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September 15, 2020
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42nd ANNUAL

JUDGE ROBERT H. STATON

INDIANA

LAW UPDATE™

September 15 - 16, 2020

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Program Director

42nd Annual Judge Robert H. Staton

INDIANA LAW UPDATE™

September 15-16, 2020
12 CLE / 1 Ethics / Also Qualifies for Business and Provisional License Credit

500 Ballroom, Indiana Convention Center

September 15, 2020

8:30 Registration & Coffee

8:55 **Welcome and Introduction**
Hon. Melissa S. May, Indiana Court of Appeals

9:00 **Ethics**
Margaret M. Christensen

10:00 **Constitutional Law**
Kenneth J. Falk

10:30 Coffee Break

10:45 **Probate, Wills, Trusts and Elder Law**
Randall K. Craig, Todd I. Glass

11:30 **Family Law**
James A. Reed, Elizabeth S. Traylor

12:15 Lunch Break *(on your own)*

Note: Real Estate Update is provided in Section 5 as materials only for this year

1:30 **Internet Law / Social Media**
Jessica L. Ballard-Barnett, Seth R. Wilson

3:00 Refreshment Break

3:15 **Insurance Law**
Anna E. Mallon

4:00 **Torts**
Kevin P. Farrell

4:45 Adjourn

September 16, 2020

8:30 Registration & Coffee

8:55 **Welcome and Introduction**
Hon. Melissa S. May, Indiana Court of Appeals

9:00 **Evidence – Criminal and Civil**
Hon. Robert R. Altice, Jr.

9:45 **Employment Law / Sexual Harassment / Workplace Issues**
Gregory W. Guevara

10:30 Coffee Break

10:45 **State and Federal Tax Update**
Richard L. Bartholomew

11:35 **Gun Law**
Guy A. Relford

12:15 Lunch Break *(on your own)*

1:30 **Criminal Law**
Mark E. Kamish, Kathie A. Perry

2:15 **Business, Contracts and Banking**
Alexandra J. Blackwell, BJ Brinkerhoff

2:45 Refreshment Break

3:00 **Cyber Security**
Paul J. Unger

3:30 **Nonprofit Organizations Update**
Zachary S. Kester

4:00 **Bankruptcy Law**
Thomas P. Yoder

4:45 Adjourn

42ND ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

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42ND ANNUAL JUDGE ROBERT H. STATON INDIANA LAW UPDATE™

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Hon. Melissa S. May
Judge, Indiana Court of Appeals, Indianapolis

Melissa S. May was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in April of 1998. She was born in Elkhart, Indiana. She earned a B.S. in criminal justice from Indiana University-South Bend in 1980, a J.D. from Indiana University School of Law-Indianapolis in 1984. She is also a graduate of the Graduate Program for Indiana Judges. Judge May is currently the Presiding Judge of the Fourth District.

Prior to her appointment to the Court, Judge May practiced law for fourteen years in Evansville, Indiana, where she focused on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, as Chair of the Appellate Practice Section from 2007-2008, and as Secretary to the Board of Governors in 2008-2009. She is also a member of the Indianapolis Bar Association and the Evansville Bar Association. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been a co-chair of ICLEF's Indiana Trial Advocacy College from 2001 to present. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 until December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission and in July 2008, she was named as Chair of that Commission. While chair, she worked with the fourteen pro bono districts to train lawyers and mediators on how to assist homeowners who are facing foreclosure. Judge May also serves on the Civil Instruction Committee, an Indiana Judicial Conference Committee, which has been working to translate all of the civil jury instructions into "plain English." She frequently speaks on legal topics to attorneys, other judges, schools, and other professional and community organizations.
In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee. In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

Hon. Robert R. Altice, Jr.
Judge, Indiana Court of Appeals, Indianapolis

Robert R. Altice, Jr., was appointed to the Court of Appeals by Governor Mike Pence and began his service on Sept. 2, 2015.

Judge Altice earned his undergraduate degree from Miami University, Oxford, OH. Subsequently, he obtained a master's degree in criminal justice administration from the University of Central Missouri, where he was honored as "Graduate Student of the Year" in his department. He received his law degree from the University of Missouri-Kansas City School of Law.

Judge Altice's legal career began in Jackson County, MO, handling felony cases as a deputy prosecutor before being promoted to Chief Deputy Prosecutor for the Drug Unit. He then practiced with a Kansas City civil law firm, focusing on medical malpractice defense. After moving to Indianapolis, he joined the law firm of Wooden McLaughlin & Sterner, concentrating on insurance defense.

In 1994, Judge Altice returned to prosecution, handling a major felony caseload as a deputy prosecutor for the Marion County Prosecutor's Office. He served as Chief of the Felony Division from 1997 to 2000, prosecuting a number of high-profile felonies while also providing management support to 35 deputy prosecutors. Judge Altice briefly served as the Office's Chief Counsel, working with the Indiana General Assembly to amend laws on domestic battery and possession of firearms by violent felons. As a prosecutor, he tried more than 100 major felony jury trials, including 25 murder cases and countless bench trials.

Judge Altice was elected to the Marion County bench in 2000 and presided over both criminal and civil dockets. As judge of Marion Superior Court, Criminal Division 2 from 2001 to 2012, he presided at 250 major felony jury trials, including 75 murder trials (seven death penalty cases).

While presiding over some of the most serious criminal matters in the state, Judge Altice also served as chair of the Marion Superior Court Criminal Term from 2005 to 2007, as a member of the Executive Committee for the Marion Superior Court from 2007 to 2009, and as Presiding Judge of the Marion Superior Court from 2009 to 2011. As the Presiding Judge, he was responsible for the administration of the Marion Superior Court, with an annual budget of $50 million, and managed a court staff of more than 850 employees. He also hosted a TV show on the government access channel, titled "Off the Bench," in which other civic leaders appeared as guests to discuss public affairs.

Judge Altice moved to the civil division of the Marion Superior Court in 2013, where he officiated at 15 civil jury trials in Superior Court 5. Judge Altice was appointed chair of the Marion Superior Court Civil Term in January 2015.
Throughout his judicial career, Judge Altice has held leadership roles in organizations that improve the administration of justice. He accepted special assignments from the Indiana Supreme Court on the Judicial Performance Task Force, which examined whether judicial evaluations might be useful in Indiana, and the Cameras in the Courtroom project, which allowed cameras in certain courtrooms under limited conditions. During Judge Altice's tenure on the Marion County Community Corrections Advisory Board, the Duval Work Release Center in Marion County was built and opened.

Judge Altice is a member of the Indiana Judges Association, the Indiana State Bar Association, and the Indianapolis Bar Association. He served on the Board of Directors of the Judicial Conference of Indiana, is a member and past president of the Sagamore American Inn of Court, was a member from 2010 to 2015 of the Indiana Judicial Conference Civil Bench Book Committee, and was a member and former chair of the Indiana Judicial Conference Community Relations Committee. In April 2015, Judge Altice was appointed to serve on an ad hoc Indiana Tax Court Advisory Task Force. He currently serves on the Tax Court Advisory Committee. Judge Altice is President of the Board of Directors for the Heartland Pro Bono District.

His community activities include prior service on the Board of Directors of these organizations: Indianapolis Police Athletic League; the Martin Luther King Community Development Corp.; and Coburn Place Safe Haven, a transitional housing facility for domestic abuse victims. Judge Altice also participated on the Super Bowl Legal Subcommittee. He is on the board of the Benjamin Harrison Presidential Site. He has presented on legal and ethical issues for the Indiana Continuing Legal Education Forum, the Indiana Judicial Center, and various Indiana bar associations. In his spare time, he enjoys gardening, golf and reading.

He and his wife, Kris, an attorney who is General Counsel for Shiel Sexton, have two adult children.

Jessica L. Ballard-Barnett
Judicial Law Clerk, Indiana Court of Appeals, Indianapolis

Jessica L. Ballard-Barnett is the Judicial Law Clerk to the Honorable Melissa S. May, Judge on the Indiana Court of Appeals.

Education:

- JD, Robert McKinney School of Law - Indianapolis (2010)
- BS, Psychology, Purdue University (2004)

Legal Experience:

- Judicial Law Clerk, The Honorable Melissa S. May, Judge, Indiana Court of Appeals (2010 – present) Bar Admissions: State of Indiana

Other Experience:

- Adjunct Instructor, Harrison College, Columbus Campus and Online, various courses (July 2012 - Present)
- Presenter/Collaborator, CLE, “Internet Law,” Indiana Law Update (September 2011 - Present)
- Adjunct Professor, University of Indianapolis, Copyright Law, Legal, Ethics, Etiquette (July 2016 - Present)
- Secretary, SENSE Charter School Board (October 2015 - Present)
- Program Chair, CLE, “Appellate Writing” (June 2016)
- Deputy Captain, Operations Team, GenCon (August 2015)
- Presenter, CLE, “Utilizing Electronic Discovery in Modern Lawyering” (April 2014)
- Presenter, CLE, “Emerging Issues in Social Media: Can Lawyers and Judges be Friends?” (November 2013)
- Presenter, CLE, “Modern Lawyering: Utilizing Social Media” (April 2013)
- Presenter, CLE, “Ethics, Internet, and Business Law” (February 2013)
- Columnist, HistoricIndianapolis.com (February 2013 - July 2014)

Richard L. Bartholomew
Girardot, Strauch & Co., Lafayette

Richard L. Bartholomew graduated from Indiana University with a BS in Business in 1978 and a JD from Indiana University School of Law in 1981. He joined the firm in 1991 and became a shareholder in 1996. His specialty areas include all areas of tax, estate planning, mergers, acquisitions and spin-off tax consulting, succession planning, continuing education presenter to the AICPA Federal Tax Conference, Indiana Continuing Legal Education Seminars, Annual Tax Symposiums in Minnesota, North Carolina, Ohio and North Dakota and Bisk Continuing Education DVD's distributed nationwide.

Richard has been actively involved in various organizations in the Lafayette community including Community Foundation of Greater Lafayette, Lafayette Rotary Club Foundation, Indiana CPA Society Litigation Services, Westminister Village Foundation, Lafayette Rotary Club,and East Tipp Summer Rec.

Richard has many interests outside of the firm including woodworking (he built all of the cabinets in his house as well as various pieces of furniture), snow skiing, fishing, golf, creating Power Point presentations for weddings and birthdays, drawing and playing with his dog, Zoe.

Alexandra J. Blackwell
Jeselskis Brinkerhoff and Joseph, LLC, Indianapolis

Alex focuses her practice on litigation and employment law. She represents individuals and business clients in civil litigation matters including disputes involving contracts, employment, commercial issues, and real estate. Alex also has experience drafting and negotiating asset purchase agreements, consulting agreements, franchise agreements, commercial leases, and corporate governance documents.

Alexandra graduated cum laude from Indiana University Robert H. McKinney School of Law, where she was the Symposium Editor and Executive Board Member of the Indiana Law Review. While in law school, Alexandra gained valuable experience as a judicial extern for Boone County Superior Court Judge Matthew C. Kincaid; Marion County Superior Court Judge Heather A. Welch; Marion County Judge Timothy W. Oakes; Court of Appeals Judge James S. Kirsch; and Southern District of Indiana Bankruptcy Judge Frank J. Otte.

Prior to law school, Alexandra graduated with honors from Indiana University.

BJ Brinkerhoff
Partner

BJ offers clients a wealth of experience on a wide variety of business advice and litigation matters, representing individuals, closely-held companies and multi-national corporations with many of their legal and entrepreneurial needs.

He focuses his practice on business disputes, including employment matters such as restrictive covenants and trade secrets, as well as shareholder claims, director and officer liability and day-to-day business disputes. BJ also manages product liability matters, wrongful death and catastrophic injury defense, restaurant and retail liability, civil rights matters, contract disputes, insurance matters, personal injury and appeals.

Indiana has a vibrant startup community and BJ has been at the forefront, alongside his clients, working with entrepreneurs to address their unique concerns and challenges. BJ counsels small business owners and entrepreneurs to guide them through their legal issues including: negotiation of real estate disputes; franchising and intellectual property matters; issues between partners and founders and counseling business owners on how to avoid legal risks.

BJ also represents clients at all phases of litigation, such as initial post-loss investigation (including immediate response examinations and inspections), alternative dispute resolution, bench and jury trials and appeals. BJ brings a unique perspective to client's disputes — he understands business, he understands litigation and most of all, he brings calm, thoughtful guidance to achieve outcomes that satisfy his clients' goals.

Often times, the risks and costs of litigation can be intimidating, especially considering the uncertainty of how lawsuits will proceed. Applying the benefits of his litigation experience, BJ seeks to collaborate with clients and their in-house counsel, employees, insurers and others to minimize those risks and maximize his clients' potential outcomes at each step along the way. Most importantly, BJ strives to work with those same clients to evaluate and develop methods to reduce the risk of future litigation.

Margaret M. Christensen
Dentons Bingham Greenebaum LLP, Indianapolis

Meg Christensen concentrates her practice on three main areas of law: lawyer ethics, appeals and business litigation. Since 2017, she has served as co-chair for Dentons Bingham Greenebaum's Recruiting Committee.

Her focus includes:
- Ethics – Meg has represented lawyers in all stages of the disciplinary process pending before the Indiana Supreme Court. Additionally, she has represented other professionals in front of various state licensing boards, and the IRS Office of Professional Responsibility.
- Appellate – Meg brings a fresh perspective to identifying and analyzing issues on appeal. Meg's experience includes representing clients in the appellate phase of complex business disputes, contract and insurance coverage disputes, and shareholder liability.
- Business Litigation – Meg assists clients in litigation in both state and federal courts in claims involving multi-million dollar contract disputes, shareholder liability, enforcement of employee restrictive covenants, inter-governmental disputes, unfair competition claims, dissolutions, administrative enforcement and licensing. She is experienced in media law issues including defamation defense, reputation management, and social media harms. Meg also represents the media in pursuing access to public records and enforcing open door laws.
- Meg's clients are primarily concerned about the impact their legal disputes will have on their business or personal lives. Recognizing that litigation introduces uncertainty into her client's plans, Meg prides herself in clearly communicating with clients about the practical effect of various strategies. Meg's goal is to help busy clients focus on what they do best while she works to present their strongest arguments in pursuit of the best possible result.
- Between the Indiana State Bar Association (ISBA), the Indiana Continuing Legal Education Forum (ICLEF) and Association of Professional Responsibility Lawyers (APRL), Meg presents on ethics at over a dozen continuing legal education seminars each year. As part of ISBA's Ethics Committee, she considers and issues advisory opinions, recommends rule changes and facilitates lawyer education events. Meg is an active member of the APRL and devotes her time to researching trends in disciplinary enforcement and lawyer ethics.
- In her free time, Meg enjoys cooking, hosting dinner parties, and attending yoga or barre class. She's an avid NPR listener, loves old homes and house rehabs and

attending camp with her two children. She has a vested interest in voting advocacy and once served as a member of the United Nations Election Protection Delegation, monitoring the polls in El Salvador’s National Election.

Randall K. Craig, J.D., CELA, CAP
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Randall K. Craig is a sole practitioner whose areas of practice emphasize elder law, wills, trusts, estates, estate planning and taxation. Mr. Craig served as an adjunct professor for several years in the University of Evansville College of Alternative Programs, having taught in the areas of estate planning, income taxation and real estate, and a licensing course for real estate salespersons. He has also taught a course on the law pertaining to savings accounts sponsored by the Indiana Savings and Loan League. Mr. Craig is co-author with Amelia E. Pohl of ***A Will is Not Enough in Indiana*** (Eagle Publishing Company of Boca, 2004), and ***Guiding Those Left Behind in Indiana*** (Eagle Publishing Company of Boca 2006). He was the subject of an article in the April 2001 issue of the *National Law Journal* "Elderly and Disabled Find Hero in Indiana Solo." Mr. Craig is a charter member (the first, and now one of only two in the State of Indiana) of the Council of Advanced Practitioners of the National Academy of Elder Law Attorneys ("CAP") which is open by invitation only to preeminent elder law attorneys. He has been a featured speaker on Elder Law developments at the Annual Judge Robert H. Staton Indiana Law Update sponsored by the Indiana Continuing Legal Education Forum each year since 2013. Mr. Craig is the longest practicing attorney in the State of Indiana who is both a Certified Elder Law Attorney and member of the Council of Advanced Practitioners of NAELA.

EDUCATION

1972 – Indiana University – B.S. degree, with distinction
1975 – Indiana University School of Law – Doctor of Jurisprudence, cum laude

ADMISSION TO PRACTICE

1975 – State of Indiana
1975 – United States Tax Court

PROFESSIONAL ASSOCIATIONS

Certified as an Elder Law Attorney by the National Elder Law Foundation (one of the first 55 attorneys in the United States to be so certified)

Board Certified Indiana Trust and Estate Lawyer by the Trust and Estate Specialty Board of the Indiana State Bar Association (Charter class)

National Academy of Elder Law Attorneys – member of special interest groups on trusts and tax

Indiana State Bar Association – member of sections on taxation, corporate and real property, probate and trust law, and elder law

Evansville Bar Association (Probate, Elder Law and Guardianship Section as well as the Chair in 2005, and member of the Board of Directors from 2007 to 2009)

Council of Advanced Practitioners of the National Academy of Elder Law Attorneys (Charter Member), the first and now one of only two Indiana members

Certified Geriatric Service Provider by The National Association for Geriatric Service Providers & Educators

Accredited to practice before the U.S. Department of Veterans Affairs

Evansville Estate and Financial Planning Council (member of Board of Directors from 2003 to 2010 and a former President)

Christian Legal Society

International Honor Society Beta Gamma Sigma

CIVIC ACTIVITIES

American Baptist East Church, Evansville, Indiana – Former chair of Board of Trustees

Southwestern Indiana Regional Council on Aging, Inc. (SWIRCA & More) – former President and current Director Emeritus

Sonlight Ministries of Evansville, Indiana, Inc. - former member of Board of Directors.

Vanderburgh County Council on Aging, Inc. – former President and member of the Board of Directors

Randall K. and Rebecca L. Craig Family Foundation, Inc. - Co-Founder and President

HONORS

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Named a Sagamore of the Wabash by the Governor of Indiana (2002)

Named an Indiana Super Lawyer by Law and Politics and the publishers of the Indianapolis Monthly 2007-2015, and again in 2019-2020.

Selected for inclusion in The Best Lawyers in America every year since 2009, and named as the Best Lawyers' 2017 Evansville Trust and Estates "Lawyer of the Year"

Since 1996, Kenneth Falk has been the legal director of the ACLU of Indiana. A 1977 graduate of Columbia Law School in New York City, Mr. Falk was employed by Legal Services Organization of Indiana (now Indiana Legal Services) from 1977 to 1996. At the time he left Legal Services he was the Litigation Director of the organization. Since 2000, Mr. Falk has also served as an Adjunct Professor of Law at the Robert H. McKinney School of Law in Indianapolis.

In his work with the ACLU, Mr. Falk has litigated and argued numerous cases in Indiana and federal appellate courts, including the United States Supreme Court.

In 1996 Mr. Falk was named a Sagamore of the Wabash and in 2004 he was awarded the David M. Hamacher Public Service Award by the Indiana State Bar Association. In 2006 he was named a "Distinguished Barrister" by the *Indiana Lawyer*. In 2016 he received the David W. Peck Senior Medal for Eminence in the Law from Wabash College. Also in 2016 he was named a Fellow of the American College of Trial Lawyers.

Kevin P. Farrell is a partner at Christie Farrell Lee & Bell in Indianapolis. He is a graduate of Marian College (1969) and Indiana University Indianapolis Law School (1974) where be finished near the bottom of his class. (That was some accomplishment when you consider his class included Dan Quayle and Court of Appeals Judges James Kirsch and Patricia Riley!). A product of inferior schools, he was placed in the slow reading group by his fourth grade teacher. A total geek in high school, he was president of the photography club. He is the recipient of numerous awards including Altar Boy of the Year (1961), Indianapolis Times honor carrier award (one year without a complaint) and Captain of the Safety Patrol (Little Flower Grade School - 1960). He is a member of Sam's Club and the National Geographic Society and was recently notified that he has been pre-approved for a Visa Platinum Card. Mr. Farrell is a Notary Public.

FINE & HATFIELD

520 N.W. Second Street
P.O. Box 779
Evansville, Indiana 47705-0779

Todd I. Glass

Todd Glass joined Fine & Hatfield in 1995 after practicing seven years in Muncie, Indiana. Since joining the firm, Mr. Glass has represented individuals and businesses with significant focus on estate planning and administration, trust planning and administration, guardianships, agribusiness and business planning, and succession strategies. His practice now concentrates in complex trust planning and wealth transfer techniques.

He represents businesses of all sizes, especially closely-held family owned businesses in a variety of markets and industries. He is active in the Newburgh and Warrick County community and has an active municipal law practice representing local government officials and boards as County Attorney for Warrick County, Indiana.

Mr. Glass has been certified as an Indiana Trust and Estate specialist since 2007 by the Indiana Trust and Estate Specialty Board (ITESB). He has served on the ITESB and its Certification Exam Committee, and since 2019 has served as Co-Chair of the ITESB. He has served as an adjunct faculty member at the University of Evansville where he taught Probate Law in the Department of Legal Studies, and he regularly speaks at continuing legal education programs.

Contact Info:
Phone: 812.425.3592
Fax: 812.421.4269
Email: tig@fine-hatfield.com

Education Summary:
Wabash College, B.A. 1984
University of Dayton, J.D. 1988

Bar Admissions:
Indiana, U.S. District Court, Northern and Southern Districts Indiana, 1988
U.S. Court of Appeals, Seventh Circuit 1990

Professional Associations and Honors:
Evansville Bar Association, (Board Member 2005-2011, President 2011-2012)
Evansville Bar Association, Probate, Elder Law and Guardianship Section (Chair 2002-2003)
Indiana Bar Association (Member, Young Lawyers Council)
Indiana Probate, Trust and Real Property Section (Council Member, 2005-2012)
Evansville Estate and Financial Planning Council
Certified Estate and Trust Specialist
Indiana Trust and Estate Specialty Board (Co-Chair 2018-present)

Community Involvement:
Castle High School Band Boosters, Inc., Board member and President (2016-Present)
Newburgh Museum Foundation Corp., Board Member and Past President (2013-2019)
Warrick County Community Foundation, Board Member (2012-2018)
Warrick County Community that Cares Coalition, Board member and Past President (2013-2014)
Indiana Supreme Court Disciplinary Commission, EBA Grievance Committee (Chair 2012-present)
Warrick County Bicentennial Steering Committee (Chair 2013)
Reitz Home Preservation Society, Inc., Past Board member and President (2007-2011)

Greg Guevara, Partner
gguevara@boselaw.com / (317) 684-5257

Greg Guevara is a partner in the Labor and Employment Group at Bose McKinney & Evans. As a highly responsive business advisor and employment litigator, Greg helps his clients by understanding their objectives and offering practical legal advice tailored to their unique situations and desired outcomes. He provides aggressive and ethical advocacy to a broad range of clients, including privately held businesses, non-profit organizations, and national companies, as well as executives, physicians, and other professionals.

Greg concentrates his practice on labor and employment law and litigation, including:

- Non-competition, non-solicitation and confidentiality agreements
- Emergency injunctions
- Defense of discrimination/EEO claims
- Wage/hour compliance and litigation
- Disability/reasonable accommodation
- FMLA/leaves of absence
- Sexual harassment and workplace investigations
- Severance and executive employment agreements
- Personnel policies/employee handbooks
- Reductions-in-force
- Union avoidance, unfair labor practices, and collective bargaining

Greg practices in the federal and state courts in Indiana and Ohio, federal and state agencies (EEOC, NLRB, ICRC, IOSHA, etc.), and other jurisdictions as needed.

He began his law career with Bose McKinney & Evans then practiced with the Columbus, Ohio office of Jones Day. Before returning to BME in August 2006, he spent seven years working as an executive for Reliant (formerly GCM), an international Christian mission organization based in Orlando, Florida. His experience in private practice, board governance and non-profit management gives him the ability to provide practical guidance and sound management advice to businesses dealing with a full range of employment-related issues.

Education
University of Michigan Law School (J.D., cum laude, 1992)
University of Michigan (B.A., high honors/high distinction, 1989)
Member, Phi Beta Kappa

Honors / Awards
Best Lawyers® 2021 Indianapolis Employment Law – Management Lawyer of the Year
Best Lawyers® 2020 Indianapolis Litigation – Labor and Employment Lawyer of the Year
The Best Lawyers in America® 2011-2021
Chambers USA 2010-2020 (Labor and Employment-Indiana)
Indiana Super Lawyers® 2013-2020 (Employment Litigation: Defense; Employment Law)

Tyler Moorhead, Associate
tmoorhead@boselaw.com / (317) 684-5130

Tyler Moorhead is an associate in the Labor and Employment, and Litigation Groups of Bose McKinney & Evans LLP. Tyler assists clients with a wide array of labor and employment matters including employment litigation, discrimination and wrongful termination defense, wage claims, non-compete, confidentiality, and non-solicitation agreements, and compliance with FMLA, ADA, FLSA, and other employment-related state and federal statutes.

Tyler also has experience representing clients in a wide variety of litigation matters including complex commercial litigation, contract disputes, fraud, breach of fiduciary duty, and toxic tort environmental litigation.

Education
Indiana University Robert H. McKinney School of Law – Indianapolis (J.D., summa cum laude, 2017)
Indiana University Kelley School of Business (B.S. in business, magna cum laude, 2014)

Honors / Awards
Dean's Tutorial Society Fellow; Norman Lefstein Award of Excellence for Pro Bono Service; Professional Responsibility Association, President; Eli Lilly Law Alumni Award, McKinney School of Law; Resident Excellence Award, McKinney School of Law; Founders Scholar, Indiana University; Indiana Excellence Award, Indiana University

Appointments / Memberships
Member: Indiana State Bar Association; Indianapolis Bar Association; Indianapolis Zoo Council

Mark E. Kamish
Baldwin Perry & Kamish, PC, Franklin

For almost two decades Mark has concentrated his efforts exclusively on defending people accused of committing crime (a partial listing includes two capital murder cases in which the death penalty was sought, other charges of murder, felony murder, manslaughter, attempted murder, reckless homicide, child molesting, rape, criminal deviate conduct, sexual misconduct with a minor, possession and dissemination of child pornography, child exploitation, sexual battery, neglect of a dependent, gun charges, drug offenses, arson, armed robbery, criminal confinement, burglary, forgery, fraud, theft, auto theft, battery, domestic battery, stalking, escape, promoting prostitution, felony driving while intoxicated and felony driving while intoxicated causing death).

In doing so, Mark has tried 60 jury trials, including 47 felony jury trials to verdict. At the appellate level, he has successfully argued before the Indiana Supreme Court. Mark is a graduate of the National Criminal Defense College (NCDC) in Macon, Georgia and has received hundreds of hours of trial advocacy training. In 2009, Mark became only the fourth lawyer ever in the state of Indiana to be a Board Certified Criminal Law Specialist by the National Board of Trial Advocacy, joining his partner Andy Baldwin, who became the third. Additionally, Mark has been a frequent faculty member for the Indiana Public Defender Council (IPDC) Trial Practice Institute (a 4-day “boot camp” for lawyers wanting to improve their trial skills). He is also a member of the National College for DUI Defense (NCDD).

