ELDER LAW DEVELOPMENTS

POST Enacted.

A. The Indiana legislature enacted a POST law to be effective July 1, 2013 (HEA No. 1182).

1. "POST" refers to a physician order for scope of treatment

a. I have been critical of the POST concept in the past because earlier proposals involved a medical-driven regime rather than one based on typical concepts associated with health care advance directives.

b. Fortunately, the new POST legislation does not limit the use of health care advance directives in Indiana, but instead it will involve a supplementary process.

(1) In fact, a health care representative could invoke the use of the POST form, which may make it less likely that a "life-prolonging procedure" will be utilized.

(2) The legislation mandated the Indiana State Department of Health (ISDH) to promulgate the POST form.

(3) Whether or not patients and health care providers will know what to do with the form or how to utilize the form properly will remain to be seen.

B. Definitions.

1. A new Chapter 6 is added, which provides definitions which are similar to those used in the context of health care consent, living wills, etc.

2. A "declarant" means a qualified person who has completed a POST form or for whom a representative has completed a POST form and whose treating physician has

likewise executed a POST form, all in compliance with the applicable provisions of Chapter 6.

3. A "life-prolonging procedure" is defined to include any procedure or intervention that serves to prolong the dying process.

4. A "qualified person" is defined as a person who has an advanced chronic progressive illness or frailty, or a condition caused by injury, disease or illness, from which, to a reasonable degree of medical certainty, there can be no recovery, and death will occur from the condition within a short period without the provision of life-prolonging procedures.

5. A "qualified person" is one who typically would be able to consent to health care and includes a qualified person's representative, including a health care representative.

C. There is a process to be followed in order to complete a POST form.

1. A qualified person and the qualified person's treating physician or the physician designee must:

   a. Discuss the qualified person's goals and treatment options based on the qualified person's health.

   b. Complete the POST form, to the extent possible, based on the qualified person's preferences determined during the discussion.

2. A representative acting for a qualified person must act in good faith and in accordance with the qualified person's express or implied intentions, if known, or the best interest of the qualified person, if the qualified person's expressed or implied intentions are not known.

3. A copy of the executed POST form shall be maintained in the qualified person's medical file.

4. A POST form may be executed only by an individual's treating physician and only if:

   a. The individual is a qualified person, and

   b. The medical orders contained in the individual's POST form are reasonable and medically appropriate for the individual, and

   c. The qualified person or representative has completed a POST form in accordance with the legal requirements of Chapter 6.

The treating physician and the qualified person or representative must sign and date the POST form for the POST form to be effective.

D. The legislation mandated the ISDH to develop and distribute a standardized POST form to include the following:

1. A medical order specifying whether cardiopulmonary resuscitation (CPR) should be performed if the qualified person is in cardiopulmonary arrest.

2. A medical order concerning the level of medical intervention that should be provided to the qualified person including comfort measures, limited additional interventions, or full intervention.

3. A medical order specifying whether antibiotics should be provided to the qualified person.

4. A medical order specifying whether artificially administered nutrition should be provided to the qualified person.

5. The signature line must include the physician's printed name, telephone number, medical license number, date of signature, etc., and an electronic or physician controlled stamp signature is permissible.

6. The signature line for the qualified person or the representative shall include the qualified person's or representative's printed name, the relationship of the representative, and the date of the signature.

7. The POST form must include a section allowing the declarant the option to appoint an individual under I.C. 16-36-1-7 to serve as the declarant's health care representative.

8. The POST form must be posted on the ISDH internet website.

E. The declarant or representative shall keep the original executed POST form.

1. The POST form is considered the personal property of the declarant.

2. The treating physician who executes a POST form shall maintain a copy of the POST form in the declarant's medical records.

3. If the POST form is executed at a health care facility, a copy of the POST form shall be maintained in the health care facility's medical records.

a. The health care provider or health care facility shall treat a facsimile, paper or electronic copy of a valid POST form as an original document.

b. The health care provider, health care facility, or an entity acting in good faith will not be considered to have knowledge of a POST form solely on the basis of a POST form's entry into the medical record.

F. A declarant or a representative may, at any time, subject to certain restrictions, request alternative treatment to the treatment specified in the POST form.

