

Searching and Different Transfers: How the Title Industry and Attorneys Use the Recorder's Office

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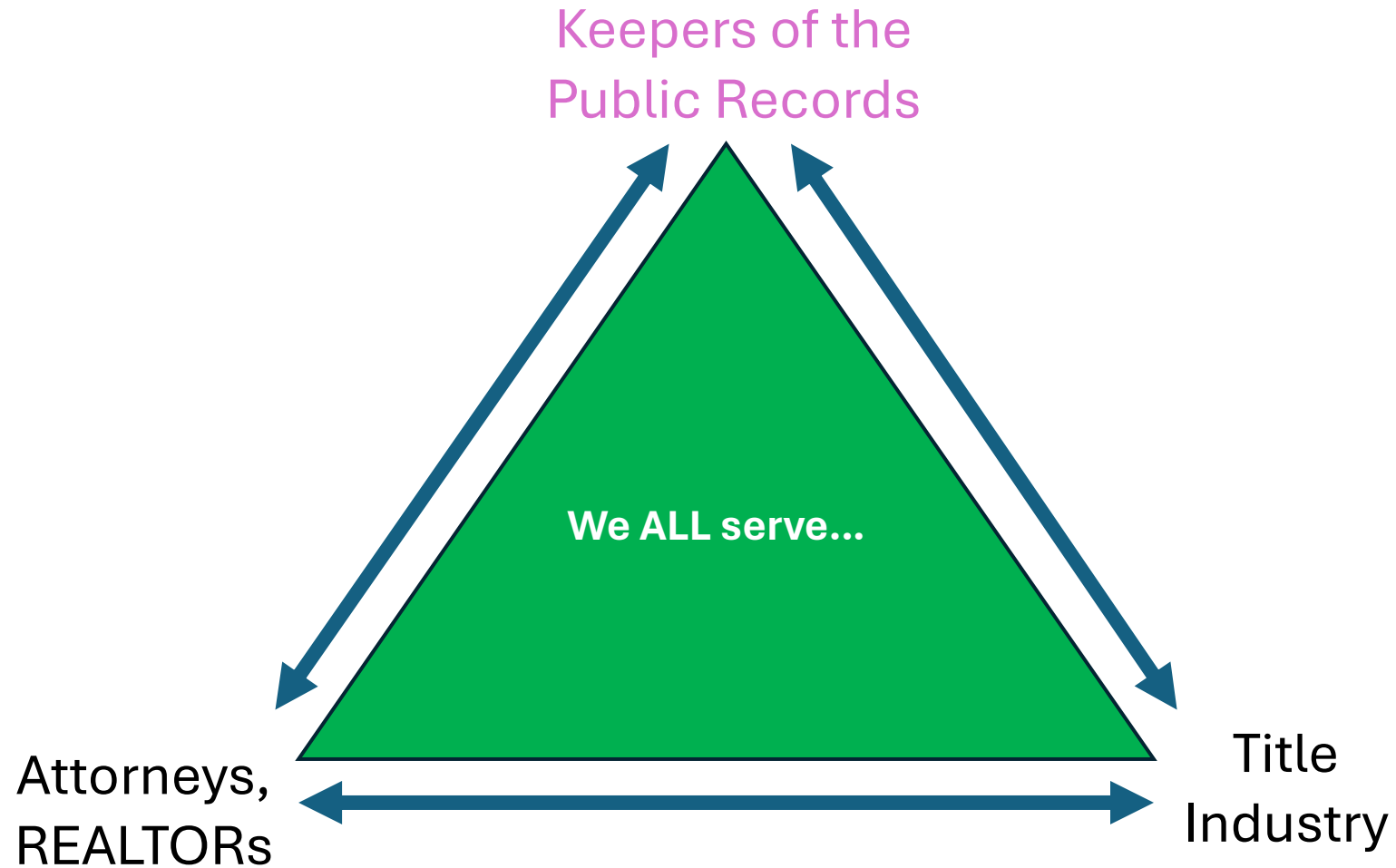


Agenda

- Our Symbiotic Relationship
- The Title Policy and the Search that leads to it...
- Deeds
- Affidavits
 - Small Estate
 - Devolution
- Transfer on Death Deeds
- Trustee Deeds
- Personal Representative Deeds



Our Symbiotic Relationship





The Public



And our Nation!