Mark received his undergraduate degree in Engineering from the United States Military Academy at West Point in 1983. Following Ranger School and a tour of duty with the 82nd Airborne Division, Mark graduated from the Field Artillery Officer Advanced Course and the Defense Language Institute (German), Presidio of Monterey, California. He commanded a nuclear weapons unit in Germany from 1988 to 1990. Following military service, Mark served for 10 years in a variety of managerial and engineering positions with Fortune 1000 companies. After 3½ years at Newell in Rockford, Illinois, Mark accepted an operations manager position at Harman-Motive, a division of Harman International, located in Martinsville, Indiana. He also served as a supplier engineer at that company.

After graduating from the Indiana University School of Law - Indianapolis’ evening program, Mark was a full-time public defender at the Marion County Public Defender Agency from 2000 to 2004, a part-time major felony PD from 2005 to 2006 and a conflict D felony PD from 2006 to 2009. In the past 10 years, Mark has continued to accept pauper counsel appointments in Hamilton, Hendricks and Monroe counties.

In 2018, Mark was appointed Criminal-Rule-24-qualified co-counsel on a death penalty case remanded from the 7th Circuit Court of Appeals after his client had been on death row for 22 years. He helped negotiate a 110-year sentence in that case by way of a plea agreement (the lowest recorded sentence in Indiana history for a person convicted of triple homicide). In 2019, Mark was lead counsel for another death row inmate whose sentence was remanded after 15 years by the 7th Circuit. That client is now also off death row and serving a sentence of life without possibility of parole.

Zachary S. Kester
Executive Director, Charitable Allies Inc., Indianapolis

Professionally, *Zac Kester* has an LL.M. (Masters of Law) concentrating on the special needs of tax-exempt organizations and has practiced law primarily for charities, focusing on organizational and compliance services. He has also earned a CFRM (Certificate in Fundraising Management) from the Lilly Family School of Philanthropy. In addition, Zac has also been named a Practitioner-in-Residence at the IU Maurer School of Law in Bloomington.

Zac speaks and publishes regularly regarding the unique needs of charities. Topics include identifying effective outcome measures, governance, board liability, human resources for small nonprofits and property tax exemption issues, among many others.

Personally, Zac, his wife, Amanda, and their four children are passionate about serving those in their communities and people globally. The Kesters strongly support adopting and fostering children, having adopted two beautiful girls from Ethiopia who are wonderful older sisters to the Kesters' biological sons.

Along with others from their local church, the Kesters help with repairs and spring cleaning at the Dayspring Center, a homeless shelter for women and children, and serve breakfast to men and women who need a helping hand at Horizon House.

Zac volunteers on his children's school board, and he and Amanda are active at their church.

The Kesters also support Compassion International and World Vision in the fight against child poverty, International Justice Mission to end human trafficking and slavery, the Invisible Girl Project, protecting little girls from gendercide, and Mission to the World missionaries Lee and Dr. Jen Bigelow and their three girls on a long-term medical mission in rural Belize.

Charles M. Kidd
Indiana Supreme Court Disciplinary Commission, Indianapolis

Deputy Executive Director, Indiana Supreme Court Disciplinary Commission. Admitted to bar, 1988, Indiana, Northern and Southern Federal Districts of Indiana. Education: Butler University, B.S. 1979; Indiana University School of Law--Indianapolis, J.D. 1987. Member: American Bar Association, Indiana State Bar Association and Indianapolis Bar Association (Distinguished Fellow); Roster of the National Organization of Bar Counsel. Former Master member, Sagamore American Inn of Court. Former Indiana Deputy Attorney General (1988-1991). Author of numerous continuing legal education works including the Survey of Recent Developments in Professional Responsibility in volumes 26 through 28 and 30 through 36 of the Indiana Law Review. AV Rated by Martindale-Hubbell.

Anna Mallon, Paganelli Law Group

Anna Mallon concentrates her practice in the areas of insurance bad faith, insurance coverage, third–party defense of insureds, and personal injury defense. Anna regularly practices in state and federal courts handling trials, summary judgment hearings, mediations and arbitrations. Prior to attending law school, Anna taught high school government.

When not practicing law, Anna enjoys traveling, ballet, and cheering on the Fighting Irish of Notre Dame and the Chicago Cubs. Anna is married and has two children.

AWARDS:
Super Lawyers, Indiana Rising Star, 2009-2011

LEGAL ORGANIZATIONS:
Indiana State Bar Association
Indianapolis Bar Association
Defense Trial Counsel of Indiana ("DTCI")
Claims Litigation Management ("CLM")
Sagamore Inn of Court

BOARD AND CIVIC INVOLVEMENT:
Defense Trial Counsel of Indiana Board Member
Indianapolis Public School Corporation Finance Committee Member
Indianapolis Center for Inquiry School 84 PTSA Vice President
Indianapolis Center for Inquiry School 84 Leadership Committee
Miami University (OH) Alumni Association

Kathie A. Perry
Baldwin Perry & Kamish, PC, Franklin

My entire career has been spent exclusively defending the accused, except for a 9 month period in 2014 when I briefly ventured into other areas of law. It was a miserable 9 months, but it helped me realize a very basic fact about myself: I am a criminal defense attorney. Period. Joining The Criminal Defense Team of Baldwin Perry & Kamish, PC with our exciting style of aggressive, creative and strategic defense and dedication to the criminally accused was a perfect fit. For those who are dedicated to criminal defense, like all of the lawyers in our firm, dealing with the hectic pace and constant pressures of representing clients accused of committing a variety of crimes is simply a way of life. I realized very quickly upon joining the firm that my history as a criminal defense attorney mirrored the experiences of all of our firm's lawyers.

1 of only 6 Board Certified Criminal Law Specialists in Indiana

AREAS OF PRACTICE

- 100% criminally related law, primarily all phases related to criminal defense, including pre-arrest advocacy, trial, appellate and post-conviction relief work.

CRIMINAL DEFENSE EXPERIENCE

- Monroe County Public Defender Agency, 1999-2001, Certified Legal Intern
- Marion County Public Defender Agency, 2001-2014, Deputy Public Defender
- Baldwin Perry & Kamish, P.C., 2015 – present, Partner

EDUCATION

- Maurer School of Law - Indiana University- (Juris Doctorate, 2001) Bloomington, Indiana

Merit Scholarship Award Winner

James A. Reed
Dentons Bingham Greenebaum LLP, Indianapolis

Jim Reed has concentrated his practice in the legal aspect of relationship transitions of all types since graduating from law school. He has been involved in divorce cases with some of the largest marital estates in Indiana. He represents many professionals (medical, legal, accounting, financial), business owners and executives, community leaders, high-profile individuals in entertainment, sports and politics, and the spouses/partners of these individuals. Because of his experience and the personal nature of the practice, Jim has helped individuals and families find solutions to complex relationship and legal transitions. His practice includes counseling cohabitating partners in implementing plans for estate transitions, health care decision making, joint ownership and survivorship, as well as representing partners in the conclusion of relationships, custody and support of their children, and the division of property and assets. Jim approaches the representation of his clients with years of diverse experience and from a broad perspective.

Guy A. Relford
The Law Offices of Guy A. Relford, Carmel

Guy A. Relford is the founder of the Law Offices of Guy A. Relford in Carmel, Indiana. His legal practice includes both civil and criminal litigation, focused exclusively on the defense of the U.S. and Indiana Constitutions and the promotion and protection of Second Amendment rights. He often lectures and conducts continuing legal education courses for Indiana attorneys on Indiana's gun laws and the justified use of deadly force in self-defense.

In 2018, Relford was awarded the national Distinguished Advocate Award from the National Rifle Association for his work in defending the Second Amendment – one of only two persons to receive the award in the country.

Relford is the owner and chief instructor of Tactical Firearms Training, LLC ("TFT") in Indianapolis. TFT conducts firearms training for persons of all experience levels. Relford is a NRA-certified firearms instructor and a NRA-certified chief range safety officer. He is the author of "Gun Safety & Cleaning for Dummies" (Wiley & Sons Publications, 2012).

Relford is also the host of "The Gun Guy with Guy Relford" on WIBC radio in Indianapolis, which airs on Saturdays from 5:00 to 7:00 pm on 93.1 FM in central Indiana and www.wibc.com from anywhere.

Relford received his law degree, cum laude, from Indiana University School of Law – Indianapolis in 1983. He received his undergraduate degree in Political Science and Psychology from DePauw University in Greencastle, Indiana in 1980, where he played varsity football. He attended Carmel High School in Carmel, Indiana.
Relford resides in Zionsville, Indiana.

Mary Slade has over 24 years of Indiana real estate transaction and litigation experience. Mary began her career in real estate as an assistant regional counsel for a national title underwriter where she handled transaction underwriting, claims, and auditing in six states including Indiana. As regional counsel for another national title underwriter, her responsibilities included underwriting and claims for 16 states and the District of Columbia. Mary's private practice concentrated on real estate litigation and commercial transactions. Prior to being a Deputy Prosecuting Attorney for the Prosecuting Attorney of Marion County, Mary graduated from Butler University with a Bachelor of Arts in International Studies and received her Juris Doctorate from Indiana University School of Law – Indianapolis. She has served as the 2018-2020 Chair of the Real Property Committee of the Probate, Trust, & Real Property Section of the Indiana State Bar Association ("PTRP") and previously served as the 2017-2018 PTRP Chair. Her volunteer work includes co-editor of the Indiana Land Title Association's Real Estate Handbook and the PTRP's newsletter. Currently, her in-house counsel work with First American as Indiana State Counsel includes underwriting simple to complex commercial, multi-site, and residential Indiana transactions as well as serving as First American's Indiana point of contact for multiple divisions and as a member of First American's Fraud Prevention Practice Group and Native American Lands Practice Group.

Elizabeth S. Traylor
Dentons Bingham Greenebaum LLP, Indianapolis

Elizabeth is a member of the firm's Litigation Department. Prior to joining BGD, Elizabeth was an associate with Smith Amundsen in their Indianapolis office. She also served as an associate with Clendening Johnson & Bohrer and as a Judicial Extern with The Honorable Judge Sarah Evans Barker. Elizabeth was selected to the Indiana Lawyer's "Rising Stars" in 2018.

Elizabeth earned her J.D. from Indiana University McKinney School of Law, *magna cum laude*, in 2015 and her B.A. from John Carroll University in 2002.

Paul J. Unger
Affinity Consulting Group, LLC, Columbus, OH

Paul J. Unger is a nationally recognized speaker, author and thought-leader in the legal technology industry. He is an attorney and founding principal of Affinity Consulting Group, a nationwide consulting company providing legal technology consulting, continuing legal education, and training.

He is the author of dozens legal technology manuals and publications, including recent published books, *Tame the Digital Chaos – A Lawyer's Guide to Distraction, Time, Task & Email Management* (2017) and *PowerPoint in an Hour for Lawyers* (2014). He served as Chair of the ABA Legal Technology Resource Center (2012-13, 2013-14)(www.lawtechnology.org/), Chair of ABA TECHSHOW (2011)(www.techshow.com), and served as Planning Chair for the 2016 ACLEA Mid-Year Conference in Savannah, GA. He is a member of the American Bar Association, Columbus Bar Association, Ohio State Bar Association, Ohio Association for Justice, and New York State Bar Association, and specializes in document and case management, paperless office strategies, trial presentation and litigation technology, and legal-specific software training and professional development for law firms and legal departments throughout the United States, Canada and Australia. Mr. Unger has provided trial presentation consultation for over 400 cases. In his spare time, he likes to run and restore historic homes.

Seth R. Wilson
Adler Tesnar & Whalin, Noblesville

Seth R. Wilson practices with Adler Tesnar & Whalin in Noblesville. Previously he practiced with Hume Smith Geddes Green & Simmons. Seth is admitted to practice in the State of Indiana, as well as both the Northern District and Southern District Federal Courts in Indiana.

Seth graduated from Regent University School of Law in Virginia Beach, Virginia in 2006 where he served as Editor-in-Chief of Regent Law Review. Seth is a 2003 graduate of Taylor University, located in Upland, Indiana, majoring in Mass Communications/Journalism, with a minor in Pre-law.

Follow Seth on Twitter or connect with Seth on Linkedin.

Practice Areas
•Premises Liability
•Products Liability
•Automobile Liability
•Worker's Compensation
•Environmental
•Commercial Litigation
•Data Security/privacy
•E-Discovery
•Mass Tort Litigation
•Estate Planning and Probate
•Legal Technology Services
•Law Firm Administration/Management

BIOGRAPHY

Thomas P. Yoder is a retired partner from the law firm of Barrett McNagny LLP in Fort Wayne, Indiana, and concentrated his practice for 42 years in business bankruptcy, creditors' rights and general insolvency matters. He now concentrates his practice, when he feels like working, in the area of commercial and business mediations and is an Indiana mediator. He is a *cum laude* graduate of Hanover College (B.A. History, 1974) and the Indiana University School of Law at Bloomington (J.D. 1977). He is a Past President of the Indiana State Bar Association (1999-2000), a former member of the Board of Directors of the American Bankruptcy Institute (1994-2000), a former director of the Allen County Bar Association (2005-2008), and is a Fellow of the American College of Bankruptcy (2003). He has also written and lectured extensively on bankruptcy and insolvency-related topics and is a co-author of *Bankruptcy- A Survival Guide for Lenders* (First ed. 1997; Second ed. 2008), published by the American Bankruptcy Institute and winner of the ABI's Outstanding Publications Award (1997). Until retiring, he had been listed in the last twenty-plus (20+) editions of "*The Best Lawyers in America*" and in every edition of "*The Indiana Super Lawyers*", as well as in certain separate specialty listings published by both. In 2000, he was awarded the Sagamore of the Wabash distinction by the Governor of Indiana, the State's most prestigious recognition of citizenship.

Robert C. Allega is a judicial law clerk for the Honorable Melissa S. May of the Indiana Court of Appeals. He is a graduate of Hanover College (B.A. English, 2010) and the Indiana University Maurer School of Law (J.D. 2013). Prior to his clerkship with Judge May, Allega worked as a deputy attorney general in the Office of the Indiana Attorney General and as a staff attorney for the Indiana Department of Correction.

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Robert C. Allega, Esq.

Section One

Ethics

Margaret M. Christensen
Dentons Bingham Greenebaum LLP
Indianapolis, Indiana

Max Hsu, Co-Author
Dentons Bingham Greenebaum LLP
Indianapolis, Indiana

Charles M. Kidd
Indiana Supreme Court Disciplinary Commission
Indianapolis, Indiana

Section One

2018-2019 Annual Report of the Disciplinary Commission of the Supreme Court of Indiana

Ethics 2020: Mid-Year Case Law Update

Margaret Christensen
Max Hsu

Current through August 2020

***In the Matter of Fraley*, No. 18S-DI-304 (January 21, 2020)**

- Fraley, committed attorney misconduct by severely mismanaging her trust account and by engaging in a pattern of dishonest and fraudulent behavior during the Commission's investigation.

- Respondent committed the following violations:

- **Count 1.** From 2014 through 2018, Respondent engaged in pervasive financial misconduct, including multiple overdrafts of her trust account, commingling of personal and client funds, use of trust account funds to pay personal or business expenses, failing to deposit client funds into a trust account, and conversion of client funds.

- **Count 2.** During the Commission's investigation into Respondent's trust account mismanagement, Respondent knowingly made false statements of material fact to the Commission and submitted to the Commission a false and forged affidavit purportedly executed by Respondent's former paralegal.

- **Count 3.** The Commission initiated a noncooperation case against Respondent due to her failure to respond to requests for information, which was dismissed with costs after Respondent belatedly complied. Respondent did not timely pay those costs, prompting the Commission to send Respondent a notice letter in advance of petitioning for a costs nonpayment suspension. Respondent replied with a letter to the Commission falsely stating that she had paid her costs. Respondent attached to that letter a copy of a check purportedly drawn on Respondent's personal checking account, which Respondent falsely represented she had previously mailed to the Commission. The Commission then requested from Respondent a copy of the cancelled check and bank records showing that the check was presented for payment. Respondent did not provide those items, but rather provided a money order to "serve[ ] as a replacement for the original check," which Respondent claimed had not been returned to her office or cashed.

- "Respondent's criminal conversion of client funds, and her elaborate pattern of fraudulent and dishonest behavior during the investigation and litigation of this matter, elevate this case into an entirely different realm."

- “Respondent lied at innumerable junctures to the Commission and during sworn testimony, forged an affidavit containing false statements of material fact, falsified a personal check, and even invented a fictitious bank manager – all in an effort to extricate herself from various investigations and proceedings that began as simple overdraft inquiries.”

- Respondent violated Professional Conduct Rules 1.15(a), 1.15(c), 8.1(a), 8.4(b), 8.4(c), and 8.4(d), and Admission and Discipline Rules 23(29)(a)(4) (2016), 23(29)(a)(5)(2016), 23(29)(a)(4) (2017), 23(29)(c)(2) (2017), 23(29)(c)(4) (2017), and 23(29)(c)(5) (2017).

  Penalty: Disbarred.

***In the Matter of Bruce N. Elliott*, 19S-DI-251 (January 23,2020)**

Facts:

- Respondent represented "Wife" in a dissolution matter, and another attorney represented "Husband."
- The negotiated resolution reached by the parties contemplated that Husband would be awarded portions of Wife's four retirement accounts.
- Under the terms of the decree, Respondent was to prepare qualified domestic relations orders ("QDROs") for two of those accounts within 90 days, and opposing counsel was to prepare QDROs for the other two accounts within 90 days. (Neither Respondent nor opposing counsel did so).

Violation: Respondent violated Indiana Professional Conduct Rule 3.2 by failing to make reasonable efforts to expedite litigation consistent with the interests of his client.

Discipline: Public Reprimand.

***In the Matter of James R. Lisher*, No.19S-DI-535 (January 23, 2020)**

Facts: Respondent employed nonlawyer Heather Brant from 2001 until 2018. Respondent delegated broad authority to Brant to handle most office tasks, including client communication, banking, and electronic court filing.

- Respondent also failed to maintain appropriate trust account records. Over the course of several months in 2018, Brant stole several thousand dollars from the firm's operating account, overdrafted the firm's trust account, and fraudulently created several purported court orders and other legal documents.

- Brant's improper actions were enabled in significant part by Respondent's **failure to appropriately supervise her.**

Ind. Professional Conduct Rules

- 1.15(a): Failing to maintain and preserve complete records of client trust accountfunds.

- 5.3(b): Failing to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.

Ind. Admission and Discipline Rules

- 23(29)(a)(3): Failing to keep records or ledgers detailing the nominal amount of attorney funds held in a trust account, showing the amount and dates of attorney funds disbursed or deposited, and a running balance of the amount of attorney funds held in the trust account.

- 23(29)(a)(7): Failing to keep reconciliation reports for a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statements.

Aggravators/Mitigators

- The parties cite Respondent's substantial *experience in the practice of law* as a fact in aggravation.

- In mitigation the parties cite among other things Respondent's:

- lack of prior discipline,
- his lack of dishonest or selfish motive,
- his restitution to affected clients, and
- his cooperation with the disciplinary process.

Discipline: 60-day suspension with automatic reinstatement

In the Matter of Burton, No. 19S-DI-309 (January 29, 2020)

Facts

- Respondent/Chief Deputy Prosecutor, committed attorney misconduct by abusing his prosecutorial authority as part of a campaign of retaliation against a detective.
- Respondent and Inmate had a sexual relationship for 20-years.
- Detective asked Inmate whether she and Respondent had a sexual relationship to which she responded, yes.
- After discovering the Detectives' line of question, Respondent was outraged and instructed the Inmate to:
  - Supply him and the elected prosecutor with a statement about the interview
  - Respondent provided Inmate with some specific guidance on what that statement should say.
  - After receiving the letter from Inmate, Elected Prosecutor filed with the VPD an Employee Misconduct Complaint against Detective.
  - A month after, VPD investigators met with Inmate. A day after, Respondent instructed Inmate not to speak with the investigators again.
  - Respondent also instructed Inmate to write another letter to Elected Prosecutor regarding the second interview and provided guidance on what to include in the letter.

Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.7(a)(2): Representing a client when there is a concurrent conflict of interest.
- 8.4(d): Engaging in conduct prejudicial to the administration of justice.
- 8.4(e): Stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct.

Aggravators/Mitigators

- The parties cite Respondent's substantial experience in the practice of law as a fact in aggravation.

- In mitigation the parties cite among other things Respondent's lack of prior discipline, his remorse and cooperation with disciplinary proceedings, and his many years of public service.

  Penalty: 90-days with automatic reinstatement.

***In the Matter of Adams,* No. 19S-DI-144 (Feb. 14,2020)**

Count 1. Respondent was hired by "Client 1" to obtain a guardianship over Client 1's three grandchildren. Respondent prepared petitions for appointment of a guardian but never filed them. Respondent erroneously told Client 1 that the petitions had been filed, and thereafter did not respond to Client 1's numerous requests for information. Respondent eventually refunded all attorney fees paid by Client 1.

Count 2. Respondent owns a business account and an IOLTA trust account. From 2011 until 2019, Respondent annually certified his business account as an IOLTA account. In February 2019, Respondent certified his IOLTA account with the Clerk and closed the certification for the business account.

Count 3. Respondent was hired by "Client 3" to represent her in a probation violation matter, accepted a $1,000 retainer, and thereafter did no work on the case and did not respond to Client 3's attempts to reach him. Respondent did not refund the $1,000 fee to Client 3 until after she filed a grievance with the Commission.

Count 4. "Client 4" hired an Illinois law firm to represent him in a post-dissolution matter in Marion County and hired Respondent to serve as local counsel. Respondent was given a $3,500 payment to serve as local counsel. Shortly thereafter Client 4 terminated the services of the Illinois firm, and Respondent was advised his services were no longer needed. Illinois counsel unsuccessfully tried for several months to obtain a refund of the $3,500 for Client 4, which Respondent did not provide until after Client 4 filed a grievance with the Commission.

Count 5. "Client 5" hired Respondent to represent him in various expungement matters and paid Respondent a $2,000 retainer.

- Respondent filed expungement petitions in Hamilton and Marion Counties inApril 2019.
- The Prosecutor filed an objection arguing the petition was statutorily noncompliant, and the court scheduled a hearing.
- Respondent did not advise Client 5 of the hearing, neither Respondent nor Client 5 appeared at the hearing, and the expungement petition was denied as a result.
- Client 5 was unable to contact Respondent for several months and

eventually hired successor counsel, who amended the Hamilton and Marion County petitions and succeeded in obtaining expungements for Client 5 in those counties.

- Respondent was successful in obtaining an expungement for Client 5 in a third county, and he reimbursed Client 5 for the successor counsel fees in the Hamilton and MarionCounty cases.

Violations: The parties agree that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.3: Failing to act with reasonable diligence and promptness.
- 1.4(a)(3): Failing to keep a client reasonably informed about the status of a matter.
- 1.4(a)(4): Failing to comply promptly with a client's reasonable requests for information.
- 1.15(g): Failing to certify that all client funds which are nominal in amount or to be held for a short period of time are held in an IOLTA account.
- 1.16(d): Failing to refund unearned fees after termination of representation. The parties further agree that Respondent's failure to properly certify his IOLTA account with the Clerk also violated Admission and Discipline Rule 2(f).

Aggravators: Respondent's pattern of misconduct and substantial experience.

Mitigators: Respondent's lack of prior discipline, his cooperation with the disciplinary process, and his engagement with JLAP to address factors contributing to his misconduct.

Discipline: Suspended 180-days, with 60 days actively served and the remainder stayed subject to completion of at least two years of probation with JLAP monitoring.

***In the Matter of Bryan*, No. 19S-DI-306 (Feb. 27 2020)**

Facts:

- Respondent possessed cocaine in his home on a date in September 2017, which police learned through information provided by a confidential informant.
- During the Commission's investigation of this matter, Respondent did not timely comply with a subpoena duces tecum, which led to the initiation of show cause proceedings. Respondent eventually produced documents that were not in compliance with the Commission's demand.

Violations:

- Respondent violated Indiana Professional Conduct Rule 8.1(b) by failing to respond to the Commission's demand for information and Professional Conduct Rule 8.4(b) by committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer.

Discipline: Suspended 150-days, with 120-days actively served and the remainder stayed subject to JLAP probation

***In the Matter of Rios*, No. 19S-DI-511 (Feb. 27 2020)**

Facts: "Client" hired Respondent to assist him with an immigration matter. Client paid Respondent

$1,420 – more specifically, a $1,000 retainer for legal work and a $420 anticipated filing fee.

- After Respondent had done a minimal amount of work and before anything was filed, Client terminated Respondent and asked for a refund of the filing fee and any unearned attorney fees.
- Respondent wrote Client a check for $920 (the $420 filing fee and $500 in unearned legal fees), but the check bounced.
- After Respondent would not write Client another check, Client sued Respondent in small claims court and obtained a default judgment in January 2017 for $920 plus $101 in court costs and post-judgment interest at the rate of 8% per annum.
- In May 2019, Respondent provided Client a $1,000 cashier's check in partial satisfaction of the amount she owes to Client.

Violation: 1.16(d) by failing to timely refund advance payment of fees and expenses thathave not been earned or incurred.

Discipline: Public Reprimand

***In the Matter of Gupta*, No. 19S-DI-71 (March 10, 2020)**

Facts: Gupta, committed attorney misconduct by, among other things, mismanaging his attorney trust accounts, charging and collecting unreasonable amounts for fees and expenses, neglecting numerous client matters, making false statements to the Commission, and evading the payment of income taxes.

- Failed file tax returns on his law firm profits since 2010;
- Failed to keep adequate records, commingled funds, used trust account funds to pay personal or business expenses, and failed to timely disburse settlement funds owed to clients or third parties;
- Routinely billed clients unreasonable amounts for travel and other expenses;
- Referred clients to consultants and allowed those consultants to submit requests for payment without providing invoices for work performed;
- Frequently absent from his law office, allowing nonlawyers to do accounting and legal work;
- Neglected to advance his client's cases, causing detriment to client such as a dismissal; and
- Claimed physical and mental health issues, but failed to withdraw from any active cases.

Respondent violated the following Rules of Professional Conduct:

1.3: Failing to act with reasonable diligence and promptness.

1.4(a)(2): Failing to reasonably consult with a client about the means by which the client's objectives are to be accomplished.

1.4(a)(3): Failing to keep a client reasonably informed about the status of a matter. 1.4(a)(4): Failing to comply promptly with a client's reasonable requests for information.

1.4(b): Failing to explain a matter to the extent reasonably necessary to permit a client to make informed decisions. 1.5(a): Charging or collecting an unreasonable amount for fees and expenses.

1.5(c): Failing to disclose to a client the method by which a

contingent legal fee will be determined.

1.7(a)(2): Representing a client when the representation may be materially limited by the attorney's responsibilities to another client, a former client, or a third person.

1.15(a): Commingling client and attorney funds, and failing to maintain a trust account in a state (Illinois) in which the attorney maintains a separate office.

Respondent violated the following Rules of Professional Conduct:

1.15(b): Maintaining more than a nominal amount of attorney funds in a trust account.

1.15(c): Failing to disburse earned fees and reimbursed expenses from a trust account.

1.15(d): Failing to deliver promptly to a client funds the client is entitled to receive, and to third parties funds they are entitled to receive.

1.16(a)(2): Failing to withdraw from representation of a client when the lawyer's physical or mental ability to represent the client is impaired.