1. A representative may request alternative treatment only if the declarant is incapable of making decisions concerning the declarant's health.

2. A health care provider receiving a request for alternative treatment shall, if it is possible, notify the declarant's treating physician, if known, of the request.

3. The treating physician who is notified of a request for alternative treatment shall:

   a. Include a written, signed note of request in the declarant's medical records to include the time, date and place of the request and the time, date and place that the treating physician was notified.

   b. Review the POST form with the declarant or representative and execute a new POST form, if needed.

G. The health care provider, health care facility, or an interested individual that believes that following medical orders set forth in a POST form will result in care or treatment, or the withholding of care or treatment, that is inconsistent with the declarant's known preferences, or in the absence of the declarant's known preferences, is not in the declarant's best interest, may seek relief under I.C. 16-36-1-8 by petitioning the probate court in the county where the declarant is located.

1. If a probate court determines that following the medical orders in the declarant's POST form will result in care or treatment, or the withholding of care or treatment, that is inconsistent with the declarant's known preferences, or, in the absence of the declarant's known preferences, is not in the declarant's best interest, the probate court may order any other relief available under I.C. 16-36-1-8.

2. The declarant's executed POST form has no effect during the declarant's pregnancy if the declarant is known to be pregnant.

H. Medical orders executed in a POST form are effective in all settings.

1. A health care provider shall comply with the declarant's POST form unless the provider:

   a. Believes the POST form was not validly exercised;

   b. Believes in good faith that the declarant, the representative, or another individual at the request of the declarant or representative has revoked a POST form;

   c. Believes in good faith that the declarant or the representative has made a request for alternative treatment;

   d. Believes that it would be medically inappropriate to provide the intervention included in the declarant's POST form; or

   e. Has religious or moral beliefs that conflict with the POST form.

2. A health care provider is not required to provide medical treatment that is contrary to a POST form that has been executed in accordance with Chapter 6.

3. If the declarant is capable of making health care decisions, the declarant's treating physician, before carrying out or implementing a medical order indicated in he declarant's POST form, shall discuss the order with the declarant to reaffirm or amend the order on the POST form.

4. A health care provider who is unable to implement or carry out the orders of a POST form shall transfer care of the declarant to another health care provider who is able to implement or carry out the orders.

5. A health care provider is not required to transfer care of the declarant if any of the circumstances have occurred which would allow the health care provider to refuse

to comply with the POST form (i.e., if the health care provider believes that the POST form was not validly executed, etc.).

I. Chapter 6 shall not be construed to modify or alter any applicable laws, ethics, standards, or protocols for the practice of medicine or nursing, including those concerning euthanasia, nor shall a POST form be construed to compel or authorize a health care provider or health care facility to administer medical treatment that is medically inappropriate or prohibited by state or federal law.

1. A death as a result of the withholding or withdrawal of life-prolonging procedures in accordance with the declarant's POST form does not constitute a suicide.

2. A person may not require an individual to complete a POST form as a condition of receiving health care services.

3. Chapter 6 shall not impair or supercede any legal right or legal responsibility that an individual may have to effect the provision, withholding or withdrawal of care or treatment, including the withholding or withdrawal of life-prolonging procedures, in a lawful manner.

4. Use of a POST form is voluntary.

J. The execution or revocation of a POST form by or for a qualified person does not revoke or impair the validity of any of the following:

1. A power of attorney that is executed by a qualified person when the qualified person is competent.

2. Health care powers that are granted to an attorney-in-fact under I.C. 30-5-5-16 or I.C. 30-5-5-17.

3. An appointment of health care representative that is executed by a qualified person, except to the extent that the POST form contains a superceded appointment of a new health care representative.

4. The authority of a health care representative under I.C. 16-36-1 to consent to health care on behalf of a qualified patient.

5. The authority of an attorney-in-fact holding health care powers to issue and enforce instructions concerning the qualified person's health care.

K. The execution of a POST form under I.C. 16-36-6 does not affect the sale, issuance or terms of a policy of life insurance.

1. A policy of life insurance is not legally impaired or invalidated by the execution of a POST form, including the withholding or withdrawal of life-prolonging procedures from an insured under the medical orders included in the POST form.