Residential investment (averaging roughly 3-5% of GDP), which includes construction of new single-family and multifamily structures, residential remodeling, production of manufactured homes, and brokers' fees.

Consumption spending on housing services (averaging roughly 12-13% of GDP), which includes gross rents and utilities paid by renters, as well as owners' imputed rents and utility payments.

-National Association of Home Builders
www.nahb.org

Our combined efforts, along with everyone in housing, amount to 15-18% of the Gross Domestic Product of the United States EVERY. SINGLE. YEAR.



Public Policy – Land Agreements and Conveyances in Writing

- **I.C. 32-21-1-1 Requirement of written agreement; agreements or promises covered.**
 - a/k/a Statute of Frauds and includes contracts for sale of land
- **I.C. 32-21-1-13. Conveyance of land; written deed required**
 - ...
 - (b) A conveyance must:
 - (1) be in writing;
 - (2) be executed or signed by the:
 - (A) lessor or landlord;
 - (B) grantor (as defined in [IC 32-17-1-1](#)); or
 - (C) land contract seller; and
 - (3) have an acknowledgment (as defined in [IC 33-42-0.5-2](#)) or a proof (as defined in and permitted under [IC 32-21-2](#)).



Public Policy – Time of Recording Determines Priority

I.C. 32-21-4-1 Recording in county where land situated; priority based on time of filing

...(recording in county)

(b) A conveyance, mortgage, or lease takes **priority according to the time of its filing**. The conveyance, mortgage or lease is fraudulent and void as against any **subsequent purchaser, lessee, or mortgagee in good faith and for a valuable consideration** if the purchaser's, lessee's, or mortgagee's deed, mortgage, or lease is first recorded.

...(curative)



Order of Receipt

IC 36-2-11-8 Record of instruments in order received; public access; copies; contaminated instruments

Sec. 8. (a) The recorder shall record all instruments that are proper for recording, **in the order in which they are received in the recorder's office for record.** The recorder shall record deeds and mortgages in separate records.

(b) Providing an exact copy of an original instrument in the possession of the recorder is sufficient to comply with the inspection of public records provided under [IC 5-14-3-3](#) if the original document has not been archived.

...