1.16(a)(3): Failing to withdraw from representation after being discharged.

3(b): Failing to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.

7.3(d): Accepting improper referrals from a service.

8.1(a): Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter.

8.4(b): Committing criminal acts (willful failure to file income tax returns) that reflect adversely on the lawyer's honesty, trustworthiness, or fitness.

8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

8.4(d): Engaging in conduct prejudicial to the administration of justice.

Ultimately, Respondent's **pattern** of misconduct was **wide-ranging, severe, andlong-lasting.**

- "The parties acknowledge in their conditional agreement that "Respondent's actions may warrant a different sanction" (Agreement at 68), and *indeed we have disbarred attorneys who have engaged in similarly egregious patterns of misconduct.*"
- **Discipline**: Suspended for a period of not less than three years, without automatic reinstatement.

***In the Matter of Wilson*, Case No. 18S-DI-365 (March 23,2020)**

Facts: Respondent operates a small, family-run law firm. From 2013 through 2017, Respondent mismanaged his trust account.

- Respondent's mismanagement included among other things multiple overdrafts, commingling of client and attorney funds, and inadequate recordkeeping.
- Much of this misconduct stemmed from Respondent's failure to adequately supervise his daughter, a nonlawyer who was employed in various roles at Respondent's firm and who was a signatory on Respondent's trust account.
- Respondent did not timely comply with a subpoena duces tecum issued by the Commission during its investigation, prompting the initiation of a show cause proceeding that was dismissed when Respondent belatedly complied.

Violations:

- Ind. Professional Conduct Rules: 1.15(a): Commingling client and attorney funds. 5.3(a): Failing to make reasonable efforts to ensure that the lawyer's firm has taken measures to assure that a nonlawyer employee's conduct is compatible with the professional obligations of the lawyer.
- 5.3(b): Failing to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.
- 5.3(c)(2): Failing to take reasonable remedial action with respect to the misconduct of nonlawyer assistants under the lawyer's supervision.
- 8.1(b): Failure to respond timely to the Commission's demands for information.

Discipline: Suspended 180-days, with 30 actively served and the remaining stayed subject to 18- months of probation, including independent oversight of trust account.

***In the Matter of Cuciuc*, No.19S-DI-267 (April 7, 2020)**

Facts: After twice failing the Indiana bar exam, Respondent applied again in December 2014, took and passed the July 2015 bar exam, and was admitted to practice in April 2016.

- In his bar exam application, Respondent answered "**no**" to:
- Questions 14 ("Have you ever been a party in a civil court case or proceeding?") and
- 15 ("Have you ever had a complaint or other action (including but not limited to, allegations of fraud, deceit, misrepresentation, forgery or malpractice) initiated against you in any administrative forum?").
- Respondent also acknowledged in his application his affirmative obligation to notify the Board of Law Examiners of any events between his application and bar admission that would cause any of the answers on his application to change.
- After he submitted his application and took the bar exam, but before he was admitted to the Indiana bar, Respondent was the subject of a civil protective order proceeding filed in Marion Superior Court as well as a Title IX complaint filed with the McKinney School of Law. Respondent failed to supplement his bar application to include information about the protective order and Title IX proceedings.

Violation: Respondent violated Professional Conduct Rule 8.1(b) by failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in a bar admissionmatter.

Discipline: Suspended for a period of not less than 180 days, without automatic reinstatement.

***In the Matter of Cogswell,* Case No. 19S-DI-135 (April 7,2020)**

Facts:

- Count 1. Respondent represented the wife ("Client 1") in a divorce.
- Parties' mediated property settlement agreement Respondent to prepare the required papers, with the husband ordered in the interim (for a period not to exceed six months) to make monthly payments directly to Client 1.
- After more than six months passed, Respondent had not prepared the documents needed to effectuate Client 1's share of the husband's retirement benefit, and the husband ceased making the monthly payments to Client 1.
- Soon thereafter, the husband also failed to timely make a $15,000 installment payment. Client 1 attempted repeatedly and unsuccessfully to contact Respondent about the status of her case.
- Respondent eventually met with Client 1 and promised to complete the retirement paperwork and take action to have the husband held in contempt for failing to make the installment payment, but failed to do so.
- When Client 1 tried to advance her case with various pro se filings, the court referred those filings to Respondent and directed him to file an appropriate pleading before the court would take any action.
- Respondent did not confer with Client 1 about these developments or otherwise take any action, which left Client 1 unclear why her requests for relief had not been successful.
- Count 2. Respondent represented "Client 2" in connection with a workplace sexual harassment matter, but Respondent turned over primary handling of the matter to his paralegal ("JB").
- In November 2017, the Equal Employment Opportunity Commission issued Client 2 a Notice of Right to Sue.
- Client 2's federal law claims were required to be filed within 90 days of receipt of this notice, and the statute of limitation for any state law claims arising from the workplace sexual harassment was two years from the date of occurrences.

- Client 2 contacted JB to confirm whether a lawsuit had been filed, and JB falsely told Client 2 that it had. Respondent did not communicate with Client 2 and did not adequately supervise JB's communications with Client 2.

- Respondent failed to file a lawsuit until after the relevant deadlines for state and federal law claims had passed, resulting in the eventual dismissal of all of Client 2's claims as untimely.

- Respondent has no prior discipline, and after the events in Count 2 Respondent fired JB and paid $15,000 in damages to Client 2 through Respondent's malpractice insurance carrier.

Violations - Respondent violated the following Indiana Professional Conduct Rules:

- 1.3: Failure to act with reasonable diligence and promptness.

- 1.4(a)(3): Failure to keep a client reasonably informed about the status of a matter.

- 1.4(a)(4): Failure to comply promptly with a client's reasonable requests for information.

- 1.4(b): Failure to explain a matter to the extent reasonably necessary to permit a client to make informed decisions. 3.4(c): Knowingly disobeying an obligation under the rules of a tribunal.

- 5.3(b): Failure to make reasonable efforts to ensure that the conduct of a nonlawyer employee over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer.

Discipline: Suspended 60-days, all stayed subject to 12-months of probation

***In the Matter of Curtis T. Hill, Jr.*, No. 19S-DI-156 (May 11, 2020)**

Facts:

- After the 2018 Indiana legislative session, the Respondent, several legislators, lobbyists, and legislative staff attended an event at a local bar.
- While at the event, Respondent inappropriately touched four women (a state representative and three legislative assistants).
- Eventually, the events at the bar were reported to legislative leaders who commissioned a report to examine potential employment law issues.
- Shortly after, the report was leaked and became a matter of public discussion.
- In March 2019, the Commission filed a disciplinary complaint against Respondent.

Hearing: A four-day evidentiary hearing was held in October 2019, followed by the parties' submission of post-hearing briefing.

- The hearing officer found that Respondent violated Rules 8.4(b) and 8.4(d), found in favor of Respondent on the Oath of Attorneys charge, and recommended that Respondent besuspended for at least 60 days without automatic reinstatement.

Discipline: Suspended for 30 days with automatic reinstatement

***In the Matter of Adam Lenkowsky*, No. 19S-DI-541 (June 12, 2020)**

- In early 2019, pursuant to a guilty plea, Respondent was convicted in Hamilton County of operating a vehicle while intoxicated ("OWI") with endangerment, a level 6 felony entered as a class A misdemeanor.
- Respondent had a prior OWI conviction in Marion County.
- Respondent had no prior discipline, has been fully cooperative with the Commission, and has voluntarily taken several measures since his arrest in Hamilton County to respond to his misconduct, including entering into a long-term monitoring agreement with the Judges and Lawyers Assistance Program.
- **Violation**: The Court finds that Respondent violated Professional Conduct Rule 8.4(b), which prohibits committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer
- **Discipline**: Respondent was suspended from the practice of law for a period of 30 days, all stayed subject to completion of at least two years of probation.

***In the Matter of Patrick E. Chavis, IV*, No. 18S-DI-491 (June 12, 2020)**

Count 1. Respondent's written fee agreement called for a $750 "non-refundable" initial fee, described both as a "retainer" and a "flat fee," with an hourly rate thereafter. The fee agreement also included hourly rates for "beginning associates," "senior associates," and "partners," even though Respondent was a solo practitioner.

Respondent took no meaningful action on Client 1's case, and Client 1 was unable to contact Respondent. During the Commissions' investigation, the Respondent was unresponsive, and could not provide any account of fees earned.

Count 2. Client told Respondent she needed the paperwork completed by Thanksgiving 2017. The written fee agreement called for a "flat fee" of $2,500 that was "non-refundable," with an hourly rate for any services not specifically covered. Respondent did not complete the paperwork by Thanksgiving or at any point thereafter, and Client 2 was largely unable to contact Respondent, including her demand for a refund. Respondent did not timely respond to the Commission's investigation and when Respondent eventually did respond, he claimed without support that he had been unable to reach Client 2 and was unaware Client 2 had been trying to reach him.

Violations: Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.3: Failure to act with reasonable diligence and promptness.
- 1.4(a)(3): Failure to keep a client reasonably informed about the status of a matter.
- 1.4(a)(4): Failure to comply promptly with a client's reasonable requests for information.
- 1.5(a): Making an agreement for, charging, or collecting an unreasonable fee.
- 1.16(d): Failure to refund an unearned fee upon termination of representation.

- Indiana Admission & Discipline Rule 23(23.1) by failing to claim notices sent by certified mail.

  Discipline: Suspended from the practice of law for a period of **90 days**, all stayed subject to completion of at least one year of probation with JLAP monitoring.

***In the Matter of Steven T. Fulk*, No. 19S-DI-277 (June 15, 2020)**

- Respondent, committed attorney misconduct by neglecting a client's case, converting an employee's tax withholdings for his own personal use, and failing to cooperate with the disciplinary process.

Violations: Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.4(a)(3): Failing to keep a client reasonably informed about the status of a matter.
- 3.4(c): Knowingly disobeying an obligation under the rules or an order of a court.
- 8.1(b): Knowingly failing to respond to a lawful demand for information from a disciplinary authority.
- 8.4(b): Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.
- 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Aggravating Factors: Respondent has shown absolutely no remorse for, or insight into, his misconduct. Respondent refused to cooperate with the Commission's investigations, has refused to meaningfully participate in these disciplinary proceedings, and has filed no petition for review, brief on sanction, or responsive brief in this Court.

Discipline: For this misconduct, Respondent was disbarred.

***In the Matter of Cody R. Williams*, No. 19S-DI-465 (July 9, 2020).**

Count 1. Respondent overdrafted his trust account on multiple occasions, has mismanaged his trust account in several other respects, and has failed to maintain adequate financial records and did not fully comply with a subpoena duces tecum issued by the Commission, leading to the initiation of show cause proceedings and a suspension for noncooperation that eventually terminated when Respondent belatedly complied.

Count 2. Respondent failed to perform any meaningful work on a client matter; did not sufficiently address Client 2's concerns during communications over the next several months; failed to advise the Client she was ineligible to file a bankruptcy petition until November 2018; and also falsely told Client 2 in November 2017 that he had contacted another attorney to assist at no extra cost with filing a bankruptcy petition. After the client changed counsel, he failed to turn over the documents and refund the flat-fee to the client.

Count 3. In a criminal matter, Respondent did not respond to numerous attempts by the prosecutor's office to schedule depositions of witnesses and failed to appear at two pretrial hearings. Respondent appeared before the court, apologized for his failures, and 2 indicated he would withdraw his appearance and refund the money paid by Client 3, which he failed to do.

Count 4. A Client hired Respondent to file a petition that the Client agreed to pay for. After getting Client's credit card information, Respondent never filed the petitions, but he repeatedly told Client that the petitions had been filed. Respondent eventually ceased communicating with Client 4. After Client filed a grievance, Respondent promised to refund unearned fees, but failed to do so.

Count 5. Respondent never visited his Client in jail despite several requests by the family and despite repeated promises by Respondent that he would do so. Thereafter, the family asked Respondent for a refund and asked the court to appoint the Client a public defender due to Respondent's failures to communicate. Respondent has not refunded unearned fees despite his admission that a refund is owed.

Violations: The parties agree that Respondent violated these Ind. Professional Conduct Rules prohibiting the following misconduct:

- 1.1: Failing to provide competent representation.
- 1.3: Failing to act with reasonable diligence and promptness.
- 1.4(a): Failing to keep a client reasonably informed about the status of a matter and respond promptly to reasonable requests for information.
- 1.15(a): Failing to hold property of a client separate from lawyer's own property.
- 1.16(d): After the termination of representation, failing to protect a client's interests, failing to refund an unearned fee, and failing promptly to return to a client case file materials to which the client is entitled.
- 8.1(a): Knowingly making a false statement of material fact to the Disciplinary Commission in connection with a disciplinary matter.
- 8.1(b): Knowingly failing to respond to a lawful demand for information from a disciplinary authority.
- 8.4(c): Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- 8.4(d): Engaging in conduct prejudicial to the administration of justice.
- Ind. Admission and Discipline Rules: 23(29)(a)(1): Failing to keep a deposit and disbursement journal containing a record of deposits to and withdrawals from an attorney trust account.
- 23(29)(a)(2): Failing to keep sufficiently detailed client ledgers.
- 23(29)(a)(3): Failing to keep records or ledgers detailing the nominal amount of attorney funds held in a trust account.
- 3 23(29)(a)(6): Failing to keep records of electronic disbursements or transfers from a trust account.
- 23(29)(a)(7): Failing to keep reconciliation reports for a trust

account.

- 23(29)(b): Inability to produce financial records by electronic, photographic, computer, or other media capable of being reduced to printed format.

- 23(29)(c)(2): Paying personal or business expenses directly from a trust account.

- 23(29)(c)(5): Making cash disbursements from a trust account.

- 23(29)(c)(6): Failing to keep records of electronic disbursements or transfers from a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statements.

Discipline: 180-day suspension without automatic reinstatement.

***In the Matter of Katherine E. Flood*, No. 19S-DI-675 (July 9, 2020)**

- Respondent pled guilty to disorderly conduct, a class B misdemeanor, arising from a domestic altercation at her home. Respondent has two prior convictions for OWI, one of which predates her bar admission.

  Violation: The parties agree that Respondent violated Indiana Professional Conduct Rule 8.4(b), which prohibits committing a criminal act that reflects adversely on Respondent's trustworthiness or fitness as a lawyer.

  Discipline: Respondent from the practice of law for a period of 90 days, stayed subject to completion of at least two years of probation.

***In the Matter of Anthony F. Tavitas*, No. 20S-DI-335 (July 9, 2020)**

- Respondent mismanaged his trust account from 2016 - 2018. Among other things, Respondent maintained inadequate records, commingled client funds with personal and business funds, neglected to timely disburse settlement proceeds to a client, and regularly paid personal and business expenses from his IOLTA.

Violations: The parties agree that Respondent violated these rules prohibiting the following misconduct:

- Ind. Professional Conduct Rules: 1.15(a): Commingling client and attorney funds and failing to maintain and preserve complete records of client trust account funds.

- 1.15(b): Maintaining more than a nominal amount of attorney funds in a trust account.

- 1.15(d): Failing to deliver promptly to a client funds the client is entitled to receive.

- Ind. Admission and Discipline Rules 23(29)(a)(5): Making cash withdrawals and electronic disbursements from a trust account.

- Ind. Admission and Discipline Rules 23(29)(a)(1): Failing to keep a deposit and disbursement journal containing a record of deposits to and withdrawals from an attorney trust account.

- 23(29)(a)(4): Failing to keep relevant fee agreements.

- 23(29)(a)(7): Failing to keep reconciliation reports for a trust account.

- 23(29)(c)(2): Paying personal or business expenses directly from a trust account, and failing to promptly withdraw fully earned fees from a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statement

Discipline: Respondent suspended from the practice of law for a period of 90 days, all stayed subject to completion of at least 12 months of probation.

***In the Matter of: Robin G. Remley*, No. 20S-DI-93 (July 9, 2020)**

- Respondent mismanaged her attorney trust accounts from 2014 - 2018. This mismanagement included among other things failing to keep adequate records, commingling client and attorney funds, making improper disbursements and electronic transfers, and paying personal and business expenses directly from her IOLTA.

  Violations: The parties agree that Respondent violated these ethics and discipline rules:

- 1.15(a): Failing to hold property of a client separate from lawyer's own property, and failing to maintain and preserve complete records of client trust account funds.

- 1.15(b): Maintaining more than a nominal amount of attorney funds in a trust account.

- 23(29)(a)(5): Making cash withdrawals and electronic disbursements from a trust account.

- Ind. Admission and Discipline Rules 23(29)(a)(1): Failing to keep a deposit and disbursement journal containing a record of deposits to and withdrawals from an attorney trust account.

- 23(29)(a)(2): Failing to keep accurate client ledgers.

- 23(29)(a)(3): Failing to keep an accurate ledger detailing the nominal amount of attorney funds held in a trust account.

- 23(29)(a)(6): Failing to keep accurate records of electronic disbursements or transfers from a trust account.

- 23(29)(a)(7): Failing to keep reconciliation reports for a trust account.

- 23(29)(c)(2): Paying personal or business expenses directly from a trust account.

- 23(29)(c)(7): Failing to reconcile internal trust account records with periodic bank account statements.

  Discipline: Respondent suspended for a period of 90 days, all stayed subject to completion of at least 18 months of probation.

In the Matter of Andrew Homan, No. 19S-DI-318 (July 24, 2020)

- Respondent was arrested for, and later pled guilty to, OWI.
- As a result of his refusal to comply with Indiana's implied consent law at the time of his arrest, and later as a result of his conviction, Respondent's license was suspended from May 2017 until July 2018, but Respondent twice drove while his license was suspended.
- Separately, Respondent entered into an "of counsel" relationship with a Texas law firm, Eastman Meyler d/b/a WipeRecord, which marketed various "criminal record removal services" and similar services.
- Under this contractual relationship, Eastman Meyler would generate customer leads, enter into representation agreements, and provide all document preparation and processing, customer service, billing, and client management. Respondent was forbidden from negotiating representation agreements with clients and, in most instances, from communicating with clients at all. Clients sought an expungement of two criminal matters in Indiana and indicated their request for relief was time-sensitive due to an immigration matter. One year after retaining Eastman Meyler, Clients still had not received resolution to their matters and were inadequately communicated with. Respondent never communicated with Clients despite the fact he was their attorney of record.

  Violations: The parties agree that Respondent violated these Indiana Professional Conduct Rules prohibiting the following misconduct:

- 1.3: Failing to act with reasonable diligence and promptness.
- 1.4(a)(2): Failing to reasonably consult with a client about the means by which the client's objectives are to be accomplished.
- 1.4(a)(3): Failing to keep a client reasonably informed about the status of a matter.
- 1.4(a)(4): Failing to comply promptly with a client's reasonable requests for information.

- 5.3(c): Ordering or ratifying the misconduct of nonlawyer assistants, or failing to take reasonable remedial action with respect to the misconduct of nonlawyer assistants under the lawyer's supervision.

- 5.4(c): Permitting a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

- 5.5(a): Assisting in the unauthorized practice of law.

- 8.4(b): Committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.

Discipline: Suspended for 90 days.

2018-2019
ANNUAL REPORT

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OF THE

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I. INTRODUCTION

This is the annual report of the activities of the Disciplinary Commission of the Indiana Supreme Court for the period beginning July 1, 2018 and ending June 30, 2019. The Disciplinary Commission is the agency of the Indiana Supreme Court charged with responsibility for investigation and prosecution of charges of lawyer misconduct. The Indiana Rules of Professional Conduct set forth the substantive law to which lawyers are held accountable by the Indiana lawyer discipline system. The procedures governing the Indiana lawyer discipline system are set forth in Indiana Supreme Court Admission and Discipline Rule 23. The broad purposes of the Disciplinary Commission are to "protect the public, the court and the members of the bar of this State from misconduct on the part of attorneys and to protect attorneys from unwarranted claims of misconduct." Admission and Discipline Rule 23 § 1.

The Disciplinary Commission is not a tax-supported agency. It is funded through an annual fee that each lawyer admitted to practice law in the State of Indiana must pay in order to keep their license in good standing. The annual registration fee in this reporting year for lawyers in active status was $180.00. After paying the costs of collecting annual fees, the Clerk of the Supreme Court distributes the balance of fees to the Disciplinary Commission, the Commission for Continuing Legal Education and the Indiana Judges and Lawyers Assistance Program to support the work of those Court agencies.

The annual registration fee for inactive status lawyers in this reporting year was $90.00. The annual registration fee is due on or before October 1st of each year. Failure to pay either required fee within the established time subjects the delinquent lawyer to suspension of his or her license to practice law until such time as the fee and any delinquency penalties are paid.

Out-of-state lawyers who received court permission to practice law temporarily in the state of Indiana (*pro hac vice* admission) were required to pay a $180.00 registration fee for each year they are participating as counsel in an Indiana case.

On **June 4, 2019**, the Supreme Court issued an order suspending **144** lawyers on active and inactive status, effective **June 28, 2019**, for failure to pay their annual attorney registration fees.

II. HISTORY AND STRUCTURE OF THE DISCIPLINARY COMMISSION

The Indiana Supreme Court has original and exclusive jurisdiction over the discipline of lawyers admitted to practice law in the State of Indiana. Ind. Const. Art. 7 § 4. On June 23, 1971, the Indiana Supreme Court created the Disciplinary Commission to function in an investigatory and prosecutorial capacity in lawyer discipline matters.

The Disciplinary Commission is governed by a board of commissioners, each of whom is appointed by the Supreme Court to serve a term of five years. The Disciplinary Commission consists of seven lawyers and two lay appointees.

The Commission meets monthly in Indianapolis, generally on the second Friday of each month. In addition to acting as the governing board of the agency, the Disciplinary

Commission considers staff reports on claims of misconduct against lawyers and must make a determination that there is reasonable cause to believe that a lawyer is guilty of misconduct which would warrant disciplinary action before formal disciplinary charges can be filed against a lawyer.

The members of the Disciplinary Commission during the reporting year were:

Name	*Hometown*	*First Appointed*	*Current Term Expires*
Nancy L. Cross	Carmel	July 1, 2011	June 30, 2021
Andrielle M. Metzel	Indianapolis	July 1, 2011	June 30, 2021
Trent A. McCain	Merrillville	July 1, 2011	June 30, 2021
Leanna K. Weissmann	Aurora	July 1, 2013	June 30, 2023
Kirk White	Bloomington	July 1, 2013	June 30, 2023
Brian K. Carroll	Evansville	July 1, 2014	June 30, 2019
John L. Krauss	Indianapolis	July 1, 2014	June 30, 2019
William A. Walker	Gary	July 1, 2009	June 30, 2019
Molly Kitchell	Zionsville	July 1, 2015	June 30, 2020

Biographies of Commission members who served during this reporting year are included in **Appendix A**.

The Disciplinary Commission's work is administered and supervised by its Executive Director, who is appointed by the Commission with the approval of the Supreme Court. The Executive Director of the Commission is G. Michael Witte, appointed June 21, 2010.

The Disciplinary Commission's offices are located at 251 North Illinois Street, Suite 1650, Indianapolis, Indiana 46204.

III. THE DISCIPLINARY PROCESS

A. The Grievance Process

The purpose of the Disciplinary Commission is to inquire into claims of attorney misconduct, protect lawyers against unwarranted claims of misconduct, and prosecute meritorious cases seeking attorney discipline. Action by the Disciplinary Commission is not a mechanism for the resolution of private disputes between clients and attorneys. Disciplinary action is independent of private remedies that may be available through civil litigation.

An investigation into lawyer misconduct is initiated through the filing of a grievance with the Disciplinary Commission. Any member of the bench, the bar or the public may file a grievance by submitting to the Disciplinary Commission an affirmed written statement on a Request for Investigation (RFI) form. Any individual having knowledge about facts relating to a complaint may submit a grievance. An RFI form is readily available from the Commission's office, from bar associations throughout the state, and on the Internet at **http://www.in.gov/judiciary/discipline/2373.htm**.

The Disciplinary Commission may also initiate a grievance concerning alleged lawyer misconduct in the absence of a grievance from a third party. Acting upon information that is brought to its attention from any credible source, the Disciplinary Commission may authorize the Executive Director to prepare a grievance in the name of the Commission. This is known as a Commission Grievance.

B. Preliminary Inquiry

The Commission staff screens each newly filed grievance to initially determine whether the allegations contained therein raise a substantial question of misconduct. If a grievance does not present a substantial question of misconduct, it may be dismissed by the Executive Director with the approval of the Commission. Written notice of dismissal is mailed to the grievant and the lawyer.

A grievance that is not dismissed on its face is sent to the lawyer involved, and a demand is made for the lawyer to submit a mandatory written response within thirty (30) days of receipt. Additional time for response is allotted in appropriate circumstances, but strictly limited. Other investigation as appropriate is conducted to develop the facts related to a grievance.

The Executive Director may call upon the assistance of bar associations in the state to aid in the preliminary investigation of grievances. Larger bar associations maintain volunteer Grievance Committees to assist the Disciplinary Commission with preliminary investigations. These bar associations include the Allen County Bar Association, the Evansville Bar Association, the Indianapolis Bar Association, the Lake County Bar Association, and the St. Joseph County Bar Association.

Upon completion of the initial inquiry and consideration of the grievance and the lawyer's response, the Executive Director may:

- Dismiss the grievance, with approval by the Commission, upon a determination that a substantial question of misconduct has not been raised;
- Determine that a substantial question of misconduct has been raised and issue a caution letter with instructions for corrective action; or
- Determine that a substantial question of misconduct has been raised, open the matter for an inquiry, and demand a written response to the allegations from the lawyer.

The grievant and the lawyer are notified in writing of each of the above actions.

Lawyers must cooperate with the Commission's inquiry by answering grievances in writing and responding to other demands for information from the Commission. The Commission may seek an order from the Supreme Court suspending a non-cooperating lawyer's license to practice until the lawyer cooperates. If after being suspended for non-cooperation, the lawyer does not cooperate for a period of 90 days, the Court may indefinitely suspend the lawyer's license. An indefinitely suspended lawyer will be reinstated only after successfully completing the reinstatement process described in paragraph K below.

C. Further Investigation

A grievance that the Executive Director determines has reasonable cause to believe that a lawyer is guilty of misconduct is docketed for further investigation and, ultimately, for full consideration by the Disciplinary Commission. Both the grievant and the lawyer are notified of this step in the process. Upon completion of the investigation, the results of the investigation are composed in a written summary, and the matter is placed on the monthly agenda of the Disciplinary Commission for consideration.

D. Authorizing Charges of Misconduct

After a grievance has been investigated, it moves to the agenda of the full Disciplinary Commission. The Executive Director makes a report to the Commission, together with recommendation about the disposition of the matter. The Commission makes a final determination whether or not there is reasonable cause to believe the lawyer is guilty of misconduct that would warrant disciplinary action. If the Commission finds that there is not reasonable cause, the matter is dismissed with written notice to the grievant and the lawyer. If the Commission finds that reasonable cause exists, it directs the Executive Director to prepare and file with the Clerk of the Supreme Court a Disciplinary Complaint charging the lawyer with misconduct.

E. Filing Formal Disciplinary Charges

The Executive Director files the Disciplinary Complaint with the Clerk of the Supreme Court setting forth the facts related to the alleged misconduct. The Disciplinary Complaint also identifies the provisions of the Rules of Professional Conduct that the lawyer is alleged to have violated. The respondent must file an answer to the Disciplinary Complaint. Failure to answer the allegations will be taken as true.