2. A POST form may not be considered in the establishment of insurance premiums for an individual.

3. A person may not require an individual to complete a POST form as a condition for being insured for health care services.

L. Other issues and questions.

1. The State Department of Health is required to promulgate the form, but the legislation does not give the ISDH any significant discretion to issue actual regulations.

2. It would appear that anyone could procure the form and try to induce his or her physician to sign or approve the form.

3. Query: Will a physician know what to do with the form or understand the process? Will discussions concerning the legalities of health care advance directives take place as now occur, or as now should occur, during the course of estate and lifetime planning when individuals consult with their attorneys?

4. Implementing the POST concept will require a significant amount of education on the part of health care providers, and of course will touch on the issue of health care advance directives, in general, which involve a number of significant legal considerations. It is possible that health care providers will begin to rely on the POST form, or will prefer to do so, which may give rise to a number of conflicts when a representative may feel that he or she is acting in accordance with the declarant's best interest, but in a manner which is inconsistent with the declarant's avowed intentions as otherwise clearly set forth previously by the declarant verbally or in the form of lawful health care advance directives.

5. If the POST form is the "personal property" of the declarant, what process will be used to transfer the POST form from facility to facility?

6. At the very least, having clear and comprehensive health care advance directives will make the POST process easier and make it less likely that a declarant's intentions will not be honored.

7. It is problematic that medical orders in a medical record, which otherwise would be obligatory, will not have the same degree of protection in the case of the POST form, since the health care provider is not charged with constructive knowledge of the fact that the POST form is contained in the medical record. It may be better in many instances not to sign the POST form but instead to require the health care provider

to enter the patient's expressed decisions in the medical record and to rely on the clear instructions set forth in comprehensive health care advance directives.

8. Patients must continue to be educated properly regarding the concepts and limitations applicable to health care advance directives, some which now have become more complex with the advent of the POST concept.

M. To fulfill the requirements of HEA 1182, the ISDH created an *Advance Directive Resource Center* web site.

1. The site is located at www.in.gov/isdh/25880.htm.

2. The Center contains links to the following forms:

a. State Form 55315: Life Prolonging Procedures Declaration

b. State Form 55316: Living Will Declaration

c. State Form 49559: Out-of-Hospital Do Not Resuscitate Declaration and Order

d. State Form 55317: Physician Order for Scope of Treatment (POST)

N. The web site also contains an updated ISDH Advance Directive Brochure, links to relevant state laws and regulations, and links to a few related web sites.

O. Forms.IN.gov provides citizens and employees of the State of Indiana a common access point to State forms. Managed by the Indiana Commission on Public Records, the Catalog contains electronic versions of relevant and current forms, allowing citizens to more easily conduct business with the State of Indiana. The above forms may also be found through the state forms website at http://www.in.gov/icpr/2362.htm.

P. The POST form is attached as Exhibit "A".

Q. Instructions to provide guidance for health professionals is attached as Exhibit "B".

R. The out-of-hospital do not resuscitate declaration and order form is attached as Exhibit "C".

II. **Limited Liability Companies - HEA No. 1394.**

A. An LLC may be organized now for a personal or non-profit purpose as well as a business purpose.

1. It is unlikely that an LLC would preferable to a trust in the context of asset protection planning or planning for long-term care, particularly considering the special rules applicable to real estate.

2. However, certain real estate, such as a vacation home or recreational property, might be placed inside an LLC for certain planning reasons, and the client's LLC interest might then be transferred to a trust or otherwise utilized in conjunction with his or her estate plan as a means of facilitating the transfer of property.

B. Non-probate transfers of an LLC interest.

1. Unless limited or prohibited by the operating agreement, any member interest in an LLC may be designated as transfer-on-death property under I.C. 32-17-14 and may be titled and held in joint tenancy with rights of survivorship between two or more individuals.

2. Upon the death of the owner of the member interest designated as TOD property:

a. Each TOD beneficiary has the status of an assignee, until admitted as a member of the LLC.

b. Each surviving TOD beneficiary is subject to all transfer restrictions or redemption options and other provisions that apply to the member's interest under the operating agreement.

c. The same status generally applies to the surviving joint tenant of an LLC interest held as JTWROS.

d. Two or more holders of a JTWROS member interest have the voting rights of a member unless otherwise provided in the operating agreement if originally issued to two or more individuals.

