appointment.

38. Ind. Code § 30-5-5-16(b).

39. Ind. Code § 30-5-5-16(a).

40. Ind. Code § 30-5-3-2.

41. United States Constitution, Article IV, Section 1: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

42. See Ind. Code § 30-5-5-2(b).

43. See “Long-Term Services and Supports for Older Americans: Risks and Financing” ASPE Issue Brief, HHS Office of the Assistant Secretary for Planning and Evaluation, Office of Disability, Aging and Long-Term Care Policy (Rev. 2016).

44. Ind. Code § 16-36-1-5.

45. Ind. Code § 29-3-1-1 et seq.

46. Ind. Code § 30-5-6-4.

47. Ind. Code § 30-5-9-1.


50. Ind. Code § 30-5-6-1.

51. Ind. Code § 30-5-6-2.

52. Ind. Code § 30-5-6-3.

53. Ind. Code § 30-5-6-4(a).

54. Ind. Code § 30-5-6-4c(c).

55. Ind. Code § 30-5-6-5.

56. Ind. Code § 30-5-6-4.

57. Ind. Code § 30-5-6-4.

58. Ind. Code §§ 30-5-9-9(b),(4),(5).

59. Ind. Code § 30-5-10-1.

60. Ind. Code § 29-3-1-1 et seq.


63. Ind. Code § 34-24-3-1.

64. Id.

65. Ind. Code § 24-4.6-6-1 et seq. The Act protects individuals sixty (60) years of age and older from financial exploitation with augmented damages in the event of misconduct by a person in a position of trust and confidence which includes family members and fiduciaries.
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