F. The Evidentiary Hearing

Upon the filing of a Disciplinary Complaint, the Supreme Court appoints a hearing officer who will preside over the case. The hearing officer must be an attorney admitted to practice law in the State of Indiana and may be a sitting or retired judge. The hearing officer's responsibilities include supervising the pre-hearing development of the case including discovery, conducting an evidentiary hearing, and submitting a written report to the Supreme Court with findings of fact, conclusions of law and recommendations. The hearing officer is not a final arbiter of the facts and the law. That determination rests with the Supreme Court. A hearing may be held at any location selected by the hearing officer.

G. Supreme Court Review

After the hearing officer has issued a report to the Supreme Court, the parties may petition the Court for a review of any or all of the hearing officer's findings, conclusions and recommendations. The Court independently reviews every case, even in the absence of a petition for review by either party. The Court then issues its final order in the case.

H. Final Orders of Discipline

The conclusion of a lawyer discipline proceeding is an order from the Supreme Court setting out the facts of the case, determining the violations (if any) of the Rules of Professional Conduct, and assessing a sanction in each case where it finds misconduct. The sanction ordered by the Court is related to the seriousness of the violation and the presence or absence of mitigating or aggravating circumstances. The available disciplinary sanctions include:

- **Private Administrative Admonition (PAA).** A PAA is a disciplinary sanction that is an administrative resolution of a case involving minor misconduct. A PAA is issued as a sanction only when the Disciplinary Commission and the respondent lawyer agree to the PAA. Unlike other disciplinary sanctions, the Supreme Court does not directly issue the admonition. Instead, the Executive Director admonishes the lawyer. However, the Court receives advance notice of the parties' intent to resolve a case by way of a PAA and may reject such a proposed agreement. There is a public record made in the Office of the Clerk of the Supreme Court of every case resolved by a PAA, although the facts of the matter are not included in the public record.
- **Private Reprimand.** A private reprimand consists of a private letter of reprimand from the Supreme Court to the offending lawyer. The case does not result in a publicly disseminated opinion describing the facts of the case. The Court's brief order resolving the case by way of a private reprimand is a public record that is available through the office of the Clerk of the Supreme Court. Sometimes where a private reprimand is assessed, the Court may issue a *per curiam* opinion for publication bearing the caption *In the Matter of Anonymous*. While the published opinion does not identify the offending lawyer by name, the opinion sets out the facts of the case and the violations of the Rules of Professional Conduct involved for the edification of the bench, the bar and the public.
- **Public Reprimand.** A public reprimand is issued in the form of a publicly disseminated opinion or order by the Supreme Court setting forth the facts of the case and identifying the applicable Rule violations. A public reprimand does not result in any direct limitation upon the offending lawyer's license to practice law.
- **Short Term Suspension.** The Court may impose a short-term suspension of a lawyer's license to practice law as the sanction in a case. When the term of suspension is six months or less, the lawyer's reinstatement to the practice of

lawis generally, but not always, automatic upon the completion of the term of suspension. If a short-term suspension is ordered without automatic reinstatement, then the lawyer may be reinstated to practice only after petitioning for reinstatement and proving fitness to practice law. The procedures associated with reinstatement upon petition are described later in this report. Even in cases of suspension with automatic reinstatement, the Disciplinary Commission may enter objections to the automatic reinstatement of the lawyer's license to practice law.

- **Long Term Suspension.** The Court may impose a longer term of suspension, which is a suspension greater than six months. Every suspension greater than six months is without automatic reinstatement and the lawyer must petition the Court for reinstatement. The suspended lawyer must prove fitness to re-enter the practice of law before a long-term suspension will be terminated.
- **Disbarment.** In the most serious cases of misconduct, the Court will issue a sanction of disbarment. Disbarment revokes a lawyer's license to practice law permanently, and it is not subject to being reinstated at any time in the future.

The lawyer discipline process in Indiana is not a substitute for private or other public remedies that may be available, including criminal sanctions in appropriate cases and civil liability for damages caused by lawyer negligence or other misconduct. The sanctions that are issued in lawyer discipline cases do not generally provide for the resolution of disputed claims of liability for money damages between the grievant and the offending lawyer. However, a suspended lawyer's willingness to make restitution may be considered by the Court to be a substantial factor in determining license reinstatement upon conclusion of suspension.

Occasionally, the Court includes in a sanction order additional provisions that address aspects of the lawyer's misconduct in the particular case. Examples of these conditions include participation in substance abuse or mental health recovery programs, specific continuing legal education requirements, and periodic audits of trust accounts.

I. Resolution by Agreement

In some cases that have resulted in the filing of a Disciplinary Complaint, the respondent lawyer and the Disciplinary Commission are able to reach an agreement concerning the facts of a case, the applicable Rule violations and an appropriate sanction for the misconduct in question. In these instances, the parties submit their agreement to the Supreme Court for its consideration. Any such agreement must include an affidavit from the lawyer accepting full responsibility for the agreed misconduct. The Court may accept or reject the agreement.

A lawyer charged with misconduct may also tender his or her written resignation from the practice of law. *Resignation is a discipline sanction. It is not the equivalent of retirement. It is not a graceful avoidance of discipline.* A resignation is not effective unless the lawyer fully admits his or her misconduct and the Court accepts the resignation as tendered. A lawyer who has resigned with pending misconduct allegations must wait five years before

seeking license reinstatement. Reinstatement after resignation is a very steep burden to overcome. It requires the attorney to prove to the Court worthiness of reinstatement despite the dark shadow of the misconduct previously admitted.

A lawyer charged with misconduct may also submit to the mercy of the Court by fully admitting the allegations and consenting to such discipline as the Court deems appropriate under the circumstances.

J. Temporary Suspension

While a lawyer's Disciplinary Complaint is pending, the Disciplinary Commission may seek the temporary suspension of the lawyer's license to practice law pending the outcome of the proceeding. Temporary suspensions are reserved for cases of the most serious misconduct or on-going risk to clients or the integrity of client funds. A hearing officer is responsible for taking evidence on a petition for temporary suspension and making a recommendation to the Supreme Court. The Court may grant or deny the petition for temporary suspension.

A separate temporary suspension procedure applies whenever an Indiana licensed lawyer is found guilty of a crime punishable as a felony. The Executive Director must report the finding of guilt to the Supreme Court and request an immediate temporary suspension from the practice of law. Generally, a finding of guilt by a trial court in these instances does not occur until the sentencing hearing. The Court may order the temporary suspension without a hearing, but the affected lawyer may submit to the Court reasons why the temporary suspension should be vacated. A temporary suspension granted under these circumstances is effective until there is a resolution of related disciplinary charges or further order of the Court. Trial judges are required to send a certified copy of the order adjudicating criminal guilt of any lawyer for *any crime, misdemeanor or felony*, to the Executive Director of the Commission within ten days of the finding of guilt.

Finally, the Executive Director is required to report to the Supreme Court any time the Commission receives notice that a lawyer has been found to be *intentionally* delinquent in the payment of child support. After being given an opportunity to respond, the Supreme Court may suspend the lawyer's license to practice law until the lawyer is no longer in intentional violation of the support order.

K. The License Reinstatement Process

When any lawyer resigns or is suspended without provision for automatic reinstatement, the lawyer may not be reinstated into the practice of law until the lawyer meets his or her burden of proof. The lawyer must prove by clear and convincing evidence that the causes of the underlying misconduct have been successfully addressed and demonstrate that he or she is otherwise fit to re-enter the practice of law. Additionally, the lawyer must successfully complete the Multi-State Professional Responsibility Examination, a standardized examination on legal ethics.

Lawyer reinstatement proceedings are heard by a hearing officer appointed by the Court. A past member of the Commission may serve as a hearing officer. After hearing evidence,

the hearing officer makes a recommendation to the Supreme Court. The Court reviews the recommendation of the Commission and may either grant or deny reinstatement.

L. Lawyer Disability Proceedings

Any member of the public, the bar, the Disciplinary Commission, or the Executive Director may file with the Commission a petition alleging that a lawyer is disabled by reason of physical or mental illness or chemical dependency. The Executive Director is charged with investigating allegations of disability and, if justified under the circumstances, prosecuting a disability proceeding before the Disciplinary Commission or a hearing officer appointed by the Court. The Court ultimately reviews the recommendation of the Commission and may suspend the lawyer from the practice of law until the disability has been remediated.

IV. COMMISSION ACTIVITY IN 2018-2019

A. Grievances and Investigations

An investigation into allegations of lawyer misconduct is commenced by the filing of a grievance with the Disciplinary Commission. During the reporting period, **1,414** grievances were filed with the Disciplinary Commission. Of this number, **113** were Commission Grievances. The total number of grievances filed was a **24%** increase above the number filed the previous year. **Appendix B** presents in graphical form the number of grievances filed for each of the past ten years.

There were **18,608** Indiana lawyers in active, good-standing status and **3,676** lawyers who were inactive, good-standing as of June 30, 2019. In addition, **1,167** lawyers regularly admitted to practice in other jurisdictions were granted temporary admission to practice law by trial court orders in specific cases during the year, pursuant to the provisions of Indiana Admission and Discipline Rule 3 (commonly known as *pro hac vice* admission). The total grievances filed represent **12.95** grievances for every one hundred actively practicing lawyers. **Appendix C** presents in graphical form the grievance rate for each of the past ten years.

Distribution of grievances is not even. Far fewer than **1,414** individual lawyers received grievances during the reporting period. Many lawyers were the recipients of multiple grievances. It is important to note that the mere filing of a grievance is not, in and of itself, an indication of misconduct on the part of a lawyer.

During the reporting period, **1,285** of the grievances either received or carried over from previous years were dismissed without further investigation upon a determination that, on their face, they presented no substantial question of misconduct.

Upon receipt, each grievance that is not initially dismissed is classified according to the type of legal matter out of which the grievance arose, and the type of misconduct alleged by the grievant. The table in **Appendix D** sets forth the classification by legal matter and by misconduct alleged of all grievances that were pending on June 30, 2019, or that were dismissed during the reporting year after investigation. Many grievances arise out of more than one type of legal matter or present claims of more than one type of alleged misconduct.

Accordingly, the total numbers presented in **Appendix D** represent a smaller number of actual grievances.

Ranked in order of complaint frequency, the legal matters most often giving rise to grievances involve *Criminal, Divorce Matters, Tort, Administrative Matters, Wills/Estates, Real Estate, Guardianship, Contract Matter, Personal Misconduct, Collection, Bankruptcy, Workmen's Compensation, Adoption, Other, Judicial Action, Condemnation and Patent.* To understand the significance of this data, it is important to keep in mind that criminal cases make up the largest single category of cases filed in our trial courts. Except for civil plenary filings, domestic relations cases account for the next highest category of cases filed. The high rates of grievances arising from criminal and domestic relations matters reflect the high number of cases of those types handled by lawyers in Indiana. The predominant types of legal matters out of which grievances arose during the reporting period are presented graphically in **Appendix E**.

Ranked in order of complaint frequency, the alleged misconduct types most often giving rise to grievances are *Improper Influence, Incompetence, Neglect, Communication/Non Diligence, Improper Withdrawal, Failure to Communicate, Excessive Fees, Conflict of Interest, Personal Misconduct, Misinforming, Lying, Other, Illegal Conduct, Fraud, Conflict, Revealing Confidences and Conversion* with complaints about Improper Influence being close to one and a half times as frequent as the next category of alleged misconduct. The predominant types of misconduct alleged in grievances during the reporting period are presented graphically in **Appendix F**.

The following is the status of all grievances that were pending before the Disciplinary Commission on June 30, 2019, or that had been dismissed during the reporting period:

	DISMISSED	OPEN
Grievances filed before July 1, 2018	**1,171**	**104**
Grievances filed on or after July 1, 2018	**1,159**	**7**
Total carried over from preceding year:	**304**	
Total carried over to next year:	**124**	

This represents an increase of **34** files carried over into the following year.

B. Non-Cooperation

A lawyer's law license may be suspended if the lawyer has failed to cooperate with the disciplinary process. The purpose of this is to promote lawyer cooperation to aid in the effective and efficient functioning of the disciplinary system. The Commission brings allegations of non-cooperation before the Court by filing petitions to show cause. During the reporting year, the Disciplinary Commission filed **51** petitions to suspend the law licenses of **26** lawyers with the Supreme Court for failing to cooperate with investigations. The following are the dispositions of the non-cooperation matters that the Commission filed with the Court during the reporting year or that were carried over from the prior year:

Show Cause petitions filed.....51

Dismissed as moot after cooperation before show cause order 0

Petition pending on June 30, 2019, without show cause order 0

Show cause orders with no suspension.....40

- Dismissed after show cause order due to compliance **32**
- Dismissed due to disbarment, resignation or suspension.....**14**
- Show cause orders pending on June 30, 2019 .....**9**

Suspensions for non-cooperation.....12

- Non-cooperation Suspensions still in effect on June 30, 2019 .....**1**
- Reinstated due to cooperation after suspension……..…**2**

Non-Cooperation Suspensions Converted to Indefinite Suspensions 4

C. Trust Account Overdraft Reporting

Pursuant to Admis. Disc. R. 23 § 29, all Indiana lawyers must maintain their client trust accounts in financial institutions that have agreed to report any trust account overdrafts to the Disciplinary Commission. Upon receipt of a trust account overdraft report, the Disciplinary Commission sends an inquiry letter to the lawyer directing that the lawyer supply a documented, written explanation for the overdraft. After review of the circumstances surrounding the overdraft, the investigation is either closed or referred to the Disciplinary Commission for consideration of filing a disciplinary grievance.

The results of inquiries into overdraft reports received during the reporting year are:

Carried Over from Prior Year **11**
Overdraft Reports Received.....**51**
Inquiries Closed **52**
Inquiries Carried Over Into Following Year.....**10**
Reason for Inquiries Closed:

- Bank Error.....**11**
- Deposit of Trust Funds to Wrong Trust Account **0**
- Disbursement from Trust Before Deposited Funds Collected.....**5**
- Referral for Disciplinary Investigation **19**
- Disbursement from Trust before Trust Funds Deposited **5**
- Overdraft Due to Bank Charges Assessed Against Account.....**0**
- Inadvertent Deposit of Trust Funds to Non-Trust Account.....**2**
- Overdraft Due to Refused Deposit for Bad Endorsement **1**
- Law Office Math or Record-Keeping Error.....**9**
- Death, Disbarment or Resignation of Lawyer **2**
- Inadvertent Disbursement of Operating Obligation from Trust **4**
- Non-Trust Account Inadvertently Misidentified as Trust Account.....**0**
- Fraudulent Office Staff Conduct.....**1**

D. Litigation

1. Overview

In 2018-2019, the Commission filed **28** Disciplinary Complaints for Disciplinary Action with the Supreme Court, **3** more than in the previous year. These Disciplinary Complaints, together with amendments to pending Verified Complaints, represented findings of reasonable cause by the Commission in **48** separate counts of misconduct during the reporting year.

In 2018-2019 the Supreme Court issued **106** final dispositive orders, **5 less** than in the preceding year, representing the completion of **106** separate discipline files, **5** less than the preceding year. Including **1** private administrative admonitions, **65** individual lawyers received final discipline in the reporting year, compared to **81** in the previous year. **Appendix G** provides a comparison of disciplinary sanctions entered for each of the past ten years.

2. Disciplinary Complaints for Disciplinary Action

a. Status of Disciplinary Complaints Filed During the Reporting Period

The following reports the status of all new Disciplinary Complaints filed during the reporting period:

Verified Complaints Filed During Reporting Period.....**28**
Number Disposed Of By End of Year.....**5**
Number Pending At End of Year.....**23**

The Commission filed **3** Notice of Foreign Discipline and Requests for Reciprocal Discipline with the Supreme Court pursuant to Admission and Discipline Rule 23 §20(b) and (d).

During the reporting year, the Disciplinary Commission filed Notices of Felony Guilty Findings and Requests for Suspension pursuant to Admission and Discipline Rule 23 § 11.1(a) in **3** cases.

b. Status of All Pending Disciplinary Complaints

The following reports the status of all formal disciplinary proceedings pending as of June 30, 2019:

Cases Filed; Appointment of Hearing Officer Pending.....**1**
Cases Pending Before Hearing Officers.....**23**
Cases Pending On Review Before the Supreme Court.....**11**
Total Verified Complaints Pending on June 30, 2019.....**25**

Of cases decided during the reporting year, **12** were tried on the merits to hearing officers at final hearings, **15** cases were submitted to the Supreme Court for resolution by way of Affidavit for Resignation, Conditional Agreement for Discipline, or Consent to Discipline, and **4** case was submitted by hearing officer findings on an Application for Judgment on the Complaint.

3. Final Dispositions

During the reporting period, the Disciplinary Commission imposed administrative sanctions and the Supreme Court imposed disciplinary sanctions, made reinstatement determinations, or took other actions as follows:

Dismissals of Disciplinary Complaint 0

Findings for Respondent on Merits 0

Caution Letters 14

Private Administrative Admonitions 1

Private Reprimands 1

Public Reprimands 5

Suspensions With Automatic Reinstatement 1

Suspensions With Reinstatement on Conditions 8

Suspensions Without Automatic Reinstatement 6

Accepted Resignations 3

Disbarments 2

Reinstatement Proceedings

Disposed of by Final Order

Granted **2**

Denied **1**

Petition Withdrawn **2**

Findings of Contempt 3

Emergency Interim Suspension Granted 2

Emergency Interim Suspension Denied 0

Temporary Suspensions (Guilty of Felony) 3

V. SUMMARY OF DISCIPLINARY COMMISSION ACTIVITIES

	2018-19	2017-18	2016-17	2015-16	2014-15
Matters Completed	1,414	1,411	1,485	1,437	1,715
Complaints Filed	28	25	30	33	32
Final Hearings	12	10	19	2	10
Final Orders	106	111	93	99	120
Reinstatement Petitions Filed	4	4	2	4	6
Reinstatement Hearings	0	2	5	3	3
Reinstatements Ordered	2	2	2	3	2
Reinstatements Deny/Dismiss	2	1	3	1	2
Income	$1,700,245	$2,214,469	$2,312,026	$2,267,417	$2,611,327
Expenses	$2,533,270	$2,391,756	$2,219,778	$2,332,029	$2,253,684

VI. AMENDMENTS TO RULES AFFECTING LAWYER DISCIPLINE

There were no amendments to the Rules of Professional Conduct or the Admission and Discipline Rules during the fiscal year 2018-19.

VII. OTHER DISCIPLINARY COMMISSION ACTIVITIES

Outreach to the bar and to the public is an important function of the Commission staff. In the past fiscal year staff of the Disciplinary Commission appeared more than **45** times as faculty at continuing education programs and as speakers at other events. These outreach opportunities occurred both in-state and out-of-state. Staff is encouraged to serve in these capacities.

Staff actively engage in outreach to in-state law schools with course presentations on professional responsibility and law practice management. Additionally, Disciplinary Commission staff have joined with the staff of the Commission on Continuing Legal Education, the Board of Law Examiners, and the Judges and Lawyers Assistance Program to develop and present a program titled “A Life in the Law”. The program instructs the audience on the functions of these bar regulatory agencies and advises on the benefits that the bar and the public receive from these agencies. To date, the program has been presented twenty (20) times and will continue to be a staple in this agency’s continuing education inventory.

VIII. FINANCIAL REPORT OF THE DISCIPLINARY COMMISSION

A report setting forth the financial condition of the Disciplinary Commission Fund is attached as **Appendix H**.

IX. APPENDICES

BIOGRAPHIES OF DISCIPLINARY COMMISSION MEMBERS

Nancy L. Cross is a senior partner of the Cross Glazier Burroughs, P.C. firm, a Certified Family Law Specialist-Family Law Certification Board, a Registered Family Law Mediator, and has been a fellow of the American Academy of Matrimonial Lawyers since 1993. In 2011 she was appointed by the Supreme Court as a Commissioner on the State of Indiana Disciplinary Commission, is currently serving on the Legislative Committee of the Indiana State Bar Association, has served on the Board of Governors, and is a former Chairperson of the Family Law Section of the Indianapolis Bar Association. Ms. Cross has written numerous articles and lectured at family law seminars throughout her career. Ms. Cross is listed in The Best Lawyers in America (Woodward/White) and has been featured in Indianapolis Monthly magazine as one of the top ten divorce attorneys in Indianapolis. Beginning in 2005 and continuing to date, she has been recognized by Indianapolis Monthly as one of the 25 foremost female attorneys in Indiana and has consistently been named one of the state's Super Lawyers by Indianapolis Monthly since 2004. Ms. Cross has restricted her practice to family law, including divorce litigation, mediation and appellate work for more than 30 years. She is a 1979 graduate of the University of Nebraska College of Law and resides with her two sons in Zionsville, Indiana. Ms. Cross began her first five-year term on the Disciplinary Commission on July 1, 2011.

Trent A. McCain is a native of Gary, Indiana. In 1995, he graduated *cum laude* from Florida A&M University in Tallahassee where he earned a Bachelor of Science degree in Business Administration. While in college, like most of America, McCain was captivated by the O.J. Simpson trial and the unparalleled advocacy of the late Johnnie L. Cochran, Jr. Little did he know then that their paths would cross years later. After college, McCain went to work for Eastman Kodak Company as an Account Executive. In 1998, he returned to Northwest Indiana to work for the local utility company as an Industrial and Commercial Sales Representative. In 1999, McCain started law school at Valparaiso University School of Law. During his time at "Valpo," McCain was awarded the Charles R. Gromley Memorial Scholarship for service to the university for two consecutive years. In his second year, he was elected President of the Black Law Students Association and in his last year, he served on the Executive Board of the Midwest BLSA. In March 2000, Johnnie L. Cochran, Jr. announced his partnership with the law office of recognized Chicago attorney James D. Montgomery. This announcement captured McCain's attention and he began his quest to work for the man he so admired five years earlier. After one solid year of persistent telephone calls and letter writing, Cochran's Chicago partner hired McCain as a law clerk in the Summer 2001. After a stellar summer, The Cochran Firm offered McCain a permanent position when he graduated the following year. Six months after the passing of his legal mentor, McCain left the Cochran Firm to establish his own practice. Now, McCain practices in both Northwest Indiana and Chicago and is the principal of McCain Law Offices. McCain's firm concentrates on permanent and catastrophic personal injury, wrongful death, medical negligence, police misconduct, and civil rights cases. On January 1, 2012, McCain co-founded McCain & White, P.C. with attorney, Kelly White Gibson. McCain is also a founding member of the National Law Group, LLC and serves as the organization's secretary. In May 2011, McCain was admitted to practice before the Supreme Court of the United States. In the same month, the Indiana Supreme Court appointed McCain to a five-year term as Commissioner on its attorney Disciplinary Commission. The Commission consists of seven (7) attorneys statewide and two (2) lay people. McCain is a Past President (2009-10) of the James C. Kimbrough Bar Association. McCain is also a member of the Indiana State, Illinois State, and Chicago Bar Associations; the Illinois and Indiana Trial Lawyers Associations; and the Chicago Inn of Court. McCain is married to Akilia McCain, an opera singer and speech language pathologist. They reside in the Miller Beach section of Gary, Indiana with their infant daughter, Nina Lauren. Mr. McCain began his first five-year term on the Disciplinary Commission on July 1, 2011.

Andrielle M. Metzel is a partner at Taftt in the firm's Litigation Group. She represents corporate and individual clients in state and federal courts and before local and state administrative bodies and agencies. Ms. Metzel has extensive experience negotiating resolutions in complex business, personal and transactional disputes. She handles employment, dispute resolution and supply chain litigation matters for her clients. Ms. Metzel is actively involved in land use, development and strategic consulting for businesses seeking to invest and grow in Indiana. Ms. Metzel is a frequent public speaker and participant in numerous seminars concerning labor and employment law issues. Ms. Metzel also provides customized, in-house training on a variety of employment law subjects. Ms. Metzel is a 1996 graduate of Robert H. McKinney School of Law. She is admitted to practice law in Indiana, the U.S. District Court for the Northern District of Indiana, U.S. District Court for the Southern District of Indiana, and U.S. Court of Appeals for the Seventh Circuit. She is a member of the Indiana State Bar Association, American Bar Association, and Indianapolis Bar Association. Ms. Metzel has served on the Board of Directors, Indianapolis Bar Association; Legal Ethics Committee, Indiana State Bar Association; the Development Chair, Indianapolis Bar Foundation; Board of Governors, District 11 Representative, Indiana State Bar Association; Board of Directors, D.A.R.E. Indiana Board of Governors; Secretary, Indiana State Bar Association; Chair-Women in the Law Division, Indiana State Bar Association; Executive Committee - Land Use Section, Indianapolis Bar Association; Advisory Panel Member, American Bar Association; Member, IndyCREW Network of Commercial Real Estate Women; Alcohol Beverage Subcommittee Member, Indiana State Bar Association; Land Use & Zoning Section Member, Indiana State Bar Association; Employment & Labor Section Member, Indiana State Bar Association; Litigation Section member, Indiana State Bar Association; Corporate Counsel Section Member, Indiana State Bar Association; Employment & Labor Relations Committee Member, American Bar Association; Women Advocate Committee Member, American Bar Association; and International Council of Shopping Centers. Ms. Metzel is currently serving her first five-year term on the Disciplinary Commission which began July 1, 2011.

Tony Walker has been practicing law for 22 years. He is the Managing Attorney of The Walker Law Group, P.C., a firm of seven attorneys, based in Gary, Indiana with additional offices in Indianapolis, Chicago, and Washington, D.C.. Attorney Walker focuses upon representing churches, schools, and government agencies. He is a graduate of the University of Massachusetts-Amherst where he received a degree in Social Thought and Political Economy. Attorney Walker continued his post-baccalaureate education studying political science at Clark Atlanta University and then law at DePaul University College of Law in Chicago. After completing law school, Attorney Walker clerked for Indiana Supreme Court Justice Robert D. Rucker, then of the Indiana Court of Appeals, and later entered private practice with the firm Meyer, Lyles & Godshalk in Northwest Indiana. Attorney Walker served as Legislative Counsel to the late Congresswoman Julia Carson in her Washington D.C. office. He has previously been Chief of Staff of Radio One, Inc., a national broadcasting company targeting urban listeners, and Chief Operating Officer and Vice-President of Business and Legal Affairs for its gospel recording label, Music One. Attorney Walker presently serves as the Executive Producer of several radio programs airing on WLTH Radio in Merrillville, Indiana, and he hosts a weekly public affairs talk show. The Indiana Supreme Court appointed Attorney Walker as a Commissioner of the Supreme Court Attorney Disciplinary Commission in 2009, and in 2011 the Governor appointed him to represent the First Congressional District on the State Board of Education. Attorney Walker also serves on the boards of the Gary Public Library and is a past chairman of the Urban League of Northwest Indiana. He is also a former member of the Gary Police Foundation and Second Chance Foundation boards. He belongs to various professional organizations including the American Bar Association, National Bar Association, Chicago Bar Association, the District of Columbia Bar Association, Indiana State Bar Association and is a former board member of the Lake County (Indiana) Bar Association. In 2018, Mr. Walker participated as appellate counsel in a case that was granted certiorari by the U.S.

Supreme Court, *Zanders v. Indiana*, 138 S. Ct. 2702 (2018). Mr. Walker concluded his service on the Commission at the close of this reporting year, completing ten years of service.