(1) If an individual receives and holds a member interest as a sole owner, and

(2) At a later date receives a member interest to be held in joint tenancy between the member and one or more other persons, then

(3) Unless otherwise provided in the operating agreement, each other person, or all joint tenants that are alive, shall have the status of an assignee of a fractional part of the member interest until the other person is admitted as a member of the LLC.

III. **IFFSA Policy Update.**

A. On December 28, 2012, the Office of Medicaid Policy and Planning issued an updated policy document which is attached as Exhibit "D" to be effective January 1, 2013.

1. The policy document updates the home equity limitation and clarifies the look-back review period effective with applications filed on November 1, 2012 and various other issues.

2. The following will summarize and reference a few issues contained in the update.

B. Look-back Review Period.

1. Commencing with the implementation date of November 1, 2009, the five year look-back period will not fully materialize until 2014 (except for trust transactions which have been subject to a 60-month look-back period since OBRA 93).

2. A look-back period of more than 36 months did not occur until November 1, 2012.

3. Beginning November 1, 2012, all non-trust transfers shall be incrementally subject to one more month of look-back, i.e., beginning November 1, 2012, the non-trust look-back is 36 + 1 month, or 37 months; for applications filed in December 2012, the look-back period is 37 + 1 = 38 months, etc., adding one month progressively for each new month until 60 months are reached.

C. Home equity restrictions.

1. A penalty consisting of ineligibility for LTC services is invoked through the ownership of the home if the applicant's interest in his or her share of an equity interest in his or her home is greater than the following home equity limit:

   a. November 1, 2009 - $500,000

   b. January 1, 2011 - $506,000

   c. January 1, 2012 - $525,000

   d. January 1, 2013 - $536,000

2. The penalty continues as long as the equity value exceeds the home equity limit.

3. Please note the following:

   a. A temporary absence from the home does not change the home designation.

   b. Income-producing home property is subject to the equity restriction.

c. The restriction does not apply if the individual's spouse, dependant child under the age of 21, or a blind or disabled child of any age (per SSI standards) is lawfully residing in the home.

d. The amount of equity that would fall under the asset protection of a long-term care partnership policy reduces the amount of the equity in excess of the limitation.

e. The equity value of a home is the current fair market value less any encumbrance (legal debt), which would include a mortgage, reverse mortgage, home equity loan, etc.

f. The current property tax assessment will serve as verification of the fair market value. Any assessment other than the most current one is unacceptable.

g. If the individual disputes the assessed value, a current arms-length, independent professional appraisal can be submitted and will be used in lieu of the assessment.

D. Annuities.

1. Annuities purchased and transactions made on annuities owned by the applicant/recipient and spouse must name the State as a remainder beneficiary in accordance with certain rules set forth in the policy document.

2. The policy document now states the following:

> As remainder beneficiary, the State is entitled to receive the total amount of medical assistance paid on behalf of the applicant for medical assistance.

The language that I typically use in the context of a Medicaid-compliant annuity purchased by the community spouse where children exist as potential beneficiaries is as follows:

> The State of Indiana - Family and Social Services in an amount equal to the total amount of Medicaid assistance paid on behalf of John Jones pursuant to 42 USC §1396p(c)(F), as required by the Deficit Reduction Act of 2005, Public Law No. 109-171; the remaining benefits, if any, shall be paid in equal shares to Mary Jones and Joseph Jones, if living, and if not living, then the share of any such deceased child shall be paid to his or her estate.

IV. Elder Law After the "Fiscal Cliff" Deal and Repeal of Indiana Inheritance Tax.

A. Significant recent tax law changes will have an obvious impact on the practice of estate planning in general and elder law in particular.

1. The American Tax Relief Act of 2012 (ATRA) will permanently set the estate tax exemption at an inflation-adjusted $5 million ($5.25 million currently).

2. Indiana House Bill 1001, which was signed into law on May 8, 2013, repealed the Indiana inheritance tax retroactively to January 1, 2013.

B. Consequently, for any decedent who dies in 2013 or thereafter, there will be no Indiana inheritance tax or Indiana estate or generation-skipping tax, and if the taxable estate for federal estate tax purposes does not exceed $5.25 million, there would be no federal estate tax.