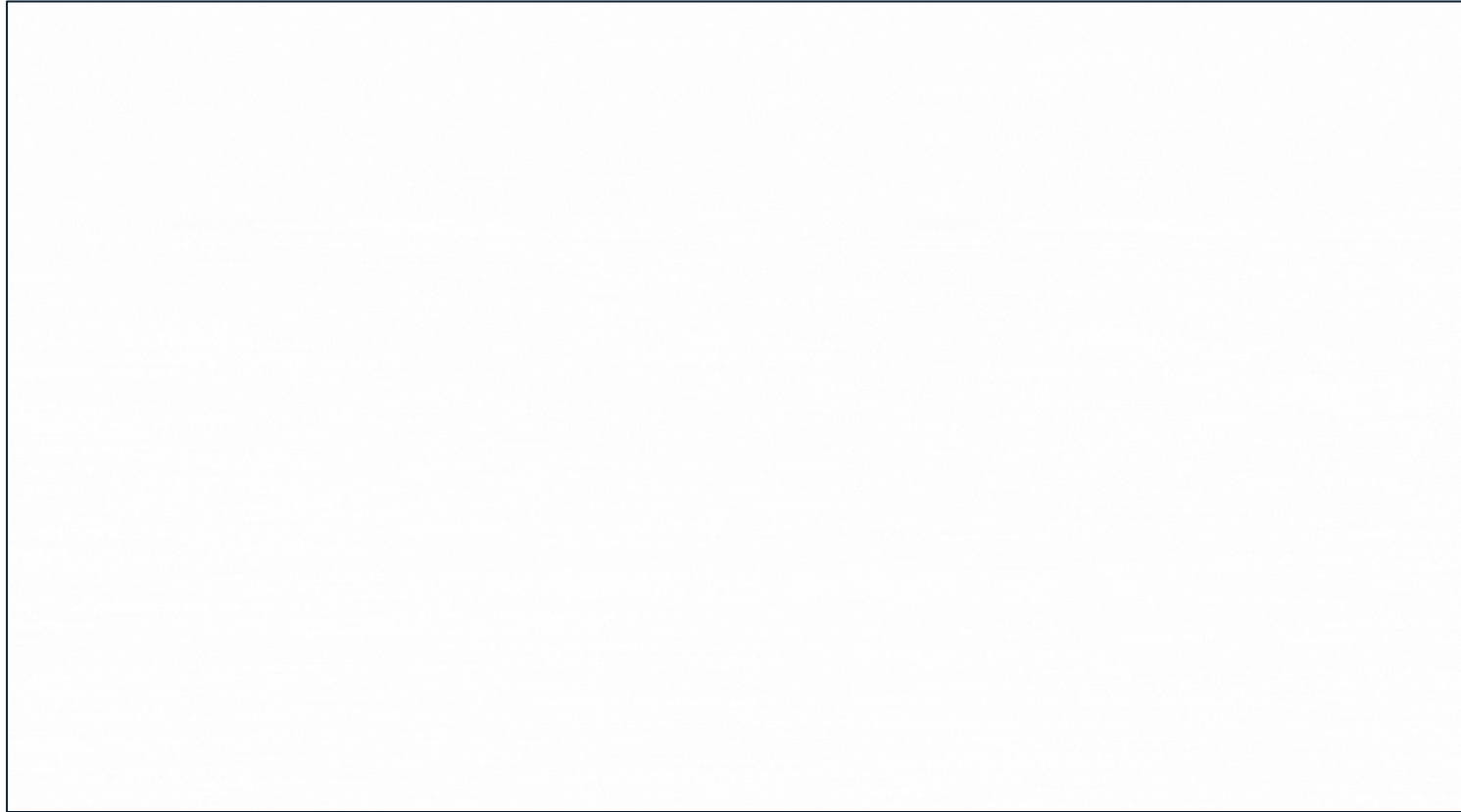


The Title Policy and the Search that leads to it...

- Definition of "Public Record" (p. 8)
- Schedule A (p. 5)
 - Date of Policy
 - Land insured
- Covered Risks (p. 1-2)
 - Vesting
 - Defects, liens, encumbrances on Title
 - Unmarketable Title
 - The Gap
- Exclusion for defects, liens, encumbrances (etc.) attaching or created after the Date of Policy



Chain of Title



A&B transfer to C&D.

C&D transfer to E.

E transfers to F&G.