Leanna K. Weissmann is a native of Aurora, IN. She graduated from Indiana University-Bloomington in 1991 with a double major in journalism and English, and then earned her law degree from Indiana University Robert H. McKinney School of Law in 1994. From 1993-1995 she served as a law clerk for Court of Appeals Judge Robert D. Rucker (now Justice Rucker of the Indiana Supreme Court). Ms. Weissmann then engaged in the private practice of law in Rising Sun, Indiana until 1998, and served as Referee of Dearborn Superior Court No. 1 from 2000-2007. She now maintains a solo law practice in Lawrenceburg, Indiana, focused entirely on appellate practice. A veteran of appellate advocacy, Ms. Weissmann has briefed over 150 cases and participated in more than 20 oral arguments before the Indiana Court of Appeals and the Indiana Supreme Court. In 2018, Ms. Weissmann was lead appellate counsel in a case that was granted certiorari by the U.S. Supreme Court, *Zanders v. Indiana*, 138 S. Ct. 2702 (2018). In 2005 Ms. Weissmann was appointed by Governor Mitch Daniels to serve on the Indiana Criminal Justice Institute Board of Trustees for a three (3) year term. She has served as appellate counsel in the following notable cases: Louallen v. State, 778 N.E.2d 794 (Ind. 2002); Tyler v. State, 903 N.E.2d 463 (Ind. 2009); Gallagher v. State, 925 N.E.2d 350 (Ind. 2010); Ripps v. State, 968 N.E.2d 323 (Ind. 2012); and Conley v. State, 972 N.E.2d 864 (Ind. 2012). Ms. Weissmann teaches fitness and is active in youth ministry programs at her church. She founded SamieSisters.com, an Internet ministry for "tween" girls. She was appointed to the Indiana Supreme Court Disciplinary Commission in 2013.

Kirk White is Assistant Vice President for Strategic Partnerships at Indiana University. He joined the IU Office of the Vice President for Engagement in 2010 and is responsible for coordinating national defense and homeland security partnerships with state and federal government agencies and IU's mutually beneficial relationships with economic development organizations in southwest Indiana. He holds additional appointments as Military Liaison for the IU Office of the President and as a member of the IU Emergency Management incident management team. Kirk joined the professional staff of IU in 1984 after completing the Bachelor of Science degree from the Indiana University School of Public and Environmental Affairs. He has served IU in several external, alumni and government relations assignments including: Assistant to the Vice President, Director of Alumni Chapters, Assistant Director and Director of Hoosiers for Higher Education, Coordinator of IU's Critical Incident Communications Team and most recently as Director of Community Relations. In June 2013, Kirk was appointed by the Indiana Supreme Court to serve a five-year term on the court's attorney disciplinary commission. A former elected official, Kirk served eight years as a member of the Bloomington City Council (1988-95), and one term as Monroe County Commissioner (1997-2000). In city and county office he focused on land use planning, improving public works, utilities, public safety, emergency management, animal control and fleet management. The Association of Indiana Counties awarded Monroe County the 2001 Local Government Cooperation Award for an emergency communications system project that Commissioner White directed. Lt. Colonel White is a Field Artillery officer in the Indiana Army National Guard and currently serves as Operations Officer for 81st Troop Command, headquartered in Terre Haute. In 24 years of service, he has been assigned as Battery Fire Direction Officer, Battery Commander, Battalion Executive Officer and Battalion Commander at Headquarters, 2nd Battalion, 150th Field Artillery Regiment and G5/Chief of Plans for the 38th Infantry Division. He was called to active duty in support of Operation Enduring Freedom and served as chief of an Embedded Training Team with a light infantry battalion of the Afghanistan National Army (2004-05) where he was awarded the Meritorious Service Medal and Combat Action Badge. He served a second tour in Afghanistan (2009-10) as commander of a provisional task force responsible for base operations and force protection in

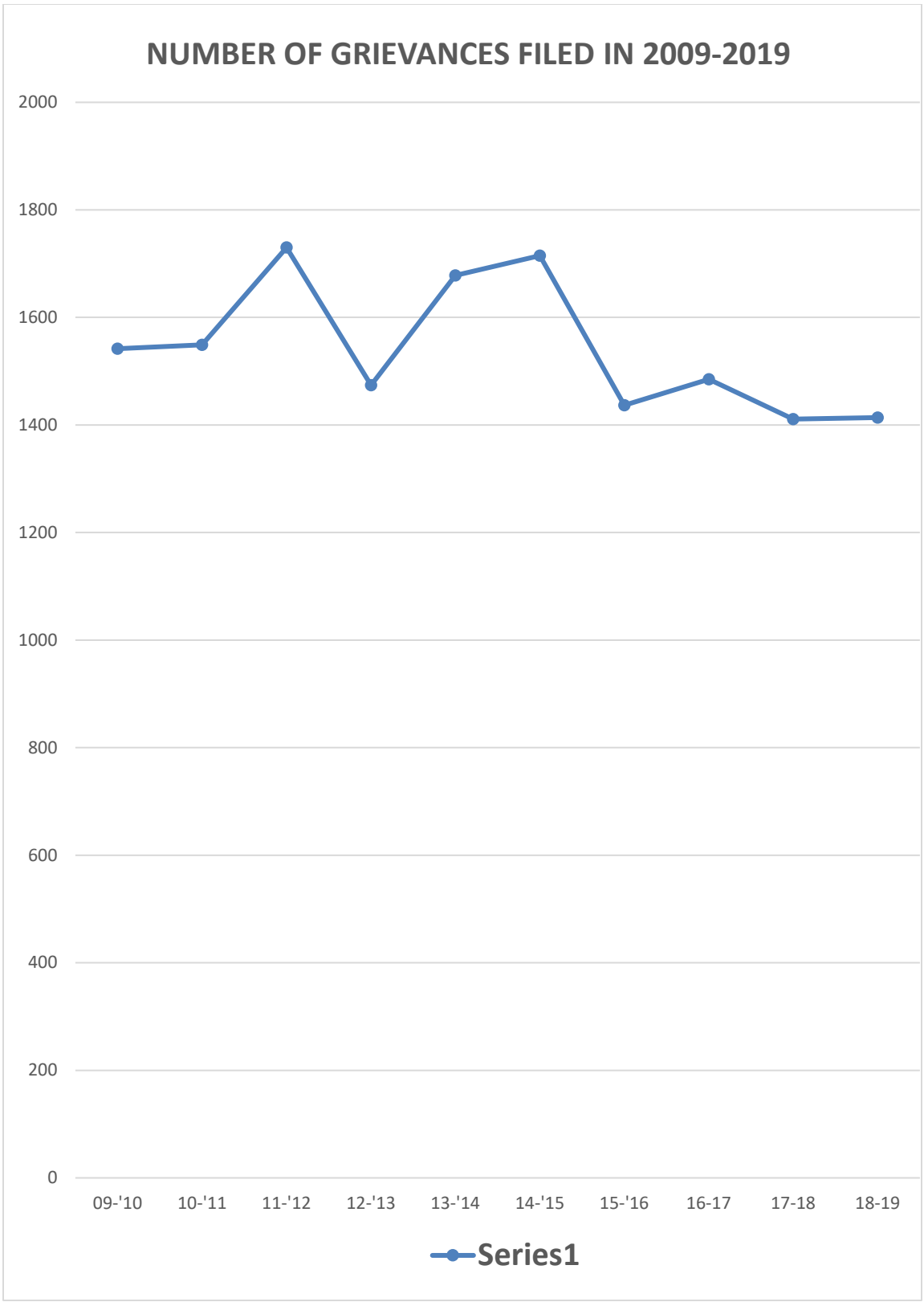
Kabul and was awarded the Bronze Star Medal. He again was called to active duty in April, 2019, for service in the Middle East. Kirk serves as a member of the Monroe County Economic Development Commission and a board member of the Bloomington Economic Development Corporation. He is a former board member of the Greater Bloomington Chamber of Commerce, former chairman of the board of trustees at First United Methodist Church in Bloomington and is Past President of the Rotary Club of Bloomington North. He and his wife Janice have two daughters.

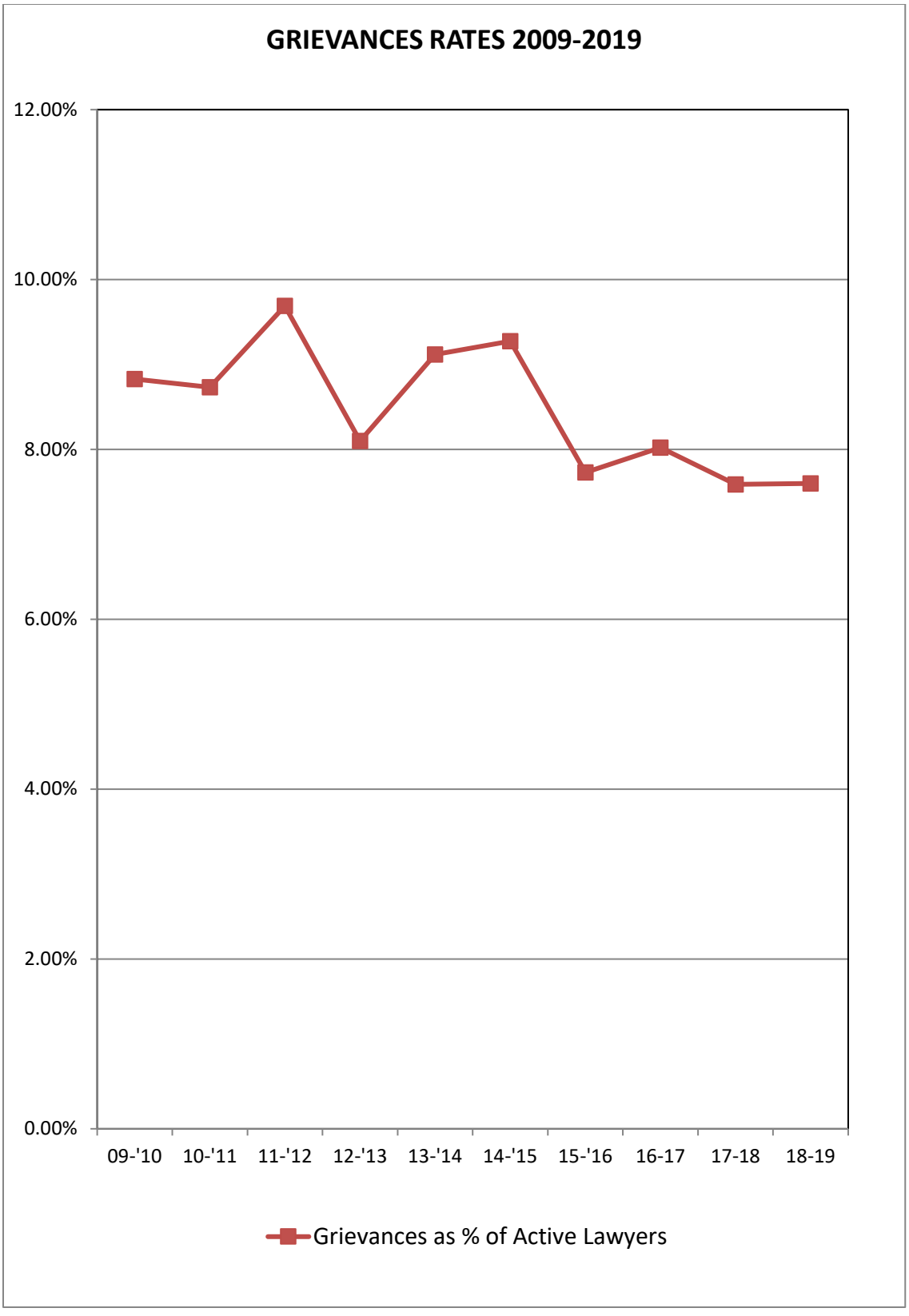
Brian K. Carroll is a partner at Johnson Carroll Norton & Ken P.C. Mr. Carroll practices in the areas of business law, estate and trust planning and administration, real estate and elder law. He is a Certified Elder Law Specialist and a Certified Estate Planning and Administration Specialist. Mr. Carroll is a fellow of the Indiana Bar Foundation as well as a fellow of the American College of Trust and Estate Counsel. Mr. Carroll graduated with a Bachelor of Science degree from Indiana University in 1978 and graduated *Cum Laude* from Indiana University Robert H. McKinney School of Law in 1982 when he was admitted to the Indiana Bar. Mr. Carroll has served as a Member of the Board of Governors and House of Delegates of the Indiana State Bar Association; and as Chair of the Indiana State Bar Association, Young Lawyer, Probate, Trust and Real Property and General Practice, Solo and Small Firm Sections. He also has served as a Director for the Evansville Bar Association and Chair of the Evansville Bar Association Probate Committee. President of the Harlaxton Society of the University of Evansville. Mr. Carroll began his first five-year term on the Disciplinary Commission on July 1, 2014.

John L. Krauss is an attorney, mediator, and arbitrator. He recently retired from Indiana University and IUPUI after 23 years. He served as the founding director of the Indiana University Public Policy Institute and a clinical professor at the IU School of Public and Environmental Affairs. He know is a Clinical Professor Emeritus – SPEA. Previously, Krauss served as Deputy Mayor of Indianapolis (1982-1991). Krauss currently serves as a senior advisor to the Chancellor of IUPUI and as adjunct professor at the Indiana University McKinney School of Law-Indianapolis. He teaches mediation and dispute resolution and has an alternative dispute resolution and mediation consultant practice. Krauss holds leadership positions with a diverse array of civic and corporate organizations, including Indiana Supreme Court Disciplinary Commission, Tourism for Tomorrow, Inc., the President Benjamin Harrison Foundation Advisory Board, Arthur Jordan Foundation and the Indianapolis Museum of Art. Past service included Chair of the Indiana Supreme Court Commission on Continuing Legal Education, Vice Chair and President of the Indianapolis Museum of Art. Krauss is a panel member for the American Arbitration Association, US Postal System, FINRA, US Institute for Environmental Conflict, National Futures Association, US Bankruptcy Court for the Southern District of Indiana. He chaired the Labor Management Committees for the closure of both Fort Benjamin Harrison and US Naval Air Warfare Center – IN and has served as a Special Mediator for the Indiana Attorney General. An avid amateur photographer. Krauss' images are in private collections and national publications.

Molly (Peelle) Kitchell was appointed to the Indiana Supreme Court Disciplinary Commission in 2015. Kitchell holds a Bachelor of Arts degree from Purdue University and a Master of Science in Occupational Therapy from the University of Indianapolis, graduating from both institutions with a 4.0 GPA. No longer practicing, her professional career in Occupational Therapy was primarily focused on Neuro rehabilitation. Raised in Kokomo, IN, she and her husband, Ryan Kitchell, returned to Indiana in 2002 after living in New Hampshire. Now residing in Zionsville,

her primary role has been caregiver to their four children. She was appointed to Indiana's Interagency Coordinating Council on Infants and Toddlers by Gov. Mitch Daniels as a parent representative. In 2019, Kitchell completed her second term on the Judicial Qualifications and Nominating Commission, having been appointed by Gov. Mitch Daniels in 2011 and Gov. Mike Pence in 2017. She is actively involved with the Children's Museum Guild of Indianapolis, the Zionsville Foundations Grants Committee, and her children's schools.

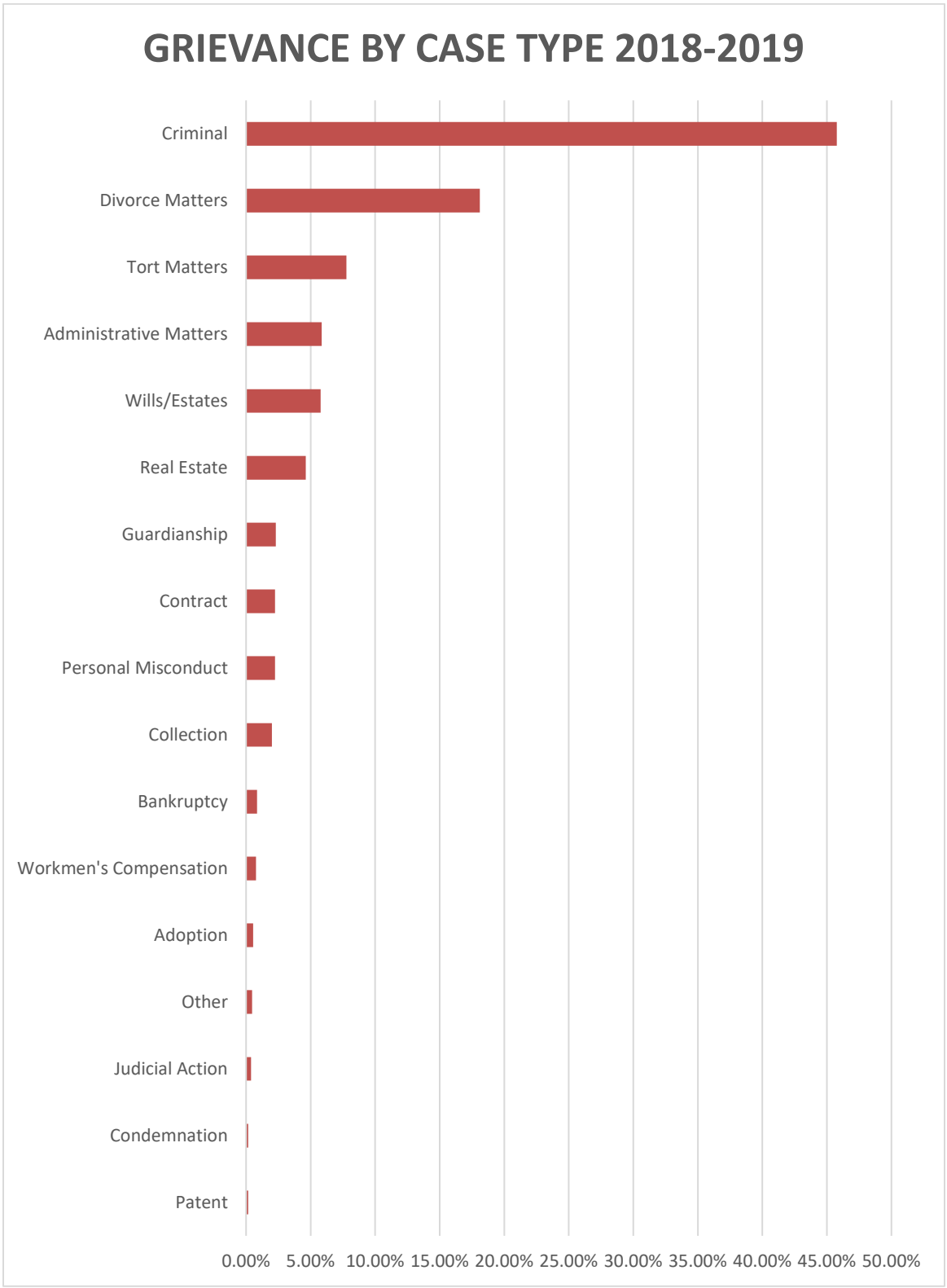

NUMBER OF GRIEVANCES FILED IN 2009-2019
2000
1800
1600
1400
1200
1000
800
600
400
200
0
09-'10
10-'11
11-'12
12-'13
13-'14
14-'15
15-'16
16-17
17-18
18-19
Series1

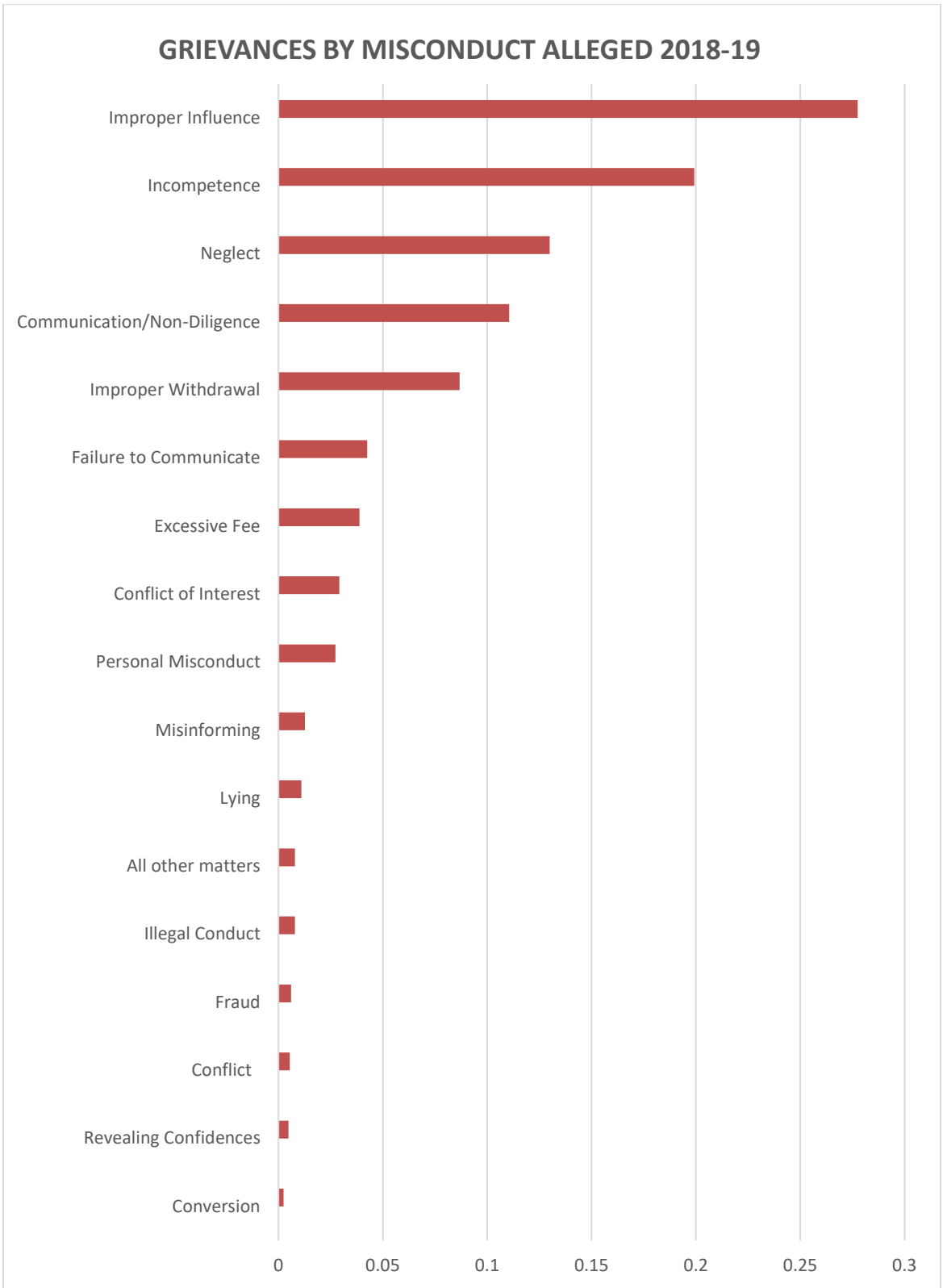

GRIEVANCES RATES 2009-2019
12.00%
10.00%
8.00%
6.00%
4.00%
2.00%
0.00%
09-'10
10-'11
11-'12
12-'13
13-'14
14-'15
15-'16
16-17
17-18
18-19
Grievances as % of Active Lawyers

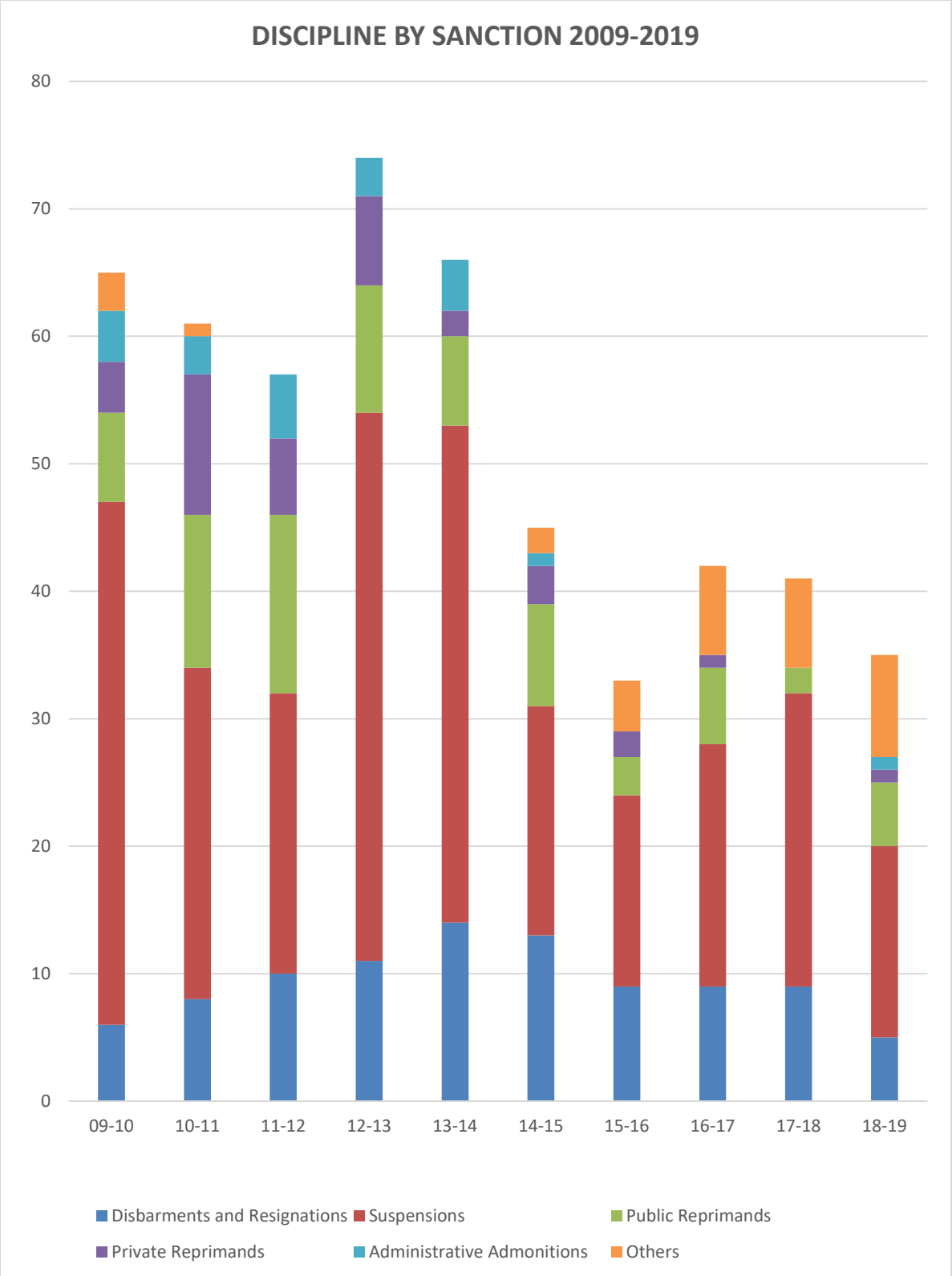
GRIEVANCES BY CASE TYPE AND MISCONDUCT ALLEGED 2018-2019

Case Type	Number	% of Total
Criminal	597	45.76%
Divorce Matters	235	18.10%
Tort	101	7.78%
Administrative Matters	76	5.86%
Wills/Estates	75	5.78%
Real Estate Matters	60	4.62%
Guardianship	30	2.31%
Contract Matter	29	2.23%
Personal Misconduct	29	2.23%
Collection	26	2.00%
Bankruptcy	11	.85%
Workmen's Compensation	10	.77%
Adoption	7	.54%
Other	6	.46%
Judicial Action	5	.39%
Condemnation	2	.15%
Patent	2	.15%
TOTAL	1298	100%

Alleged Misconduct	Number	% of Total
Improper Influence	457	27.75%
Incompetence	328	19.91%
Neglect	214	12.99%
Communication/Non-Diligence	182	11.05%
Improper Withdrawal	143	8.68%
Failure to Communicate	70	4.25%
Excessive Fee	64	3.89%
Conflict of Interest	48	2.91%
Personal Misconduct	45	2.73%
Misinforming	21	1.28%
Lying	18	1.09%
All Other Matters	13	.79%
Illegal Conduct	13	.79%
Fraud	10	.61%
Conflict	9	.55%
Revealing Confidences	8	.49%
Conversion	4	.24%
TOTAL	1647	100%


GRIEVANCE BY CASE TYPE 2018-2019
Criminal
Divorce Matters
Tort Matters
Administrative Matters
Wills/Estates
Real Estate
Guardianship
Contract
Personal Misconduct
Collection
Bankruptcy
Workmen's Compensation
Adoption
Other
Judicial Action
Condemnation
Patent
0.00% 5.00% 10.00% 15.00% 20.00% 25.00% 30.00% 35.00% 40.00% 45.00% 50.00%


GRIEVANCES BY MISCONDUCT ALLEGED 2018-19
Improper Influence
Incompetence
Neglect
Communication/Non-Diligence
Improper Withdrawal
Failure to Communicate
Excessive Fee
Conflict of Interest
Personal Misconduct
Misinforming
Lying
All other matters
Illegal Conduct
Fraud
Conflict
Revealing Confidences
Conversion
0
0.05
0.1
0.15
0.2
0.25
0.3


DISCIPLINE BY SANCTION 2009-2019
80
70
60
50
40
30
20
10
0
09-10
10-11
11-12
12-13
13-14
14-15
15-16
16-17
17-18
18-19
Disbarments and Resignations
Suspensions
Public Reprimands
Private Reprimands
Administrative Admonitions
Others

INDIANA SUPREME COURT DISCIPLINARY COMMISSION FUND
Statement of Revenues and Expenses (Unaudited)
Fiscal Year Ending June 30, 2019

BEGINNING DISCIPLINARY FUND BALANCE		$869,943
REVENUES:		
TOTAL REGISTRATION FEES COLLECTED		$1,702,985
REVENUE FROM OTHER SOURCES:		
Court Costs	20,872	
Reinstatement Fees	2,500	
Investment Income	240	
Rule 7.3 Filing Fees	7,400	
Other	0	
TOTAL REVENUE FROM OTHER SOURCES		$31,012
TOTAL REVENUE		$1,733,997
EXPENSES:		
OPERATING EXPENSES:		
Personnel	1,690,195	
Travel	51,429	
Investigations/Hearings	40,130	
Dues and Library	24,284	
Postage and Supplies	24,251	
Utilities and Rent	93,694	
Maintenance	17,314	
Equipment	28,422	
Other Expenses	718	
TOTAL OPERATING EXPENSES		$1,970,437
TOTAL EXPENSES		$1,970,437

Section Two

THE U.S. SUPREME COURT – 2019-2020 TERM

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Section Two

The U.S. Supreme Court – 2019-2020 Term.....Kenneth J. Falk

I. Introduction

The 2019-2020 Supreme Court term was, for many reasons, one of the most memorable in a generation as the Court charted a path that served to remind us that it is a judicial, not a political, body and that Chief Justice Roberts is most definitely in charge of, and guiding, the Court.