1. There are numerous positive effects of these changes beyond the obvious one of eliminating the taxes that otherwise would be payable.

2. One positive benefit is that it will no longer be necessary to obtain a consent to transfer in Indiana (frequently called a "tax waiver" in other states) from the county assessor in order to transfer certain assets following the death of a decedent.

3. Now it will no longer be necessary to file an inheritance tax return, and for most decedents, it will not be necessary to file a federal estate tax return, thus simplifying the estate and trust settlement process.

4. On the negative side, however, is the likely result that many people who otherwise might have been encouraged to plan because of the possibility of taxes will now most likely fail to plan at all under the mistaken impression that there are no other significant reasons to plan.

C. There are obviously many other reasons to plan than to minimize or avoid the imposition of federal estate taxes and Indiana inheritance taxes.

1. There are many income tax aspects of estate and elder law planning, not only pertaining to the utilization of particular kinds of trusts, but also including such matters as utilizing proper beneficiary arrangements in the case of IRAs and other tax-qualified arrangements.

2. Asset protection, particularly in the realm of Medicaid eligibility and planning for long term care, is a significant component of the practice of elder law which will not be impacted by the tax law changes.

3. It will remain important to plan for business succession and the proper passing of business assets, and the same legal difficulties will continue to arise that have always plagued people who fail to plan properly and whose families must later sort out the legal consequences of non-existent or inappropriate planning.

D. One probable result of the tax law changes is that significantly more interest will be directed to other aspects of planning, which may result in more practitioners entering the field of elder law.

1. Some people have referred to the current environment as the "perfect storm for elder law planning."

2. Consumers, and we attorneys ourselves, must be careful of attorneys moving outside their areas of practice and "dabbling" in the practice of elder law.

3. One planning concern that will be given significantly more attention is the goal of obtaining a step-up in basis for appreciated assets at the time of the death of a decedent.

4. As a result of significantly higher federal estate tax exemptions, the portability of those exemptions, and the higher income tax rates after ATRA, planners will be forced to rethink the design of their plans and trusts, particularly in the case of married individuals with assets less than $10.5 million.

5. Planning will be focused on ways to ensure an increase in tax basis and providing more flexible income tax results than historically resulted as a consequence of the traditional marital deduction/credit shelter trust design.

6. Practical implications.

   a. Due to portability and the inapplicability of the Indiana inheritance tax, it will make more sense in many instances for spouses to continue to own their assets jointly, or to plan to utilize the "portability" concept to allow the surviving spouse to take advantage of the entire $10.5 million credit shelter

exemption equivalent amount at the time of the surviving spouse's subsequent death.

b. Asset protection trusts, like the irrevocable income-only trust (IIOT) used frequently in the context of long term care planning, which was not implemented for tax reasons, but which was often useful for its tax implications, will give rise to the desired step-up in basis at the time of the death of the trust creator, while still accomplishing the goal of asset protection in the context of long term care.

c. Gifts, on the one hand, may be utilized more frequently since it is less likely that there will be a federal estate tax result, but in other cases, gifts of appreciated assets will not be made and those assets will be retained in order to obtain a basis step-up at the time of the decedent's death.

d. Although in a non-tax environment the traditional credit shelter or family trust component of an estate plan will still make sense as a means of providing financial flexibility for a decedent's family, the loss of the step-up in basis at the time of the surviving spouse's death will make significantly less sense.

(1) As a result, plans are now being implemented which will give the surviving spouse a general power of appointment over the family trust assets as a means of generating a step-up in basis at the time of the surviving spouse's subsequent death.

(2) It is likely that trusts will continue to be utilized for various reasons, including asset protection, because of the flexibility and protections afforded by the use of trust devices.

(3) The tax disadvantages of trusts, i.e., the compressed brackets and the maximum rate of tax which is reached at a very low level of income (any income trapped in a trust over $11,900 will probably be taxed at a rate higher than the beneficiary's rate), can be avoided through such mechanisms as "spraying" provisions among a number of beneficiaries.