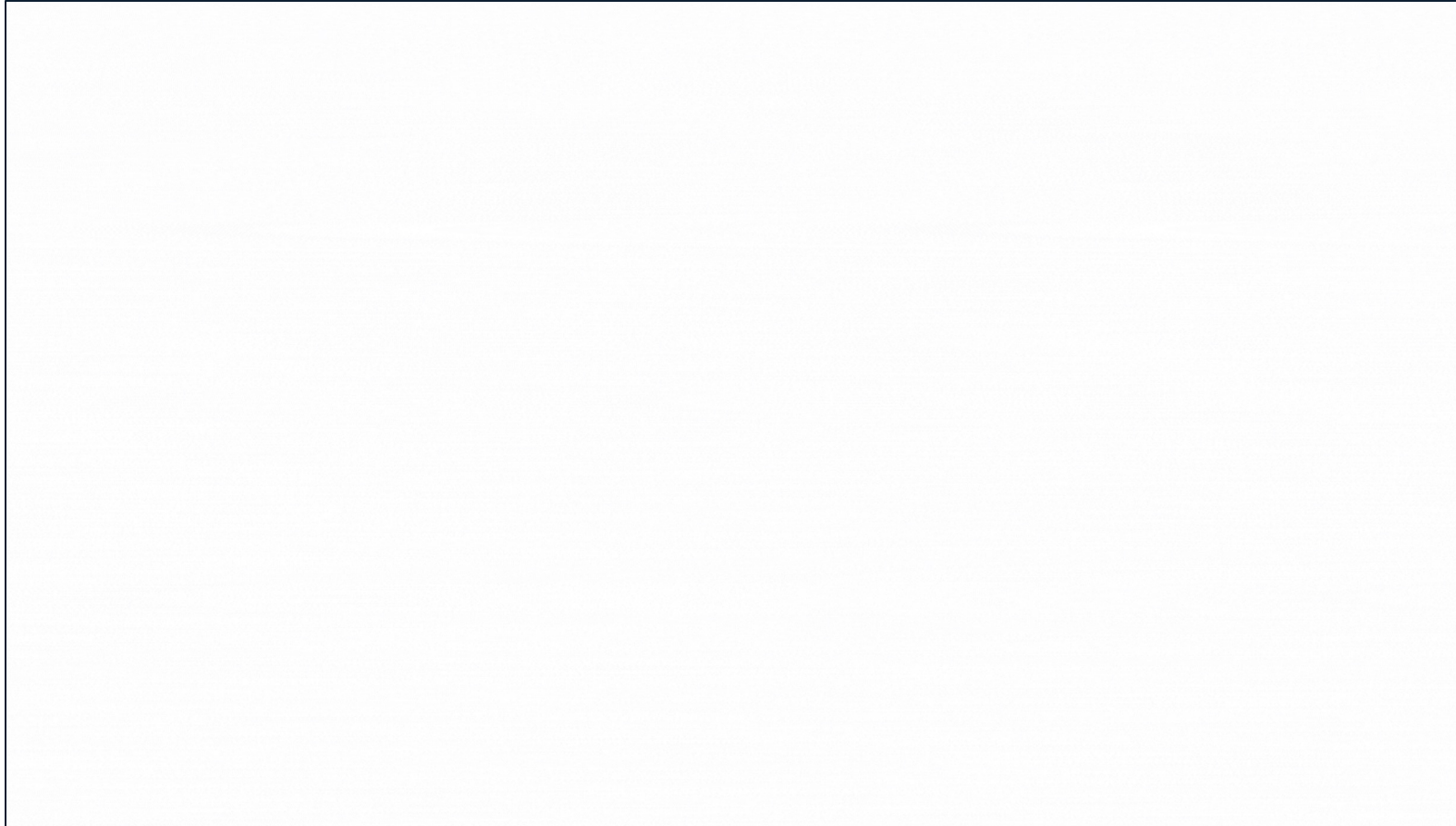
Grantors to Grantees.

Grantors to Grantee.

Grantor to Grantees.



Liens and Encumbrances



**IC 36-2-11-12
Grantor and
grantee index;
separate indexes
for deeds and
mortgages;
requisites**

E transferred to F&G. BUT E has a mortgage on the property and a judgment was entered against E. These are liens and encumbrances that must be found by a searcher.

The Gap!!!

**Signing
Date**

**Recording
Date**

Judgment Liens!
Mechanic's Liens!
Tax Deeds!
Other Mortgages!



Timing Matters

“On January 15, 2019, the court ordered a tax deed to be issued pursuant to the Auditor’s petition. The Auditor issued a tax deed (“Tax Deed”) to S&C Financial dated January 15 and recorded the Tax Deed on February 12 at 7:45 a.m., **forty-five minutes after the Khans recorded their deed.**”

-S&C Financial Group, LLC v. Pinky Khan and Ahmad Khan
Indiana Court of Appeals
20A-TP-1934
Decided May 19, 2021



Deeds Generally

- Grantor
- Words of Conveyance – Reagan v. Dugan, 41 N.E.2d 841 (“assign” and “transfer” were words of conveyance)
- Grantee - Lyles v. Lescher, 9 N.E. 365 (Ind. 1886).
- Description – Lehman v. Pierce, 36 N.E.2d 952 (Ind. Ct. App. 1941); Gilbert v. Lusk, 106 N.E.2d 404 (Ind. Ct. App. 1952)
- Signature - I.C. 33-42-9-6 (appointment of signer); UETA I.C. 26-2-8-101, *et seq.* (electronic signatures)
- Notarization - Per Bever v. North, “(a)n acknowledgment is essential to entitle a deed to go upon record, but it is not essential to give effect to the deed as between parties.” 8 N.E. 576 (Ind. 1886).
- “Instrument Prepared By” – I.C. 36-2-11-15
- Date – Cassidy v. Ward, 123 N.E. 724 (Ind. Ct. App. 1919)(date is prima facie evidence that may be rebutted).
- Consideration – Costa v. Costa, 115 N.E.2d 516 (Ind. Ct. App. 1953)(deed valid without consideration listed)
- Delivery and Acceptance – McColley v. Binkley, 121 N.E. 847 (Ind. Ct. App. 1919)(deed must be actually or constructively delivered).