II. Employment discrimination and LGBTQ issues

In a trio of cases, *Bostock v. Clayton Co., Ga.*; *Altitude Express, Inc. v. Zarda*; *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 140 S. Ct. 1731 (2020), the Court addressed the question of whether discrimination against LGBTQ employees is prohibited discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2.

The Supreme Court, with Justice Gorsuch writing for six Justices, held that discrimination against someone because of their "sex" makes it unlawful to fire someone because they are gay or are transgender. This was based on the explicit language of the statute as treating an employee differently because they are gay or transgender requires the employer to treat them differently because of their sex. It makes no difference what the drafters of the 1964 law meant by the term "sex," as what solely matters is the language of the statute, not the aims of the legislators.

III. Religion issues

1. In *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), parents of students at a religious private school in Montana claimed that a Montana rule that prohibited state scholarship monies from going to students attending private schools violated the Free Exercise Clause. The Montana Supreme Court found that exclusion of aid to religious schools was required by the Montana Constitution's prohibition on aid to sectarian schools. Based on this, the Montana Supreme Court invalidated the entire program, thus ending it for all students.

The Court, in a 5-4 decision, sided with the parents. Writing for the Court, the Chief Justice found that the "no aid" provision of the Montana Constitution discriminated based on religious status and was therefore subject to strict scrutiny and Montana's interest in separating church and State was not a compelling governmental interest that justified the discrimination. Because the Free Exercise Clause prevented application of the Montana Constitution's "no aid" provision, the Montana Supreme Court had no authority to invalidate the program.

"A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2261.

2. In *Our Lady of Guadalupe School v. Morrisey-Berru*, 140 S. Ct. 2049 (2020), teachers brought claims against religious schools claiming, in one case, a violation of the Age Discrimination in Employment Act and, in another case, a violation of the Americans

with Disabilities Act. The Supreme Court has previously recognized, *Hosanna-Tabor Evangelical Luther Church and School v. EEOC*, 565 U.S. 171 (2012) , that the "ministerial exception," mandated by the First Amendment, prohibits courts from entertaining employment discrimination action brought against religious employer by certain key employees who are involved in the religious education of students. In *Our Lady of Gudalupe*, the Court held that it made no difference that the teachers did not have the title of "minister," had little formal religious training, or did not hold themselves out as religious leaders. What matters is what the employees do, and here they both assisted with the religious development of their students. This was sufficient to invoke the ministerial exception. The decision was 7-2, with Justice Alito writing for the majority.

3. In *Little Sisters of the Poor v. Pennsylvania*, 140 S. Ct. 2367 (2020), the Court addressed the legality of rules that allowed employers with moral objections or sincerely held religious objections to opt out of the requirement in the Affordable Care Act that they provide contraceptive coverage for employees. The rules were enjoined by the lower courts, but the Supreme Court (7-2, with Justice Thomas writing) held that the federal Health Resources and Services Administration had statutory authority under the ACA to promulgate the regulations and that there was therefore no need to determine whether the exemptions were mandated by the Religious Freedom Restoration Act. The Court also held that there were no procedural deficiencies in promulgating the rules. However, the lower court had not yet determined whether the regulation violated the substantive

provision of the Administrative Procedure Act and the case was remanded to consider that.

IV. Abortion

In *Whole Women's Health v Hellerstedt*, 136 U.S. 2292 (2016), the Court, by a 5-3 decision struck down Texas abortion statute that, among other things, required abortion doctors to have admitting privileges. The Court held that in order to determine if an abortion regulation is an undue burden, the standard under *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion), the benefits of the law must be weighed against its burdens, applying facts on both sides. There was no benefit to the admitting privilege requirement, and it served only to make it virtually impossible to obtain an abortion due to the difficulty in obtaining admitting privileges.

Louisiana passed a similar, if not identical statute that would make it almost impossible to obtain an abortion in Louisiana if it became effective. The district court found that there was no health benefit to the statute and enjoined the law. The Fifth Circuit reversed.

The Supreme Court reversed the Fifth Circuit in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020) (plurality decision). Justice Breyer, writing for four Justices found that the statute was indistinguishable from *Whole Women's Health* and concluded that the statute imposed an unjustified burden on a woman's right to obtain an abortion, Four

Justices dissented. The crucial fifth vote in favor of reversal was provided by the Chief Justice, who had dissented in *Whole Women's Health.* Nevertheless, he recognized that "[t]he legal doctrine of stare decisis requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents." *Id.* at 2134 (Roberts, C.J., concurring in the judgment).

V. Presidential power

1. In *Department of Homeland Security v. Regents of Univ. of Calif.*, 140 S. Ct. 1891 (2020), the Court addressed the question of whether President Trump lawfully repealed President Obama's order that had created the DACA (Deferred Action for Childhood Arrivals) program. By a 5-4 decision, with the Chief Justice writing for the majority, the Court held that the rescission of the DACA program was arbitrary and capricious, and thus it was invalid under the federal Administrative Procedures Act. The grounds given for the rescission at the time of the decision to end the program were inadequate and the Administration's *post hoc* rationalization would not be listened to.

The Chief Justice, along with three other Justices, also concluded that there was not a plausible inference that the rescission was motivated by animus in violation of equal protection.

Thus, much like the case striking down the citizenship question in the census, *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), it appears clear that the Court believes that the DACA program could be terminated by the President, if proper procedural steps were followed and adequate reasons were offered. But the program lives on.

2. *Trump v. Vance*, 140 S. Ct. 2412 (2020). The New York County (Manhattan) district attorney served a grand jury subpoena duces tecum on an accounting firm that had custody of the President's financial and tax records. The President asserted broad presidential immunity that prevents state criminal subpoenas because compliance would impair the President's Article II functions. The Court held, 7-2, with the Chief Justice writing, that there is no such blanket immunity. The President retains the right, available to all citizens, to challenge the subpoena on any grounds allowed by New York law and can raise any subpoena-specific constitutional challenges.

3. In *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020), the question presented in two cases was whether subpoenas issued by a number of committees in the House of Representatives to obtain financial information concerning the President, his children, and their businesses were appropriate. The President argued that the subpoenas lacked a legitimate legislative purpose and violated the separation of powers. Executive privilege was not claimed.

The Court, by a 7-2 margin, with the Chief Justice writing for the majority, held that although Congress has the power to secure needed information to legislate, separation of power concerns must be considered as well. Courts must determine if the asserted legislative purposes justified the significant step of demanding the President's papers. Any subpoena must be narrow, and courts must assess the burdens imposed on the President by the subpoena. The cases were therefore remanded back for the lower courts to take these factors into account.

4. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). Congress established the Consumer Financial Bureau ("CFB") after the 2008 financial crisis as an independent agency that was to ensure the safety of consumer debt products. This was part of the Dodd-Frank Wall Street Reform and Consumer Protection Act that also transferred to the CFB the duty of administering various consumer protection statutes. Dodd-Frank gave the CFB extensive rulemaking, enforcement, and adjudicatory powers. Congress also established that the CFPB would be headed by a single Director, appointed by the President with Senate approval for a five-year term during which the Director could be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(1), (3).

Seila Law Firm objected to a subpoena it had been issued by the CFPB on the grounds that the agency leadership by a director who could only be removed for cause violated the separation of powers. In a 5-4 decision, with the Chief Justice writing for the

Court, found that the portion of Dodd-Frank that circumscribed the President's removal power was a violation of the separation of powers and was unconstitutional. The Court noted that it had approved limits on the President's removal power when the entity that had been established was a multi-membered board, balanced along partisan lines, that had much less power than the CFPB, or an independent counsel who, again, had limited powers and no rulemaking or adjudicative powers. However, rather than declare the entire CFPB unconstitutional, the Chief Justice, along Justices Alito and Kavanaugh and the otherwise dissenting Justices, concluded that the unconstitutional portion of the statute was severable from the remainder.

VI. Faithless electors

In *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), the Court addressed the question of whether presidential electors may be penalized if they do not cast their votes in the Electoral College for the candidate they are committed to vote for. The Court unanimously, with Justice Kagan writing, held that the power vested in states under Article II of the Constitution to appoint presidential electors is broad and allows states to enact penalties for faithless electors.

VII. Native Americans

In *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), the defendant had been convicted of crimes in Oklahoma state court. Federal law, 18 U.S.C. § 1153(a), provides that within "the Indian country," "[a]ny Indian who commits" certain offenses is "subject to the exclusive jurisdiction of the United States," *i.e.*, must be tried in federal court. The defendant argued that inasmuch as he was an enrolled member of the Seminole Nation and his crimes took place on the Creek Reservation, the state court had no jurisdiction over him. The question the case presented was whether his crimes took place on the Creek Reservation.

Justice Gorsuch, writing for five Justices, held that Congress had established the Creek territory in 1883, and the Creek Reservation continues to this day. Once established, only Congress can disestablish a reservation, and this requires clear congressional intent. The question is whether Congress has ever clearly abrogated the original treaty language. It had not. As a result, much of eastern Oklahoma was declared to be the Creek Reservation. The Court acknowledged that this was a potentially destabilizing decision but noted that the State and its Native American tribes have proven over the years that they can work together as partner and that Congress could step in at any time to give legislative direction. The Chief Justice dissented along with Justices Alito, Kavanaugh, and Thomas.

VIII. First Amendment

1. In *Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020), the Court addressed the constitutionality of an exemption from the Telephone Consumer Protection Act's prohibition on robocalls to cell phones if the purpose of the calls was to collect debts owned or backed by the federal government. The plaintiffs, political and polling organizations, claimed that the exemption violated the Free Speech Clause. The Court, by Justice Kavanaugh, with three Justices concurring and two concurring in the judgment, held that exempting the government in this way violated the First Amendment. This was a content-based statute as the regulation depends on the content of the call. It cannot satisfy strict scrutiny and is unconstitutional.

However, rather than strike the robocall prohibition, a majority of the Justices agreed that the government-debt exception could be severed from the rest of the law generally prohibiting the robocalls. "As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech." *Id.* at 2344 (plurality decision).

b. *Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S. Ct. 2082 (2020). In a law passed in 2003, Congress limited the funding of American and foreign non-governmental organizations to those that had explicit policies opposing prostitution and sex trafficking. In 2013, in an action brought by domestic organizations, the Court held that the requirement that the organizations have this policy violated the

First Amendment as the First Amendment prohibits the government from telling people what to say and this provision went beyond the use of federal funds and demanded that the organizations espouse the government's position in all respects. *Agency for International Development v. Alliance for Open Society, International, Inc.*, 570 U.S. 205 (2014).

Although this new case concerned the same provision, the plaintiffs were foreign affiliates of American organizations. As foreign citizens outside the United States do not possess rights under the Constitution, they cannot claim that the law violated their constitutional rights. The decision was 5-3 and was written by Justice Kavanaugh.

IX. Second Amendment

New York State Rifle and Pistol Ass'n v. City of New York was set up to be a major Second Amendment case. New York City prohibits its residents from possessing a handgun without a license, and the only license the City makes available to most residents allows its holder to possess her handgun only in her home or en route to one of seven shooting ranges within the city. The City thus bans its residents from transporting a handgun to any place outside city limits-even if the handgun is unloaded and locked in a container separate from its ammunition.

The lower court upheld the rule against constitutional challenges. After the Supreme Court accepted the case for review, the rule was modified to allow the transportation of weapons outside of the City. This succeeded in convincing a majority

of the Court that the claims for injunctive and declaratory relief were now moot and the lower court's decision was vacated and remanded. 140 S. Ct. 1525 (2020) (per curiam). Three Justices dissented, noting that the City waited until certiorari was granted to try to moot the case.

X. Fourth Amendment

In *Kansas v. Glover*, 140 S. Ct. 1183 (2020), a police officer ran a registration check on a pickup truck and learned that the registered owner's license had been revoked. Suspecting that the owner was driving unlawfully, the officer stopped the truck, confirmed that the owner was driving, and issued the owner a citation for being a habitual violator of Kansas traffic laws. The Kansas Supreme Court, breaking with 12 state supreme courts and 4 federal circuits, held that the stop violated the Fourth Amendment since there was no reasonable suspicion that the person driving the car was the owner. The Supreme Court, by an 8-1 decision, with Justice Thomas writing, disagreed. Commonsense indicates that the person driving a vehicle is the owner of it and when the officer lacks information that negates that inference, a brief investigative stop does not violate the Fourth Amendment.

The Court emphasized that the reasonable suspicion standard looks at the totality of the circumstances. But here there were no additional facts to counter the presumption that the driver was the owner of the vehicle.

XI. Criminal cases

1. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020). Whereas many jurisdictions have adopted an insanity test that asks whether a defendant's illness leaves him or her with the inability to distinguish right from wrong, the test in Kansas is whether the defendant was able to understand what he or she was doing when the crime was committed. However, the defendant can raise any argument he wants during the penalty phase of a case to demonstrate why mental illness should mitigate his sentence. The defendant argued that denying him the ability to demonstrate insanity by showing that he did not understand the difference between right and wrong violated due process. The Court by Justice Kagan (6-3) concluded that due process simply does not require a specific test of insanity.

2. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) – Oregon and Louisiana do not require unanimous jury verdicts to convict in criminal cases. This case arose in Louisiana where Ramos was convicted, and sentenced to life without parole, based on a 10-2 jury verdict, The Supreme Court, with Justice Gorsuch writing for, essentially, a 6-3 Court, held that the Sixth Amendment right to a jury trial requires a unanimous verdict to convict a defendant of any offense that is serious enough to warrant a trial by jury. In doing so the Court overruled *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality). The dissent, by Justice Alito with the Chief Justice and Justice Kagan, concurring in part, argued that regardless of whether it was correct or not, *Apodaca* should not be overruled and that *stare decisis* should be respected.

XII. *Bivens* claims

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), the Court recognized that a claim could be brought against the federal officers directly under the Constitution. This notion was extended by the Court to actions directly under the Fifth and Eighth Amendments in *Davis v, Passman*, 442 U.S. 228 (1979) and *Carlson v. Green*, 446 U.S. 14 (1980), but it has not been extended by the Court further.

In *Hernandez v. Mesa*, 140 S. Ct. 735 (2020),a U.S. Border Patrol Agent shot and killed a 15-year-old Mexican citizen on Mexican soil by shooting across the border. The child's survivors filed a case against the agent alleging a violation of the child's Fourth and Fifth Amendment rights. The Court (6-3), with Justice Alito writing, concluded that the petitioners had no cause of action. Even though a *Bivens* claims has been recognized for alleged Fourth and Fifth Amendment violations, the context here was significantly different. Any expansion of the *Bivens* remedy would intrude on foreign relations, which is entrusted to other political branches. The expansion could also risk undermining border security. And, the fact that Congress has not allowed damages remedies under the Federal Tort Claims Act for injuries inflicted outside of the United States reinforces the idea that the Court should not create a cause of action extending across the border.

XIII. Coming attractions in the 2020-2021 term (the questions presented are quoted directly from the petitions for certiorari or the Court's articulation of the question(s) presented). Review has been granted in all these cases.

a. *California v. Texas* -No. 19-840

As part of the Patient Protection and Affordable Care Act (ACA), Congress adopted 26 U.S.C. § 5000A. Section 5000A provided that "applicable individual[s] shall" ensure that they are "covered under minimum essential coverage," 26 U.S.C. § 5000A(a); required any "taxpayer" who did not obtain such coverage to make a "[s]hared responsibility payment," id.§ 5000A(b); and set the amount of that payment, id. § 5000A(c). In *National Federation of Independent Business v. Sebelius,* 567 U.S. 519, 574 (2012), this Court held that Congress lacked the power to impose a stand-alone command to purchase health insurance but upheld Section 5000A as a whole as an exercise of Congress's taxing power, concluding that it affords individuals a "lawful choice" between buying health insurance or paying a tax in the amount specified in Section 5000A(c). In 2017, Congress set that amount at zero but retained the remaining provisions of the ACA. The questions presented are:

1. Whether the individual and state plaintiffs in this case have established Article III standing to challenge the minimum coverage provision in Section 5000A(a).

2. Whether reducing the amount specified in Section 5000A(c) to zero rendered the minimum coverage provision unconstitutional.

3. If so, whether the minimum coverage provision is severable from the rest of the ACA.

b. *Carney v. Adams* (No. 19-309)

1. Does the First Amendment invalidate a longstanding state constitutional provision that limits judges affiliated with any one political party to no more than a "bare majority" on the State's three highest courts, with the other seats reserved for judges affiliated with the "other major political party"?

2. Did the Third Circuit err in holding that a provision of the Delaware Constitution requiring that no more than a "bare majority" of three of the state courts may be made up of judges affiliated with any one political party is not severable from a provision that judges who are not members of the majority party on those courts must be members of

the other "major political party," when the former requirement existed for more than fifty years without the latter, and the former requirement, without the latter, continues to govern appointments to two other courts?

c. *Collins v. Mnuchin* (No. 19-422)

In 2008, Congress created the Federal Housing Finance Agency (FHFA) - an "independent" agency with sweeping authority over the housing finance system. 12 U.S.C. § 4511(a). Unlike every other independent agency except the Consumer Financial Protection Bureau, FHFA is headed by a single Director who can only be removed for cause by the President and is exempt from the congressional appropriations process. 12 U.S.C. §§ 4512(b)(2), 4516(f)(2). The questions presented are:

1. Whether FHFA's structure violates the separation of powers; and

2. Whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent.

d. *Department of Justice v. House Committee on the Judiciary* (No.19- 1328)

Whether an impeachment trial before a legislative body is a "judicial proceeding" under Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal Procedure. [This would allow the court to authorize disclosure of the redacted portions of the Mueller report and the sealed grand jury transcript to the House Judiciary Committee for use in the President's impeachment investigation].

e. *FNU Tanzin v. Tanvir* (No. 19-71)

Whether the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb et seq., permits suits seeking money damages against individual federal employees.

f. *Fulton v. City of Philadelphia* (No. 19-123)

The City of Philadelphia chose to exclude a religious agency from the City's foster

care system unless the agency agreed to act and speak in a manner inconsistent with its sincere religious beliefs about marriage. The Third Circuit upheld that action under Employment Division v. Smith.

The questions presented are:

1. Whether free exercise plaintiffs can only succeed by proving a particular type of discrimination claim—namely that the government would allow the same conduct by someone who held different religious views-as two circuits have held, or whether courts must consider other evidence that a law is not neutral and generally applicable, as six circuits have held?

2. Whether Employment Division v. Smith should be revisited?

3. Whether a government violates the First Amendment by conditioning a religious agency's ability to participate in the foster care system on taking actions and making statements that directly contradict the agency's religious beliefs?

g. *Torres v. Madrid* (No. 19-292)

Police officers shot Petitioner, but she drove away and temporarily eluded capture. In this excessive force suit, the district court granted summary judgment for the officers on the ground that no Fourth Amendment "seizure" occurred. The Tenth Circuit affirmed, reasoning that an officer's application of physical force is not a seizure if the person upon whom the force is applied is able to evade apprehension.

The question presented is:

Is an unsuccessful attempt to detain a suspect by use of physical force a "seizure" within the meaning of the Fourth Amendment, as the Eighth, Ninth, and Eleventh Circuits and the New Mexico Supreme Court hold, or must physical force be successful in detaining a suspect to constitute a "seizure," as the Tenth Circuit and the D.C. Court of Appeals hold?

h. *Uzuegbunam v. Preczewski* (No. 19-968)

While a student at Georgia Gwinnett College, Petitioner Chike Uzuegbunam began distributing religious literature on campus. College officials stopped him because he was outside the 0.0015% of campus where "free speech expression" was allowed. When Chike

reserved a free speech space and again tried to evangelize, officials stopped him because someone complained which, under College policy, converted Chike's speech to "disorderly conduct" (i .e., "disturb[ing] the peace and/or comfort of person(s)"). Facing discipline if he continued, Chike sued. Another student, Petitioner Joseph Bradford, self-censored after hearing how officials mistreated Chike.

Chike and Joseph raised constitutional claims against Respondents' enforcement of their policies, seeking damages and prospective equitable relief to remedy the censorship and chill. After Respondents changed their speech policies post-filing, mooting all equitable claims, the lower courts held that Chike and Joseph did not adequately plead compensatory damages, and their nominal-damages claims were moot.

Six circuits hold that a government's policy change does not moot nominal damages claims. Two circuits hold such claims moot if the government changes a policy it has never enforced against the plaintiff. The Eleventh Circuit alone holds that, absent compensatory damages, government officials are never liable for violating constitutional rights if they change their policy after being sued.

The question presented is: Whether a government's post-filing change of an unconstitutional policy moots nominal-damages claims that vindicate the government's past, completed violation of a plaintiff's constitutional right.

XIV. Conclusion

It is dangerous to try to impose political labels of liberal and conservative on Supreme Court Justices. The 2019-2020 term illustrated this in many ways. It also illustrated that this is "the Roberts Court." We will have to see what the 2020-2021 term brings.

Section Three

2020 RECENT DEVELOPMENTS IN ESTATE and TRUST PLANNING

Estates, Trusts, Guardianships
Advanced Directives, Non-Probate

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Section Three

2020 Recent Developments in Estate and Trust Planning.....Todd I. Glass

II. TRUST PLANNING AND ADMINISTRATION

Case Law and Legislation in Estates,
Trusts, Guardianships and Advance Directives……Todd I. Glass

I. ESTATES, WILLS AND ADMINISTRATION

A. CLAIMS – NONPROBATE PROPERTY. SB 50, Section 15 amends I.C. 32-17-13-7 to provide technical corrections related to who is a claimant.

B. ELECTRONIC ESTATE PLANNING DOCUMENTS. SB 50, Section 8 amends I.C. 30-4-1.5-4 to allow an electronic will to be signed on behalf of the settlor by a person designated by the settlor. This was a Section bill approved by the Probate Code Study Commission.

C. PROOF OF TITLE. SB 50, Sections 1, 2 and 3 amend I.C. 6-1.1-5-7, I.C. 29-1-7-23 and I.C. 29-1-7-24 to provide technical corrections to the changes made last year. The changes clarify the procedure for filing the proof of title affidavit and the requirements of the affidavit. The proposals came from the Section and were approved by the Probate Code Study Commission.

D. SMALL ESTATE AFFIDAVIT – TECHNICAL. SB 50, Sections 4, 5 and 6 amend I.C. 29-1-8-2, 3 and 4 to remove incorrect references to years related to application of the statute. These are purely technical corrections. The Section proposed these changes and are approved by the Probate Code Study Commission.

E. ACCOUNT – SUFFICIENCY – REVERSAL OF APPROVAL. ***Montgomery v. Estate of Montgomery*****, 127 N.E.3d 1238 (Ind. App. 2019)**. Sheri and Pamela Shively

are the daughters of Donald Montgomery, and Steve is Pamela's husband. Steve was appointed as Personal Representative of Donald's Estate. Donald's Will left his estate to Sheri and Pamela equally. Steve also was Successor Trustee of Donald's Trust. Sheri and Pamela, as well as Steve entered into a Settlement Agreement and Mutual Release of Claims which was filed in the Trust and Estate matters. The Agreement outlined all items of property owned by Donald at the time of his death and listed an approximate date of death value. The Agreement mutually released all parties from any and all known claims, demands, causes of action, obligations, and liabilities of every kind and nature whatsoever which each had, or claims to have had, or now has, against the other, which related to or arises out of Donald's Trust or Estate. The Agreement also provided that Steve had to prepare a final combined Personal Representative's and Trustee's Accounting and file any necessary closing documents with the court. Steve filed an accounting and Sheri filed an objection. Sheri objected because Steve failed to indicate the time period covered; the beginning and ending value for assets; indicate if assets were sold and whether there was a gain or loss; failed to show what assets were distributed to the beneficiaries; and showed no reserve for taxes. Because Sheri claimed that the accounting was statutorily deficient, she requested that Steve be removed as PR and Trustee. Steve claimed that he was relieved of any fiduciary obligation to Sheri pursuant to the release in the settlement agreement. The trial court denied Sheri's motion, approved the final accounting, and closed the estate. Sheri appealed.