V. **Estate of Phillip Roy, 963 N.E.2d 78 (Ind.App. 2012).**

A. The Indiana Court of Appeals held that even though Ind.Code §29-1-7-15.1(b) provides that real estate shall not be sold by the executor or administrator of a decedent's estate to pay any debt or obligation which is not a lien, or to pay any costs of administration, unless letters testamentary or of administration are taken out within five months after the decedent's death, nevertheless a trial court could order the sale of property under those circumstances.

1. Ind.Code §29-1-7-15.1(b) reads as follows:

> No real estate situate in Indiana of which any person may die seized shall be sold by the executor or administrator of the deceased person's estate to pay any debt or obligation of the deceased person, which is not a lien of record in the county in which the real estate is situate, or to pay any costs of administration

> of any decedent's estate, unless letters testamentary or of administration upon the decedent's estate are taken out within five (5) months after the decedent's death.

2. In Estate of Roy, the decedent died intestate on November 2, 2008, the FSSA filed an invalid notice of lien against the real estate on April 1, 2009, and the FSSA filed a petition to open an estate on August 26, 2009. The actual appointment of co-personal representatives occurred on December 17, 2009.

3. The estate's position was that the co-personal representatives were prevented from selling the real estate and using a portion of the proceeds to pay the FSSA's claim because the estate was not opened within five months. It appears from the case that the estate itself had petitioned for and received permission to sell the real estate at auction. The court found, however, that Ind.Code §29-1-7-15.1(b) did not give rise to a limitation on the trial court's authority to issue an order for the sale of real estate under Ind.Code §29-1-15-3.

B. HB 1056, PL 99, §4, adds Ind.Code §29-1-10-21 which reads as follows:

> Sec. 21. (a) All authority to act with respect to an estate administered under I.C. 29-1-7 and I.C. 29-1-7.5 is vested exclusively in the personal representative.
>
> (b) If this article prohibits an action by the personal representative, the prohibition restricts the personal representative, regardless of court order, unless:

(1) a majority in interest of the distributees expressly consent to the proposed action; or

(2) the statute imposing the restriction expressly permits a court to approve the prohibited action.

The purpose of this statutory "fix" was to make it clear that only the personal representative could determine whether or not it was appropriate to sell real property to pay claims.

1. The Estate of Roy assumes that the court has power to sell assets to pay claims.

2. The court's analysis overlooks the purpose of the statute, which is to clear title to real property.

3. The problem is apparent since an FSSA claim is not time barred, and essentially the FSSA could open an estate at any time and force the sale of property to pay its claim.

4. The statutory fix makes clear that the decision whether or not to sell property to pay claims rests with the personal representative.

VI. **In re Supervised Estate of Lee v. Colussi, 954 N.E.2d 1042 (Ind. App. 2012).**

A. Joseph A. Colussi was the estate's attorney, and a malpractice action was filed against him for failing to inform himself as to the status of the estate's assets or to monitor their use.

1. The estate's position was that Colussi breached the applicable standard of care by failing to control or monitor the estate checking account.

2. The trial court had granted summary judgment in favor of Colussi on the estate's legal malpractice claim, and the Court of Appeals concluded that a genuine issue of material fact existed as to whether Colussi breached a duty owed to the estate in that an expert witness testified that he would have monitored the opening of the

paperwork for the estate account more carefully and he would have monthly bank statements for an estate account sent to his office. The expert witness testified that he believed that such actions are required of all lawyers doing estate work.

B. HB 1056, PL 99, § 3, adds Ind.Code §29-1-10-20 which reads as follows:

> Sec. 20. (a) As used in this section, "estate lawyer" refers to a lawyer performing services for an estate at the request of the estate's personal representative.
>
> (b) Except as otherwise provided in a written agreement between the estate lawyer and an interested person, an estate lawyer:
>
> (1) represents and owes a duty only to the personal representative;
>
> (2) does not have a duty to collect, possess, manage, maintain, monitor, or account for estate assets, unless otherwise required by a specific order of the court; and
>
> (3) is not liable for any loss suffered by the estate, except to the extent the loss was caused by the estate lawyer's breach of a duty owed to the personal representative.
>
> (c) If a provision of a court's local probate rule conflicts with this section, this section controls.

This section has been referred to as the "*Colussi* fix." It should be noted that the Supreme Court of Indiana denied transfer of the Colussi case. 967 N.E.2d 1034 (Ind. 2012).