Affidavits

- Statutory
 - Small Estate – should be used rarely under I.C. § 29-1-8-3(c)
 - Devolution (a/k/a “passage of title”) – used when no estate has been opened
- Non-Statutory, but statutory under 36-2-11-19
 - Informational
 - Clarifying Record
- Note: All affidavits requires signature of affiant and acknowledgment to be recorded.
- An informational or clarifying affidavit can be recorded with a copy of a probated will, a court order or decree, a disclaimer, or other document attached to it



Small Estate Affidavit

- Used and recorded under I.C. § 29-1-8-3(c) to save legal fees when there is court-appointed guardian acting for a deceased adult (ward) who owned real property **OR** a court-appointed personal representative of an unsupervised estate when total estate asset value doesn't exceed ceiling amount.
- Date of Death determines the applicable ceiling amount based on \$25,000, \$50,000, or \$100,000
- Affidavit from I.C. 29-1-8-3(c) includes
 - Legal description
 - The appropriate threshold statement for the gross estate MINUS liens encumbrances, expenses of administration, and reasonable funeral expenses.
 - The names of persons entitled to partial interest due to death, the share, and whether the share is divided or undivided
 - Statement explaining how the interests of those persons were determined
- I.C. 29-1-8-4 states other requirements for the guardian or personal rep handling the “small estate.”

Note: 2020 changed the law substantially. Small estates before 2020 commonly only used an affidavit with no process under 29-1-8-4.



Devolution Affidavit

- Used typically where the only asset in an estate is real property of any value and when no personal representative has been appointed (to “open” an estate).
- I.C. 29-1-7-23(b) affidavit contents:
 - Decedent’s name and date of death
 - Affiant’s relationship to the decedent
 - Description of how decedent became vested in ownership interest (with cross-reference)
 - Legal description of the property
 - Names of all distributees known to affiant
 - Explanation of how the interest passed to distributees (intestate or testate); if there is a probated Will, refer to it and the cause number for the order probating the Will
 - Explanation of how fractional shares were calculated and apportioned to distributees
- Auditor may charge an endorsement fee (“affidavit of transfer” under I.C. 36-2-11-14(a)(3)), but affidavit is exempt from sales disclosure requirement (see I.C. 29-1-7-23(c))
- Recorded in the grantor/grantee index using the legal description from (b)(4) (see I.C. 29-1-7-23(d))
- Relied upon after 7 months have passed following the death (see I.C. 29-1-7-23(f))



Miscellaneous Affidavits

- Used to clarify public records that transfer occurred as a matter of law.
- I.C. 36-2-11-19(a)(1) – “An affidavit that...concerns the birth, marriage, death, name, residence, identity, or relationship of any of the parties named in an instrument affecting real property...may be recorded in the office of the county in which the property is located. If an affidavit is presented to the recorder for record under this section, the recorder shall record it in the miscellaneous records in the recorder’s office.”
- (b) – “An affidavit recorded under this section may be received in evidence in any proceeding affecting the real property and constitutes prima facie evidence of the facts and circumstances contained in the affidavit.”
- Note: Affidavits are sworn instruments. “Prima facie evidence” means that they can be rebutted in a court of law.



Transfer on Death Deeds

- Used in estate planning to automatically transfer real estate at death to help avoid probate.
- Owner still owns the property and can sell or mortgage the property without consent of any TOD beneficiary. Can also remove or change beneficiary because beneficiary has NO RIGHTS to the property until after the Owner has died.
- I.C. 32-17-14-1, *et seq.* Two types: TODD only (I.C. 32-17-14-11, owner and grantee is the same as the grantor) or Deed to an Owner(s) who are different from the Grantor, with TODD included (I.C. 31-17-14-13)
- To be effective the TODD must be executed by the owner (or legal representative) *AND* recorded in the Recorder's Office before the owner's death. I.C. 32-17-14-11; I.C. 32-17-14-13(e)(starting July 1, 2024).
- Example language: "(insert owner's name) conveys and warrants (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's name)". I.C. 32-17-14-11(f); I.C. 32-17-14-13(d)(after July 1, 2024).
- AUDITOR ENDORSEMENTS: Previously NOT required for the first type. Starting July 1, 2024, an auditor endorsement required on either type. I.C. 32-17-14-11(i); I.C. 32-17-14-13(g).
- Owner is entitled to keep homestead deduction if the real estate is the principal residence.
- Same requirements as a deed as far as signature and acknowledgment so it may be recorded.