The Court of Appeals reversed and remanded. This opinion contains a great discussion of the statutory requirements in final accounting for estate and in final accounting for trusts. IC 29-1-16-3 provides in part that [e]very personal representative may file in the

court a verified account of his administration at any time prior to final settlement and distribution but every personal representative must file in the court a verified account of his administration ... (a) Upon filing a petition for final settlement ... IC29-1-16-4 provides that accounts shall be "for a period distinctly stated and shall consist of three (3) schedules, of which the first shall show the amount of the property chargeable to the personal representative; the second shall show payments, charges, losses and distributions; the third shall show the property on hand constituting the balance of such account, if any. When an account is filed, the personal representative shall also file receipts for disbursements of assets made during the period covered by the account. IC 29-1-16-5 provides that the PR shall also petition the court for an order authorizing him to distribute the estate and shall specify the persons to whom distribution is to be made, including what each is to receive.

IC 30-4-5-12 governs accounting by trustees and provides that, unless the terms of the trust provide otherwise, the trustee shall deliver a written statement of accounts to each income beneficiary annually and the statement shall contain at least all receipts and disbursements since the last statement and all items of trust property held by the trustee on the date of the statement at their inventory value. IC 30-4-5-13 provides that a verified statement of accounts filed with the court shall show, the period covered by the account; the total principal with which the trustee is chargeable; an itemized schedule of all principal cash and property received, disbursed or distributed; an itemized schedule of income received and disbursed or distributed; the balance of principal and income remaining at the close of the period, how it is invested, and both the inventory and current market values of all investments. The Court noted that the signatories to the Settlement Agreement expressly

agreed that they did not release any claim related to their rights and obligations created pursuant to the agreement, and the agreement required Steve to file a combined final accounting. The Court found numerous deficiencies in Steve's accounting and reversed the trial court's approval of the accounting and remanded for further proceedings.

F. CLAIM – CONTRIBUTION – UNIFORM FRAUDULENT TRANSFER ACT – PARTITION – DISBURSEMENT. Underwood v. Fulford, 128 N.E.3d 518 (Ind. App. 2019). Demming retained Underwood, a real estate broker, to help her purchase two properties in Bloomington. Instead of facilitating the sale to Demming, Underwood approached Kinney about purchasing the properties as partners, which they ultimately did. Demming sued Underwood and Kinney asserting claims for breach of fiduciary duty and constructive fraud. Demming prevailed and was awarded $154,552.14 in damages, for which Underwood and Kinney were held jointly and severally liable. Underwood satisfied the judgment on her own. Kinney died, survived by his wife Judith Fulford ("Fulford"). Underwood filed a Contribution Action, demanding equal contribution for payment of the Demming Judgment. Underwood also filed a partition action to petition to compel partition of other real estate jointly owned by Underwood, Fulford, and the Estate. She next filed a fraudulent transfer action against the Estate, alleging that Kinney had conveyed properties to Fulford in violation of Indiana's Uniform Fraudulent Transfer Act ("UFTA"). The property was sold. The trial court entered its finding that the Demming Judgment found Kinney vicariously liable for Underwood's wrongful conduct and that Kinney had committed no independent fraudulent act. The trial court therefore concluded that Kinney (and now his Estate) had a common-law right and a statutory right to indemnity from Underwood for the

Demming Judgment and that this decision rendered the Fraudulent Transfer Action invalid and moot. The trial court issued an order in the partition action determining the respective interests in the partition proceeds as follows: fifty percent (50%) to Underwood; twenty-five percent (25%) to Kinney (and now the Estate); and twenty-five percent (25%) to Fulford. The trial court authorized the disbursement of Fulford's share but ordered that the remaining shares be held by the clerk until further order. Underwood appealed.

The Court of Appeals reversed, in part, and affirmed, in part. It carefully reviewed the language of UFTA and noted that the Court previously held that a defendant cannot logically be held liable for fraudulent transfer under the UFTA if he is not to be held liable for the creditor's underlying claim. Therefore, the Court refused to address Underwood's claim that the trial court applied a wrong legal standard to determine if the Estate was a debtor under UFTA. The Court dismissed Underwood's argument that the trial court erred in allowing the Estate common-law indemnity for the Demming Judgment. Kinney committed no independent act of fraud but was held constructively liable for Underwood's own wrongful and fraudulent conduct. The Court concluded that the record supported judgment for the Estate and affirmed the trial court's judgment for the Estate in the Contribution Action and Fraudulent Transfer Action. However, the Court did find that the trial court erred in the Partition Order by retaining of the partition proceeds belonging to Underwood and the Estate. The Court remanded for distribution of the proceeds.

The Court of Appeals reversed and remanded. IC 29- 1-7-20 governs the burden of proof in a will contest, and places the burden on the contestor. "In Indiana, the general rule is that where a testator retains possession or control of a will and the will is not found at the

testator's death, a presumption arises that the will was destroyed with the intent to revoke it. *Matter of Estate of Borom*, 562 N.E.2d 772, 775 (Ind. App. 1990). The proponent of the will may rebut that presumption by introducing evidence which tends to support a contrary conclusion such that destruction with the intent to revoke is disproven by a preponderance of the evidence. Id. When a copy of the will is offered for probate, and probate of the copy is contested, the burden of proof remains on the contesting party through the proceeding to establish that the will was in fact revoked. IC 29-1-7-20. However, the contestor is aided by the presumption of destruction with the intent to revoke. *Matter of Estate of Borom*, 562 N.E.2d at 776. That presumption shifts the burden of going forward to the proponent of the will to present evidence to rebut the presumption. Id. Of course, the contestor still retains the ultimate burden of proof." Id. The Court noted that the trial court never had any factual evidence to determine if the Will was an original or a copy, when it chose to treat it as a copy. By statute, the Estate, as contestor of the will, had the ultimate burden of proof. The Estate was not entitled to a presumption in its favor without factual findings. The Court held that because the probate court misplaced the burden of proof on Trowbridge, its decision was contrary to law.

G. CLAIM – IRA – DISSOLUTION – WAIVER. *Hamilton v. Hamilton*, 132 N.E.3d 428 (Ind. App. 2019). In the Hamiltons' dissolution, they entered into an agreement whereby the husband's IRA was to be split 50/50 with the wife. The agreement gave the husband thirty (30) days to carry out those provisions. On the seventh day, the husband went to his financial advisor's office but the office was closed. He went back on the eighth day, but the advisor was on vacation. He left the dissolution decree with the office and

instructions to make changes in accordance with the agreement. On the ninth day, the husband was involved in an automobile accident with injuries that led to his death. Apparently, the wife was still the named beneficiary on the IRA. The wife filed a claim in the husband's estate for the amount of the IRA. The husband's personal representative was his daughter. Everyone agreed the wife was entitled to half but as named beneficiary she was claiming the full amount. The probate court granted summary judgment to the estate based on the agreement entered into in the dissolution and the efforts by the husband to complete the split within the allotted period of time.

The Court of Appeals affirmed. The wife was relying on Graves v. Summit Bank which held that the beneficiary, on an insurance policy and an IRA, remained the named beneficiary until changed. The Court of Appeals distinguished that case and relied instead on Von Haden v. Supervised Estate of Von Haden, 699 N.E.2d 301 (1998) where the Indiana Court of Appeals found that a similar 50/50 agreement should be upheld. The Court of Appeals also found that by signing the agreement, the wife waived her right to claim the husband's 50% and that the husband had done, according to the affidavit of financial advisor, everything necessary to complete the transfer at the time of his death.

H. SPECIAL ADMINISTRATOR – REMOVAL – PROCEDURE. In re Unsupervised v. Toliver, 123 N.E.3d 670 (Ind. 2019). Mother of one of decedent's children and aunt of another of decedent's children moved to have decedent's father removed as special administrator, or for reconsideration of his appointment. The trial court reconsidered and rescinded decedent's father's appointment as special administrator and appointed mother and aunt as co-special administrators of decedent's estate for the limited

purpose of pursuing the wrongful-death action that decedent's father had filed on the estate's behalf. Decedent's father appealed.

The Court of Appeals affirmed in *In re Unsupervised Estate of Orlando C. Lewis, Jr*., 106 N.E.3d 1057 (Ind. App. 2018). The Court of Appeals held that the trial court's decision to replace decedent's father was not a removal of a special administrator subject to the removal statute, IC 29-1-10-6, but merely a reconsideration of its earlier decision. The Indiana Supreme Court held that the trial court could reconsider its appointment because the matter was still pending; second, that the court did not abuse its discretion in rescinding the appointment; and, third, that a court should give notice and hold a hearing before appointing a special administrator or reconsidering such an appointment, even if the governing statute and trial rule do not require these things.

I. WILL CONTEST – VENUE. *Witham v. Steffan*, 131 N.E.3d 774 (Ind. App. 2019). Indiana has extensive case law making it clear that a will contest is a cause of action separate from the estate administration. To help clarify that issue for people reading the will contest statute, the Section proposed a change to I.C. 29-1-7-17 stating that the cause of action was a "separate" cause of action. Instead, the legislature amended I.C. 29-1-7-17 effective July 1, 2017 to state that the will contest must be filed "in the same court." In 2018, the Section was able to convince the legislature to add the language separate cause of action effective July 1, 2018. This case is a result of this legislature confusion. A will was probated in the Lake County Superior Court which assumed jurisdiction. The will contest was filed May 1, 2018 in the Lake County Circuit Court. The personal representative filed a motion to dismiss for failure to state a claim because it had been filed in the wrong court pursuant to

the statute in place at the time of the filing. The circuit court transferred the entire action to the superior court which then dismissed the will contest petition with prejudice because it was filed in the wrong court.

The Court of Appeals reversed and remanded. It first noted that the motion to dismiss was not for failure to state a claim but for improper venue. It then noted that the appropriate remedy was not dismissed with prejudice but rather transfer. In this case, the circuit court had already transferred the matter back to the superior court and that should have resolved the issue.

J. WILL – COPY – PROBATE – BURDEN OF PROOF. ***Trowbridge v. Estate of Everett Thomas Trowbridge*****, 131 N.E.3d 630 (Ind. App. 2019)**. Decedent died, survived by his brother, Michael. Michael filed a Petition for Issuance of Letters of Administration, asserting that his brother died intestate. Some months later, decedent's ex-wife, Trowbridge, filed a Petition for Probate of Will and Appointment of Co-Personal Representative asserting that the Decedent died testate pursuant to a will executed shortly after the couple divorced. The Will was a form will with handwritten entries which was signed, witnessed, and notarized. In the margin, there was a handwritten designation of a combination to a safe. Michael, as Personal Representative for the Estate, filed an Objection to Probate of Will. The Estate's attorney testified regarding his professional consultation with Trowbridge. He testified that Trowbridge brought into his office a signed copy or duplicate of the original will and that she had "said, in essence, that it was a signed copy and the original was to be in the safe." Trowbridge denied making a statement that the original will would be found in the Decedent's safe. Michael testified that he opened the Decedent's safe and found no will

inside. The probate court said it was unable to discern the originality of the document and noted the absence of expert testimony offered by Trowbridge. The probate court issued an order denying the probate of the will and granting the objection. Trowbridge appealed.

The Court of Appeals found that the key issue was whether the original will was in the possession of the decedent. If it was, the Estate as contestor of the proferred will—whose burden it is to prove the original will was lost or destroyed—benefits from an initial presumption that the will was lost or destroyed if it was in the possession of the testator. However, who had possession of the will was in fact disputed by the facts cited by the lower court. Therefore, since the Estate was not entitled to the presumption without a predicate finding of facts, the lower court misplaced the burden of proof. It was reversed and remanded for further proceedings.

K. WILL CONTEST – MOTION TO INTERVENE. Estate of Dorothy M. Hall, Delores Tilly v. Hall, 149 N.E.3d 628 (Ind. App. 2020). Frank and Dorothy Hall owned real property in Floyds Knobs Indiana. Together they conveyed three acres to Hall and to Hall's brother who are Frank's children. The remaining eight acres they owned jointly until Frank's death. Dorothy's two daughters were Dories Andres and Delores Tilly. In 2008, Dorothy made a will that left the remaining eight acres to Hall with the residue of her estate to Tilly. In 2010, Dorothy signed a Quitclaim Deed conveying the eight acres to Tilly. Dorothy died in 2014. Andres filed a Petition for Supervised Administration. The court probated the 2008 will and pursuant to the will appointed Tilly's husband Thomas as the personal representative. Andres filed a Petition to Contest the Will and later a Petition to Set Aside the Deeds. Hall notified of the administration and the petitions, entered an

appearance and was an integral part of proceedings after that point in time. However, in 2017, Tilly and Andres filed a Motion to Withdraw the petitions to contest the will and set aside the deeds and to dismiss any and all claims with prejudice stating they had reached a settlement. Hall was given 14 days to file a response. Hall's lawyer filed a Motion to Intervene along with discovery. The motion was accompanied by affidavits showing Hall's long-term involvement in the estate administration and Andres' petitions to contest the will and the deeds. The trial court granted Hall's Motion to Intervene and denied Tilly's objections to the discovery and Motion to Strike Hall's affidavit. The order was certified for appeal as an interlocutory order.

The Court of Appeals affirmed. Recognizing the uniqueness of the situation, the Court spent considerable time outlining Hall's involvement in the estate administration and the contest to the will and deeds. Hall was not required to file a separate request to set aside the deeds or joint Andres petition because he was already an interested party.

II. TRUST PLANNING AND ADMINISTRATION

A. LEGACY TRUST. SB 50, Sections 12, 13 and 14 amend I.C. 30-4-8-1 and I.C. 30-4-8-16 to limit the exception to the Legacy Trust to only unpaid creditors. This was approved by the Section and by the Probate Code Study Commission.

B. NONJUDICIAL TRUST – NONJUDICIAL ACCOUNT. SB 50, Section 11 amends I.C. 30-4-5-14.5 to provide a technical correction changing the word new to net. This was approved by the Section and the Probate Code Study Commission.

C. SILENT TRUST. SB 50, Section 10 amends I.C. 30-4-3-6 to make it clear that the designated representative is not to reveal the contents of a silent trust to the beneficiary while acting on the beneficiary's behalf. This was approved by the Section and the Probate Code Study Commission.

D. TRUST SIGNATURE. SB 50, Section 9 amends I.C. 30-4-2-1 to allow the settlor's signature to be made by someone under the direction of the settlor.

E. CONTENTS – PROOF – BEST EVIDENCE RULE. Zartman v. Zartman, 127 N.E.3d 242 (Ind. App. 2019). There were three children of the deceased: Brenda, Paul and William III. William Jr. operated a farm and, in later years William III worked the farm with his father. William Jr. and Marilyn each established revocable trusts. Each trust held one-quarter of the farm, and the remaining half of the farm had been transferred to William III. Marilyn died in August 2004, and William Jr. died in February 2010. Thereafter, William III, as a trustee of Marilyn's trust, transferred to himself the one-quarter of the farm held by her trust. Paul and Brenda first initiated litigation against William III in Florida after the death of William Jr., who was a resident of Florida. The Florida court determined that William III had committed a breach of the trust and removed William III as trustee. It also declared that it had no jurisdiction over Indiana real estate. Back home again in Indiana, Paul and Brenda filed suit against William III seeking, among other things, to set aside William III's conveyance and to recover lost income on that land. Following a trial, however, the jury returned a verdict in favor of William III.

The Court of Appeals reversed and remanded. Paul and Brenda presented four issues on appeal but one was particularly dispositive, that being whether the trial court erred in its

application of Evidence Rule 1008, the best evidence rule. None of the parties had a complete copy of either Marilyn's trust document or the amendments. Because the parties had only the first and last pages of Marilyn's original trust document, they turned to the series of rules about "best evidence" to prove the content of the trust and the amendment. The Court reviewed Evidence Rules 1002, 1004, 1007 and 1008. Designated evidence included a copy of William Jr.'s First Amendment, and deposition testimony of William III that he saw the First Amendments to the trusts of both parents and that the only difference was the substitution of names. Evidence also showed that Paul had seen the First Amendment to Marilyn's trust shortly after it was signed, and, with the exception of the substitution of names, gender pronouns, and the like where appropriate, Marilyn's First Amendment was the same as William Jr.'s. This evidence was undisputed and established the content of Marilyn's First Amendment. However, in denying Paul and Brenda's motion, the trial court interpreted Rule 1008 as demanding that disputes about the content of a lost writing be decided by the jury. Paul and Brenda, however, argued the content in the context of a summary judgment motion. In that case, the Court concluded that it would be illogical to read Rule 1008 as requiring a trial judge to disregard undisputed designated evidence and held that Rule 1008 required evidentiary disputes about the content of a lost writing to be determined by a jury only during a jury trial and not during summary judgment. The trial court misconstrued its role in determining the contents of Marilyn's trust for purposes of deciding summary judgment. The case was therefore remanded so that the trial court could reconsider its ruling on summary judgment in accordance with these directions and sustain the present judgment, or not, accordingly.

F. MEDIATED SETTLEMENT – BREACH – FEES. ***In re Docket Trust of McQueary v. Thompson,*** **125 N.E.3d 664 (Ind. App. 2019).** *Sadie* McQueary established the Trust in 2004. One of the assets of the Trust was a forty-acre parcel of land in Westfield ("the Westfield property"). Upon Sadie's death, the trustee was to distribute fifty percent of the estate to Gary, who is Sadie's son, and fifty percent to Sadie's Grandsons. Sadie died on June 10, 2013. Gary became the successor trustee of the Trust. After the Grandsons docketed the Trust in Marion County Court, requested accounting and objected to that accounting, Gary and the Grandsons entered into a mediated settlement agreement under which Gary agreed to resign as trustee in favor of Thompson. Gary and the Grandsons also agreed to spend money for the survey of the Westfield property to further a sale. After settlement, however, Gary revoked his consent to the survey and filed a complaint to quiet title. Gary sought that order from the Hamilton County Court declaring that title to the Westfield property had vested in Gary and the Grandsons outside of the Trust at the time of Sadie's death. The Trustee filed a motion to dismiss Gary's complaint in Hamilton County pursuant to Indiana TR 12(b)(8) on the ground that the same action was pending in the Marion Court. The Trustee also filed a petition for instructions in which he asked the Marion Court whether he could spend the money for the survey and if he could accept offers on the property of below one million dollars. The Hamilton Court held a hearing and took the matter under advisement pending a determination by the Marion Court as to whether all of the terms and conditions of the mediated settlement agreement had been completed. The Trustee filed a motion in the Marion Court to enforce the mediated settlement agreement, asserted that Gary had violated the terms of the settlement agreement when he filed his quiet-title action. The Marion Court notified the Hamilton Court that the terms of the settlement agreement had not

been fulfilled and found that Gary breached the terms of the settlement agreement. The Hamilton Court dismissed Gary's complaint to quiet title. Following a hearing at which the attorneys *presented argument regarding whether Gary breached the settlement agreement, the Marion Court also ordered Gary to pay the Trustee's attorney fees and the Grandsons attorney fees.*

The Court of Appeals affirmed, in part, and remanded, in part. Gary first argued that the Marion court erred when it granted the Trustee's motion to enforce the settlement agreement; however, the Court ruled that Gary invited any error in the trial court's enforcement of the settlement agreement as he was a party to the mediation that resulted in the mediated settlement agreement, he signed the settlement agreement, and he joined the Grandsons in asking the trial court to accept the settlement agreement. Invited error notwithstanding, Gary also argued that the trial court erred when it enforced the mediated settlement agreement because the settlement agreement impermissibly altered the terms of the Trust since keeping the Westfield property in the Trust and allow the trustee to sell the Westfield property rather than distribute the property as the Trust directed altered the terms of the Trust. The Court drew attention to other provisions of the Trust that grant the Trustee the discretion to retain and withhold distribution of the assets to counter this argument, however. Gary's additional arguments that the Marion Court erred when it ordered him to pay attorneys' fees fell flat as well because he clearly breached a term of the settlement agreement, by filing the complaint to quiet title in Hamilton County breached the terms of the settlement agreement. While the Court agreed with Gary that the settlement agreement did not give the Trustee a perpetual right to sell the Westfield property and that the complaint

to quiet title did not necessarily violate a specific term of the settlement agreement, the quiet title action did violate the "release language" of the settlement agreement. By entering into the settlement agreement Gary agreed not to file any cause of action against any of the other parties. Because Gary breached the settlement agreement, which breach caused the Grandsons to initiate legal action to enforce the agreement, the trial court did not err when it ordered Gary to pay the Grandsons' attorneys' fees. This did not extend to the trustee's attorneys' fees though and the trustee was not entitled to an award of attorney's fees as it was not a party to the settlement agreement. Regardless, the Trustee was authorized to pay his attorney's fees out of the Trust.

G. RESIDUARY GIFT – CONSTRUCTION – INTESTATE DISTRIBUTION.

***Doll v. Post*, 132 N.E.3d 34 (Ind. App. 2019)**. Ollie Waid, Jr. established a revocable living trust into which approximately 4.6 million dollars was placed. At Ollie's death, the issue became the construction of the residuary clause of the trust. The trust in Article VII contained specific gifts to specific individuals and charities. Apparently, the residuary provision in Article VIII was repealed in its entirety. This left vague direction in the trust that the trustee shall hold, distribute and pay the remaining principal and undistributed income in perpetuity subject however to limitations imposed by law. Apparently, there was an intent to create a charitable trust with charities selected by the trustee. However, that was not expressed in the document itself. The trial court found the charitable argument persuasive and construed the residuary provision to be a charitable trust.

The Court of Appeals reversed and remanded. The State of Indiana filed a brief on behalf of a charitable trust. However, the Court of Appeals found that there were no

limitations in the trust document itself to charitable beneficiaries and as a result there was no specific gift to be enforced in the trust. This meant that the trust became part of the estate and the decedent died without a will, requiring intestate distribution. [If Trustee disclaimed power to distribute to non-charitable, it is not clear if that would cure this issue

H. BREACH – SALE WITHOUT APPROVAL – FINDER'S FEE. ***Living Trust Agreement of Morningstar v Fortunka,*** **136 N.E.3d 1139 (Ind. App. 2019).** The beneficiaries of a trust filed objections to the trustee's accounting asserting claims of breach of fiduciary duty, self-dealing, and negligent handling of trust assets. The trustee sold real estate from the trust at a substantial discount without ever having the property appraised, paid herself a salary for her services and paid herself a finder's fee for selling the real estate. The trial court entered judgment for the beneficiaries. The trial court concluded that the trustee was not a credible witness and that she breached her duty to preserve trust property by failing to have the properties appraised and for selling it against the objections of multiple beneficiaries at less than fair market value; that she breached her duty against self-dealing by paying herself a finder's fee without consultation or consent from the beneficiaries or the court and she breached her duty of loyalty to the beneficiaries by requiring them to strictly adhere to certain bidding criteria if they wanted to purchase the property, while giving third parties special treatment. The court found the trustee liable to the beneficiaries for lost profits of $128,000 and disgorged the $6,780 in finder's fees. This amount was charged against the trustee's beneficial interest in the Trust. The court also awarded a judgment against the trustee for $94,472.00 in attorney fees. The trustee appealed.

The Court of Appeals affirmed. The opinion includes a thorough discussion of the Indiana law on fiduciary relationships, breach of duty to preserve property, breach of duty of loyalty and fiduciary conflicts of interests. The Court found substantial evidence to support the judgment of the trial court.

I. CONSTRUED – SURVIVING/PER STIRPES – AMBIGUITY. *Murphy v Trustees of Star Financial Bank*, 140 N.E.3d 339 (Ind. App. 2020). Janice Dray (Janice) executed a Living Trust Agreement. The income from the Trust was to be distributed to Janice's sister-in-law, Jacqueline for life. Upon Jacqueline's death, the Trust property was to be liquidated and distributed in equal shares to Janice's sister, Alma and her brother, Ralph. The distribution provision in the Trust provided: At the death of [Jacqueline], the remaining assets are to be converted to cash and distributed in equal shares, share and share alike, to [Ralph], brother of [Janice], and [Alma], sister of [Janice], and if either said [Ralph] or [Alma] is not then living, to their surviving children, per stirpes. Jacqueline lived for 28 years after the trust was created and upon her death both Alma and Ralph had passed away. All of Alma's children had also passed away and two of Ralph's five children were deceased. The Trustee docketed the trust to request instructions as to the distribution. Ralph's children argued that the phrase "surviving children," as used in the distribution provision, placed two conditions on the distribution of the corpus: (1) the qualified recipient must be a child of Ralph or Alma; and (2) the recipient must be alive on the date of Jacqueline's passing, making them the sole beneficiaries. Alma's grandchildren argued that the use of "per stirpes" language in the distribution provision reinforced the idea that each of Ralph's and Alma's families should receive one-half of the Trust property, as the intent of Janice was to

create two equal gifts to the families of her two siblings due to the use of "equal shares" language, with a "per stirpes" division at the second generation. The trial court found the language of the trust to be ambiguous as "surviving" generally establishes a conditional gift requiring the beneficiary to be alive on the date of distribution, whereas "per stirpes" indicates a distribution among family members with a right of representation that allows descendants of a predeceased beneficiary to take the beneficiary's interest. To resolve such ambiguity, the trial court considered external evidence and found that Janice intended to create equal, unconditional, vested gifts of the remainder of the Trust corpus to the families of both of her siblings.

The Court of Appeals affirmed. Ralph's children argued that the "surviving" language predominated over "per stirpes" and that the first beneficiaries were Ralph and Alma as and the second-class beneficiaries were the children of Ralph and Alma who survived Ralph, Alma, and Jacqueline. They maintained that the corpus that should have been distributed to Alma's children and Ralph's predeceased children now passes to Ralph's surviving children because the survival of Alma's and Ralph's children was a condition precedent of receiving their parent's share. The Court of Appeals started with a discussion of Indiana law with regards to distribution. "Generally, when a gift is to a group of individuals sharing the same relationship to the settlor, the use of the words 'share and share alike' denotes a per capita distribution, rather than a per stirpes distribution." Trust Agreement of Westervelt v. First Interstate Bank of N. Ind., 551 N.E.2d 1180, 1184 (Ind. Ct. App. 1990), reh'g denied, trans. denied. 2020 Ind. App. LEXIS 8 at 3. "Per stirpes means literally by roots or stocks; by representation. It denotes that method of dividing an intestate estate where

a class or group of distributees take the share which their ancestor would have been entitled to, taking it by their right of representing such ancestor, and not as so many individuals, or as the expression is used, per capita." Matter of Estate of Walters, 519 N.E.2d 1270, 1272 (Ind. Ct. App. 1988), trans. denied. 2020 Ind. App. LEXIS 8 at 4. Janice's distribution provision contained a reference to both methods, which the Court of Appeals agreed made the document ambiguous. The Court noted that "Indiana has long recognized that extrinsic evidence of the facts and circumstances known to the settlor and existing at the time of execution may be considered by a court when construing an instrument." Citing to Dougherty v. Rogers, 119 Ind. 254, 20 N.E. 779, 781 (1889). 2020 Ind. App. LEXIS 8 at 5. The Court recognized that the trial court felt that a per stirpes distribution at the second-generation level, instead of per capita, was necessary to effectuate Janice's intent as Ralph and Alma did not have an equal number of children during their lifetimes. One of Alma's children had died in infancy, a fact known by Janice, the trial court suggested an explanation for the use of the term "surviving" as referring to Alma's five children who were alive when the Living Trust Agreement was created in 1990. 2020 Ind. App. LEXIS 8 at 5. The Court of Appeals held that the trial court properly considered extrinsic evidence and agreed with the trial court that a per stirpes distribution was intended.