Transfer on Death Deed v. Life Estate

- TODD [transfer on death deed]
- Used in estate planning to automatically transfer real estate at death to help avoid probate.
- Owner still owns the property and can sell or mortgage the property without consent of beneficiary. Can also remove or change beneficiary because beneficiary has NO RIGHTS to the property.
- Example language: "(insert owner's name) conveys and warrants (or quitclaims) to (insert owner's name), TOD to (insert beneficiary's name)". I.C. 32-17-14-11(f); I.C. 32-17-14-13(d)(after July 1, 2024).
- After owner A dies, affidavit is recorded by TOD beneficiary B, reflecting the automatic transfer to B. No merger of interests because B did not own anything until after A died.

- Life Estate reserved by Deed
- Used in estate planning to automatically transfer real estate at death to help avoid probate and to ensure a step-up in cost basis at the owner's later death.
- After execution, owner only owns a life estate. The other parties are called remaindermen which is a type of ownership right so the owner cannot sell or mortgage the entire property without the consent and signature of the remaindermen.
- Example language: "(insert A's name) conveys and warrants to (insert B's name) reserving a life estate in (insert A's name)."
- After life estate holder A dies, affidavit is recorded reflecting automatic transfer to B which merges life estate into remainder re-establishing the fee simple ownership.



Don't Recommend On-the-spot Corrections to TOD Deeds

- Each grantee listed as an Owner” in a TOD deed must be an individual (natural person) who is certain to eventually die
- There are two main formats that can be used to identify the Owner in a TOD deed, so that the Owner’s death (or the death of the last of 2 named Owners) causes the property to pass to the TOD beneficiary or beneficiaries:
 - Shorter: “Olivia Owner (‘Grantor’) CONVEYS AND WARRANTS on Grantor’s death to _____ [TOD beneficiary]
 - Longer: “Olivia Owner (‘Grantor’) CONVEYS AND WARRANTS to Olivia Owner (‘Grantee’), TOD on Grantee’s death to _____ [TOD beneficiary]
- When the second type of TOD Deed (under I.C. 32-17-14-13) is used and recorded to make a current change in the ownership of the property in addition to naming a TOD beneficiary, the longer format will be used.
- Use of the shorter format can create a potential trap and make the TOD deed invalid if the current Owner and Grantor is not a natural person (individual) . . . For example, if the record owner is a trust. A trust can be a TOD beneficiary, but a trust cannot be an ‘Owner.’”
- If the Recorder or the Auditor or a staff person notices a discrepancy in a TOD deed between the “Owner” identified in the deed and record ownership in the land records, recommend that the submitter contact an attorney to investigate and to revise the deed. PLEASE DO NOT HAVE THE PERSON WHO PRESENTS THE DEED MAKE HANDWRITTEN ADDITIONS OR CORRECTIONS.
- What can go wrong? See **Estate of Drew A. Kogan**, Boone County 06D01-2205-ES-000091, now pending with Indiana Court of Appeals under Case No. 24A-ES-35



Trustee Deeds

- Typically, created to protect the assets from tax implications or for the long-term care of the beneficiary. Private in nature and contents (written terms of the trust) not in public record.
- Types of Trusts: Revocable, Irrevocable, Testamentary, “Grantor Trusts,” “Land Trusts,” “Special Needs Trusts,” “Supplemental Needs Trusts,” Qualified Personal Residence Trust (QPRT), Matrimonial Trusts
- Inter Vivos – Testator ALIVE; Trust created by a document separate from a will; real property assets of trust go into trust via deed
- Testamentary – Testator DEAD; Trust created in a will; typically, the assets of the deceased “pour over” into the trust and become assets of trust
- Title to property either in name of trustee or trust. See I.C. 30-4-1-2-(21).
- Certification of Trust – used to provide to third-parties to show trust existence and trustee authority. Sometimes recorded to show the public some details about the Trust and whether or when it became irrevocable or when the identity of the trustee(s) changed. See I.C. 30-4-4-5..
- Typically, unless the trustee sells real property, a sales disclosure is *not* required because the transfer was not done for consideration and is not a conveyance.
- Residential real property owned by a trust can be entitled to homestead deduction if a person with even a small interest as a beneficiary is occupying the real estate as the principal residence. See I.C. 6-1.1-12-37(a)(2)(B)(iv) and 6-1.1-12-17.9.
- Same requirements as a deed as far as signature and acknowledgment so it may be recorded.



Probated Estates

- Probate occurs when a person passes and a personal representative needs to administer the assets of the estate
- Will v. Intestate
- If sole or primary asset is Indiana real property and if there is a Will, the Will can be probated (see I.C. 29-1-7-4(a)(1) and 29-1-7-24) **without administration** (without appointing a personal representative) so that a devolution or passage of title affidavit can be used and recorded under I.C. 29-1-7-23
- Real Property transferred via Personal Representative Deed
 - To legatees or devisees (will)
 - To heirs (intestate)
 - To 3rd parties (conveyances)
- Personal Representative Authority? Supervised v. Unsupervised Estate
 - Will controls
 - Solvency also affects PR authority



Personal Representative Deed Language

- IC 29-1-15-18 – Court ordered Deed:
 - Intestate language: "A.B., as personal representative of C.D., deceased, by order of the _____ Court of _____ County, Indiana, dated _____, for good and sufficient consideration, conveys to E.F. the following real estate: (insert description)."
 - Testate language: "A.B., as personal representative of C.D., deceased, by virtue of the decedent's said will, for good and sufficient consideration, conveys to E.F. the following described real estate: (insert description)."
- IC 29-1-7.5-3.4 -- Unsupervised Administration (per will) distribution to devisees:
 - "A.B. is the personal representative of the estate of C.D., deceased. This estate is pending as Cause Number _____ in _____ County, Indiana. The personal representative, by virtue of the power given a personal representative under Indiana law, hereby distributes to E.F. the following described real estate: (insert description)."
- IC 29-1-7.5-3.6 – Unsupervised Administration (per will) conveyance by Personal Representative:
 - "A.B. is the personal representative of the estate of C.D., deceased. This estate is pending as Cause Number _____ in _____ County, Indiana. The personal representative, by virtue of the power given a personal representative under Indiana law, for good and sufficient consideration conveys to E.F. the following described real estate: (insert description)."



Entitled to Be Recorded

IC 32-21-2-6 Instruments entitled to be recorded

Sec. 6. An instrument that complies with this article, [IC 33-42](#), and [IC 36-2-11](#) is entitled to be recorded.

IC 33-42-0.5-2" Acknowledgment"

Sec. 2. "Acknowledgment" means:

- (1) a principal's declaration, before a notarial officer, that a record has been signed for the purpose stated in the record; or
- (2) if the record was signed in a representative capacity, a declaration by the individual, before a notarial officer, that the individual signed the record with the proper authority and signed it as the act of the individual or entity identified in the record.



May Be Recorded

IC 36-2-11-15 Instruments that may be received for record or filing; name of person or governmental agency that prepared instrument

...(timing of applicability due to enactment)

(b) The recorder may receive for record or filing an instrument that conveys, creates, encumbers, assigns, or otherwise disposes of an interest in or lien on property only if:

- (1) the name of the person and governmental agency, if any, that prepared the instrument is printed, typewritten, stamped, or signed in a legible manner at the conclusion of the instrument; and
- (2) all Social Security numbers in the document are redacted, unless required by law.

...(the Social Security Number statement)



Recording Requirements

IC 36-2-11-16 Requirements for instruments to be received and recorded ...(exceptions)

- Legibility
- Names of who executed, witnessed, notarized
- Notarization or Proof Correct
- Marked as copy
- Redeemed through Affidavit
- Copies must be accepted



Thank You

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