J. ISSUE – ADOPTION - OUT OF FAMILY. *Walters v. Corder,* 146 N.E.3d 965 (Ind. App. 2020). Mildred Goodman set up an irrevocable trust for her son, Charles. The trust was to pay income to Charles for life, then income to Charles' wife for her life. At wife's death, the property was to be distributed to the issue of Charles, per stirpes. Charles had one son, David. David had three children with his wife, Joan- Brittany, Matthew and

Molly. Mildred also had a Will that created a trust for her grandson, David. The income was to be paid to David for his lifetime, remainder to David's then living children, share and share alike. Mildred died in 1994. Greatgrandchildren Brittany and Matthew were alive when Mildred died, and Mildred knew that Joan was pregnant with Molly. David and Joan divorced the year after Mildred's death. David married Michelle and they had a daughter Raquel. Joan remarried and David allowed her husband to adopt Brittany, Matthew and Molly. David died in 2017. The sole issue in this case was whether Brittany, Matthew and Molly would be included in the beneficiary classes (then living children or issue of Charles) under the two trusts. The probate court entered judgment for the three children to be included in the class. Raquel appealed.

The Court of Appeals affirmed. Raquel argued that she was the only biological child of David sine the other three children had been adopted out of the bloodline. The Court of Appeals noted that the primary goal in construing a trust is to ascertain and give effect to the intent of the settlor. The term "children" was not defined in either trust and the trusts were silent as to adopted children. Mildred had a strong relationship with Brittany and Matthew and knew that Joan was pregnant before she died. David and Joan were still married when Mildred died. The Court affirmed the decision of the probate court because it had no evidence of any intent on the part of Mildred to exclude her three great grandchildren from membership in the class of beneficiaries merely because her grandson gave his consent to their stepfather adopting them after Mildred died.

K. DECLARATORY JUDGMENT – STATUTE OF LIMITATIONS – CONSTRUCTIVE TRUST. *Deal v Gittings*, 144 N.E.3d 716 (Ind. App. 2020). Prior

Court of Appeals and Indiana Supreme Court decisions related to this case have been previously summarized. The lengthy facts significantly shortened here start with Niles and Georgia Richmond who were married in 1985. Nile's daughter, Brenda Gittings was from a prior marriage as was Georgia's son, William Deal. Niles and Georgia had separate trusts. Included in Niles' Trust was property in West Virginia. Niles' Trust had Brenda and his son, Marc as beneficiaries. When Niles died, Georgia became trustee of both trusts. She provided a copy of Niles' trust to Brenda but did not provide a copy of her trust. Georgia later sent to Brenda deeds transferring the real estate from Niles' trust to Georgia's trust, which Georgia changed to exclude Brenda and her brother Marc. The West Virginia property turned out to have over $3 million in oil royalties all of which ended up being paid to William, Georgia's son. In 2013, William petitioned the court to docket Niles' trust and grant him declaratory judgement approving the transfer of the land and the minerals to Georgia's trust. Brenda pursued a series of different defenses seeking to invalidate the transfers. The trial court found that those defenses violated the statute of limitations. The Court of Appeals affirmed and the Indiana Supreme Court granted transfer. While Brenda's claims were barred by the statute of limitations it did not prevent them from diminishing William's claim to declaratory judgement. William was not entitled to approval of the transfers because Georgia did not seek court approval despite a clear conflict of interest. The Indiana Supreme Court affirmed the trial court in part, reversed in part, and remained for further proceedings. On remand, the trial court issued an order declaring that the transfers from Niles' trust to Georgia's trust was void ab initio. It also ordered a constructive trust be established from the time of the transfer to protect money that should have been paid to Brenda but went to William. William appealed.

The Court of Appeals affirmed. Its main conclusion is that the trial court had no other option because of the decision of the Indiana Supreme Court and that the transfers were void ab initio. William argued that the transferred were voidable but not void. The Court of Appeals found that the conflict of interest involved in this situation, under Indiana law, did make the deeds void. William also argued that the constructive trust was a remedy and not an independent cause of action. However, the Court of Appeals noted that the constructive trust is imposed where there is unjust enrichment. They found that the money paid to William should have been paid to Brenda and that he was unjustly enriched.

III. GUARDIANSHIPS AND POWERS OF ATTORNEY

A. EXPLOITATION OF DEPENDENTS AND ENDANGERED ADULTS. SB 249 defines "person in a position of trust" and "self-dealing." It provides that a: (1) person commits exploitation of a dependent or an endangered adult if the person recklessly uses or exerts control over the personal services or property of an endangered adult or dependent; and (2) person in a position of trust commits exploitation of a dependent or an endangered adult if the person recklessly engages in self-dealing with the property of the dependent or endangered adult. It increases the penalty if the person has a prior unrelated conviction. It removes: (1) provisions relating to the Social Security Act; (2) a sentencing enhancement that applies if the victim is at least 60 years of age; and (3) a sentencing enhancement based on the value of the property.

B. GUARDIAN – COMPROMISE – CONFIDENTIALITY. SB 50, Section 7 amends I.C. 29-3-9-7 to make compromise of a guardianship matter confidential except for

the persons listed in the statute. This was a Section bill approved by the Probate Code Study Commission.

C. GUARDIANSHIP – ADULT SERVICES. SB 139 combines the volunteer advocates for seniors program and the volunteer for advocates for incapacitated adults program into one program. It requires that in submitting a progress report to the court, a volunteer advocate for seniors and incapacitated adults shall include a person's centered care plan in the progress report.

D. GUARDIAN – TERMINATION – PARENTING TIME. ***Manis v McNabb,* 104 N.E.3d 611 (Ind. App. 2018)**. Child was born in 2012. In 2015, Guardian filed a petition for Guardianship. After a hearing, the trial court appointed Guardian as temporary guardian. Mother filed a motion to terminate the guardianship and requested parenting time. The trial court ordered the temporary guardianship extended. Mother was charged with possession or use of drugs, possession of a controlled substance, and possession of paraphernalia. At this point, the trial court appointed Guardian as permanent guardian and did not order parenting time for Mother, instead leaving the issue of visitation to the discretion of the Guardian. Mother went inpatient for substance abuse treatment and during one of her stays she was alleged to have made threats of harm about the Guardian. The Guardian obtained a protective order against Mother. Mother resides with her grandparents who furnish her with total financial support; she hasn't worked in two years; she has had multiple car accidents and she totaled two cars; and she used her grandmother's credit card without authorization. Mother appealed the trial court's denial of her petition to terminate guardianship and for denial of her request for parenting time.

The Court of Appeals affirmed, in part, and reversed, in part. It noted that there is a strong presumption that a child's interests are best served by placement with the natural parent. A parent's burden to show a modification of custody is justified is "minimal," and after meeting "this 'minimal' burden of persuasion to terminate the guardianship, the third party has the burden to prove by clear and convincing evidence that the child's best interests are substantially and significantly served by placement with another. Matter of Guardianship of I.R., 77 N.E.3d at 813. The Court felt that the evidence showed that Mother's living situation was not completely stable; that Mother was not working on becoming self-sufficient; and that Mother was either unable or unwilling to make safe decisions for herself. Guardian met her burden to prove by clear and convincing evidence that Child's best interests was substantially and significantly served by placement away from Mother. The Court held that the trial court did not err by denying Mother's petition to terminate the guardianship. Next the Court addressed whether a trial court has authority to determine and order parenting time for a parent whose child is placed with a guardian. The Court reasoned that although no statute explicitly grants courts this authority in guardianship proceedings, no statute precludes it, either. The Court noted that the General Assembly has clearly intended for noncustodial parents to have parenting time unless it would endanger or impair the physical or mental health of the child. The Court held that a trial court has the authority to determine and order parenting time for a parent whose child is placed with a guardian. The Court reversed on the parenting time issue and remanded for further proceedings.

E. GUARDIANSHIP – SPECIAL IMMIGRANT JUVENILE – JURISDICTION. In re the Guardianship of Xitumul, 137 N.E.3d 945 (Ind. App. 2019).

Uncle, an undocumented immigrant, petitioned to be appointed guardian of his niece. The niece had been abandoned in Guatemala by her parents and sent alone to United States. Uncle also sought an Order that would enable his niece to seek special immigrant juvenile (SIJ) status from the United States Citizen and Immigration

Services (USCIS). The Court found it unnecessary to appoint Uncle as a guardian because he held a power of attorney over his niece and because no party to the action was a US citizen. Uncle appealed.

The Court of Appeals reversed and remanded. It analyzed the Special Immigrant Juvenile (SIJ) federal legislation. SIJ status was created by Congress "to protect abused, neglected, and abandoned immigrant youth through a process allowing them to become legal permanent residents" despite their unauthorized entry into or unlawful presence in the United States. Luis, 114 N.E.3d at 857 (quoting In the Interest of J.J.X.C., a Child, 318 Ga. App. 420, 734 S.E.2d 120, 123 (2012)). In order to qualify as a SIJ a person must be unmarried, under the age of twenty-one, be present in the United States, and be legally committed to or placed in the custody of an individual by a juvenile court located in the United States. In addition, it must be found that reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law and it would not be in the person's best interest to be returned to their country of nationality. Xitumul, 137 N.E.3d at 951. The state juvenile court is to make the determinations regarding abuse, neglect, or abandonment, and a child's best interests and entering an order regarding its findings. Once the Order is obtained, the juvenile can then submit their application for SIJ status to the USCIS. In reviewing the Indiana Guardianship Code, the Court of Appeals

noted that section 29-3-5-1(a) provides that "[a]ny person may file a petition for the appointment of a person to serve as guardian for an incapacitated person or minor[.]" There are no restrictions in the Indiana Guardianship Code based on citizenship status of either the proposed Guardian nor of the minor. While the trial court denied the appointment of a guardian, the court made many findings for SIJ status. Citing to Luis, 114 N.E.3d at 859, the Court noted that, "it is inescapable that a minor seeking SIJ status is dependent upon a state court to make the prerequisite findings in a predicate order for the minor to qualify for such status under the scheme established by federal immigration law." 137 N.E.3d at 952. The Court of Appeals remanded to the trial court with instructions to reconsider the request for guardianship in light of Indiana law and the request for SIJ findings and, if the guardianship is granted, to issue a predicate order with the appropriate findings.

F. GUARDIANSHIP – ARBITRATION – ASSISTED LIVING – APPLICATION. *Jane Doe 1 v. Carmel Operator*, 144 N.E.3d 743 (Ind. App. 2020). The Guardian of an assisted living facility resident brought a claim for breach of contract and negligence against the facility ("CSL"), an employee and the background checking company ("Certiphi") for alleged sexual abuse of the resident by the employee. The Guardian visited CSL and informed CSL that she had also toured other facilities. Guardian authorized a nurse at CSL to assess Resident in May, 2018. On May 23, 2018, Guardian went to CSL and paid the deposit. On the morning of May 31, CSL e-mailed an Assisted Living and Memory Care Residency Agreement ("Residency Agreement") to Guardian. On June 4, 2018, CSL signed the Residency Agreement that Guardian had signed and provided to CSL on June 1. Resident moved in on June 4. Section VII of the Residency Agreement was entitled, in bold capital

letters, “BINDING ARBITRATION AGREEMENT” (Arbitration Agreement). Id. at 63. The Arbitration Agreement stated, in relevant part: THIS AGREEMENT GOVERNS IMPORTANT LEGAL RIGHTS. PLEASE READ IT CAREFULLY AND IN ITS ENTIRETY BEFORE SIGNING IT.

The Agreement went on to define arbitration in great detail. The “SIGNATURE PAGE FOR ASSISTED LIVING RESIDENCY AGREEMENT” immediately follows the Arbitration Agreement. The signature page started with: The undersigned certifies that he/she has read this Assisted Living Residency Agreement and its Addenda or that the Residency Agreement and its Addenda have been fully explained to him/her, that he/she understands their contents, and has received a copy of the Residency Agreement and its Addenda and that he/she is the Resident, or a person authorized by the Resident or otherwise authorized to execute this Residency Agreement and its Addenda and accept all of the terms therein. The trial court, denied CSL’s motions to dismiss but granted their motion to compel arbitration. Guardian appealed raising two issues: whether the trial court erred by enforcing the arbitration agreement despite Guardian’s claim that the agreement is unconscionable and whether the trial court erred by enforcing the arbitration agreement against Certiphi based upon equitable estoppel.

The Court of Appeals affirmed. The Arbitration Agreement referenced the Federal Arbitration Act. The Act places arbitration agreements on equal footing with any contract and requires courts to enforce them. General contract defenses of fraud, duress or unconscionability apply. Unconscionable has been defined in Indiana as a contract that “no sensible person not under delusion or duress or in distress would make, and one that no

honest and fair person would accept. See McAdams v. Foxcliff, 92 N.E.3d 114, 1150 (Ind. App. 2018). The Court of Appeals found that the Arbitration Agreement applied and there was no evidence of its unconscionability. Further the broad language of the Arbitration Agreement meant that it was to apply to all agents of CSL as well, and that Guardian must arbitrate her claim against Certiphi.

IV. MISCELLANEOUS

A. BURIAL SITE – WRONGFUL RESALE – REMEDY. *Salyer v. Washington Regular Baptist Church Cemetery*, 135 N.E.3d 955 (Ind. App. 2019). In 1982, Kathy Salyer purchased four contiguous grave sites in the cemetery comprised of lot 14. She purchased an additional grave site (grave site 15), next to lot 14 on its north end. In 2014, Salyer noted that a Lowe Johnson had been buried in grave site 15. She contacted the cemetery which admitted it had inadvertently sold grave site 15 twice. In 2015, Salyer filed a small claims action requesting that the cemetery move Johnson and restore grave site 15 to her. Johnson's daughter, Christy Sams, intervened because she did not want her father moved as grave site 15 was next to his family plot. The first Court of Appeals case reversed and remanded, finding that the small claims court had no jurisdiction for this type of declaratory action. On remand, the circuit court of Ripley County entered a judgment allowing Lowe Johnson's body to remain but ordering the cemetery to give Salyer a free grave site. Salyer appealed.

The Court of Appeals affirmed. It began by recognizing that the purchase of a grave site is a real estate transaction. I.C. 23-14-33-6 defines a burial rite as a "right of

internment, entombment or an inurnment. As a result, Salyer was entitled to use the grave site in fee simple for burial purposes only. The Court of Appeals then turned to the interpretation of I.C. 23-14-59-2 which provides in a case of wrongful burial, that the cemetery "shall" correct the problem. It also noted that the declaratory judgment action in this case was in the discretion of the trial court and that the trial court had a difficult equitable decision to make with Johnson buried next to his family in Salyer's burial site. The Court of Appeals found that the trial court had ample evidence to support its decision allowing Johnson's body to remain but giving Salyer a free grave site next to her family plot. Judge Kirsch dissented. His interpretation of I.C. 23-1459-2 would require the cemetery to remove Johnson's body from Salyer's burial site.

NOTE: In ***Salyer v. Wash. Regular Baptist Church Cemetery*, 141 N.E.3d 384 (Ind. 2020),** the Supreme Court granted transfer. The Court found that the burial of a person in one of Salyer's plots was wrongful burial under the wrongful burial statute and that the decedent's remains must be removed. The Supreme Court affirmed the denial of damages and fees.

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2019 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 50

AN ACT to amend the Indiana Code concerning probate.

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

SECTION 1. IC 6-1.1-5-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 7. (a) A person to whom the title to real property has passed, either under the laws of descent of this state or by virtue of the last will of a decedent, may procure a transfer of the real property on the tax duplicate on which the real property is assessed and taxed. In order to procure the transfer, the person must ~~prepare~~ **file** an affidavit ~~and, except as provided in section 9 of this chapter, file it~~ **prepared under IC 29-1-7-23(b)** with the auditor of the county in which the real property is ~~situated.~~ **located and record** the affidavit ~~shall contain the following information:~~ **with the recorder of the county in which the real property is located.**

~~(1) the decedent's date of death;~~

~~(2) whether the decedent died testate or intestate; and~~

~~(3) the affiant's interest in the real property.~~

~~In addition, if the decedent died testate, the affiant must attach a certified copy of the decedent's will to the affidavit. However, if the will has been probated or recorded in the county in which the real property is located, the affiant, in lieu of attaching a certified copy of the will, shall state that fact in the affidavit and indicate the volume and page of the record where the will may be found.~~

~~(b) Except as provided in section 9 of this chapter, the county auditor shall enter a transfer of the real property in the proper transfer~~

~~book after the affidavit is filed with his office.~~

~~(c)~~ **(b)** No transfer made under this section has the effect of conferring title upon the person procuring the transfer.

SECTION 2. IC 29-1-7-23, AS AMENDED BY P.L.231-2019, SECTION 10, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 23. (a) When a person dies, the person's real and personal property passes to persons to whom it is devised by the person's last will or, in the absence of such disposition, to the persons who succeed to the person's estate as the person's heirs; but it shall be subject to the possession of the personal representative and to the election of the surviving spouse and shall be chargeable with the expenses of administering the estate, the payment of other claims and the ~~allowance is~~ **allowances** under IC 29-1-4-1, except as otherwise provided in IC 29-1.

(b) **A person may sign and record an affidavit to establish** prima facie evidence of the ~~devolution of~~ **passage of** real estate title to distributees under this section. **An affidavit under this section** may ~~be established by an affidavit containing~~ **contain** the following information:

(1) The decedent's name **and date of death.**

(2) ~~The decedent's date of death.~~ **A statement of the affiant's relationship to the decedent.**

(3) A description of ~~the most recent~~ **how the following deeds or other instruments vested in the decedent an ownership or leasehold interest in real property, with a cross-reference if applicable, under IC 36-2-7-10(l) to each deed or other** instrument:

(A) Deeds or other instruments recorded in the office of the recorder ~~of the county~~ where the real ~~estate~~ **property** is located.

(B) Deeds or other instruments that disclose a title transaction (as defined in IC 32-20-2-7).

~~(4) A description of the most recent instrument responsible for conveying title to the real estate.~~

~~(5)~~ **(4)** ~~A~~ **The legal** description of the conveyed real ~~estate~~ **property** as it appears in ~~the instrument~~ **instruments** described in subdivision ~~(4).~~ **(3).**

(5) The names of all distributees known to the affiant.

(6) ~~Identifying information unique to~~ **An explanation of how each interest in** the ~~instrument or instruments described in subdivisions (3) and (4), as applicable, that may be used by the recorder to identify the instrument or instruments, as applicable,~~

~~in the recorder's records.~~

~~(7) An explanation of how title~~ **real property** ~~devolved~~ **passed upon the decedent's death** to each distributee ~~under this section, including a recitation of devolution~~ by:

(A) intestate ~~transfer~~ **succession** under IC 29-1-2-1; or

(B) ~~a~~ **the** decedent's last will and testament that has been admitted to probate under section ~~9~~ **13** of this chapter, **with references to:**

(i) the name and location of the court that issued the order admitting the will to probate; and

(ii) the date when the court admitted the decedent's will to probate.

~~(8) A statement that establishes that:~~

~~(A) at least seven (7) months have elapsed since the decedent's death;~~

~~(B) no letters testamentary or letters of administration have been issued to a court appointed personal representative for the decedent within the time limits specified under section 15.1(d) of this chapter; and~~

~~(C) a probate court has not issued findings and an accompanying order preventing the limitations in section 15.1(b) of this chapter from applying to the decedent's real property.~~

~~(9) The name of each distributee known to the affiant.~~

~~(10)~~ **(7)** An explanation of how ~~each portion of the~~ **any** fractional ~~interest~~ **interests in the real property** that may have ~~devolved among~~ **passed to** multiple distributees ~~known to the affiant was~~ **were** calculated **and apportioned.**

(c) Upon presentation of an affidavit described in subsection (b), the auditor of the county where the real ~~estate~~ **property** described in ~~subsection (b)~~ **the affidavit** is located must endorse the affidavit ~~and record the estate title transfer in the auditor's real estate ownership records~~ as an instrument that is exempt from the requirements to file a sales disclosure **form and must enter the names of the distributees shown on the affidavit on the tax duplicate on which the real property is transferred, assessed, and taxed under IC 6-1.1-5-7.**

(d) Upon presentation of an affidavit described in subsection (b), the recorder of the county where the real ~~estate~~ **property** described in ~~subsection (b)~~ **the affidavit** is located must:

(1) record the affidavit; and

(2) index the affidavit as the most recent instrument responsible for the transfer of the real ~~estate~~ **property** described in subsection

~~(b).~~ **(b)(4).**

(e) Any person may rely upon an affidavit **recorded with the county recorder:**

(1) made in good faith; and

(2) under this section;

as **prima facie** evidence of an effective transfer of **the decedent's** title **to the real property interest under subsection (a) to the distributee described in the affidavit.**

(f) If:

(1) at least seven (7) months have elapsed since the decedent's death;

(2) the clerk of the court described in subsection (b)(6)(B) has not issued letters testamentary or letters of administration to the court appointed personal representative for the decedent within the time limits specified under section 15.1(d) of this chapter; and

(3) the court described in subsection (b)(6)(B) has not issued findings and an accompanying order preventing the limitations in section 15.1(b) of this chapter from applying to the decedent's real property;

any person may rely upon the affidavit described in subsection (e) as evidence that the real property may not be sold by an executor or administrator of the decedent's estate to pay a debt or obligation of the decedent, which is not a lien of record ~~(as defined in IC 32-20-3-1).~~ **in the county in which the real property is located, or to pay any costs of administration of the decedent's estate.**

SECTION 3. IC 29-1-7-24, AS AMENDED BY P.L.86-2018, SECTION 211, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 24. Except as provided in ~~IC 29-1-8-1, IC 29-1-8-2, IC 29-1-8-3, and~~ IC 29-1-13-2, no will is effective for the purpose of proving title to, or the right to the possession of, any real or personal property disposed of by the will, until it has been admitted to probate.

SECTION 4. IC 29-1-8-1, AS AMENDED BY P.L.231-2019, SECTION 13, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 1. (a) Forty-five (45) days after the death of a decedent and upon being presented an affidavit that complies with subsection (b), a person:

(1) indebted to the decedent; or

(2) having possession of personal property or an instrument evidencing a debt, an obligation, a stock, or a chose in action belonging to the decedent;

shall make payment of the indebtedness or deliver the personal property or the instrument evidencing a debt, an obligation, a stock, or a chose in action to a distributee claiming to be entitled to payment or delivery of property of the decedent as alleged in the affidavit.

(b) The affidavit required by subsection (a) must be an affidavit made by or on behalf of the distributee and must state the following:

(1) That the value of the gross probate estate, wherever located, (less liens, encumbrances, and reasonable funeral expenses) does not exceed:

(A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, ~~2007;~~ **2006;** and

(B) fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, ~~2007.~~ **2006.**

(2) That forty-five (45) days have elapsed since the death of the decedent.

(3) That no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction.

(4) The name and address of each distributee that is entitled to a share of the property and the part of the property to which each distributee is entitled.

(5) That the affiant has notified each distributee identified in the affidavit of the affiant's intention to present an affidavit under this section.

(6) That the affiant is entitled to payment or delivery of the property on behalf of each distributee identified in the affidavit.

(c) If a motor vehicle or watercraft (as defined in IC 9-13-2-198.5) is part of the estate, nothing in this section shall prohibit a transfer of the certificate of title to the motor vehicle if five (5) days have elapsed since the death of the decedent and no appointment of a personal representative is contemplated. A transfer under this subsection shall be made by the bureau of motor vehicles upon receipt of an affidavit containing a statement of the conditions required by subsection (b)(1) and (b)(6). The affidavit must be duly executed by the distributees of the estate.

(d) A transfer agent of a security shall change the registered ownership on the books of a corporation from the decedent to a distributee upon the presentation of an affidavit as provided in subsection (a).

(e) For the purposes of subsection (a), an insurance company that, by reason of the death of the decedent, becomes obligated to pay a death benefit to the estate of the decedent is considered a person

indebted to the decedent.

(f) For purposes of subsection (a), property in a safe deposit box rented by a decedent from a financial institution organized or reorganized under the law of any state (as defined in IC 28-2-17-19) or the United States is considered personal property belonging to the decedent in the possession of the financial institution.

(g) For purposes of subsection (a), a distributee has the same rights as a personal representative under IC 32-39 to access a digital asset (as defined in IC 32-39-1-10) of the decedent.

SECTION 5. IC 29-1-8-3, AS AMENDED BY P.L.231-2019, SECTION 14, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 3. (a) As used in this section, "fiduciary" means:

(1) the personal representative of an unsupervised estate; or

(2) a person appointed by a court under this title to act on behalf of the decedent or the decedent's distributees.

(b) Except as otherwise provided in this section, if the value of a decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of:

(1) an amount equal to:

(A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, ~~2007,~~ **2006;** and

(B) fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, ~~2007,~~ **2006;**

(2) the costs and expenses of administration; and

(3) reasonable funeral expenses;

the fiduciary, without giving notice to creditors, may file a closing statement as provided in section 4 of this chapter and disburse and distribute the estate to the persons entitled to it, as provided in section 4 of this chapter.

(c) If an estate described in subsection (a) includes real property, an affidavit may be recorded in the office of the recorder in the county in which the real property is located. The affidavit must contain the following:

(1) The legal description of the real property.

(2) The following ~~statement.~~ **statements:**

(A) If the individual dies after June 30, ~~2007~~ **2006,** the following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: fifty thousand dollars ($50,000), the costs and expenses of administration, and reasonable funeral expenses.".

(B) If the individual dies before July 1, ~~2007,~~ **2006,** the

following statement: "It appears that the decedent's gross probate estate, less liens and encumbrances, does not exceed the sum of the following: twenty-five thousand dollars ($25,000), the costs and expenses of administration, and reasonable funeral expenses.".

(3) The name of each person entitled to at least a part interest in the real property as a result of a decedent's death, the share to which each person is entitled, and whether the share is a divided or undivided interest.

(4) A statement which explains how each person's share has been determined.

SECTION 6. IC 29-1-8-4, AS AMENDED BY P.L.231-2019, SECTION 15, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 4. (a) As used in this section, "fiduciary" means:

(1) the personal representative of an unsupervised estate; or

(2) a person appointed by a court under this title to act on behalf of the decedent or the decedent's distributees.

(b) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a fiduciary may close an estate administered under the summary procedures of section 3 of this chapter by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the fiduciary, the value of the gross probate estate, less liens and encumbrances, did not exceed the sum of:

(A) twenty-five thousand dollars ($25,000), for the estate of an individual who dies before July 1, ~~2007,~~ **2006,** and fifty thousand dollars ($50,000), for the estate of an individual who dies after June 30, ~~2007~~; **2006;**

(B) the costs and expenses of administration; and

(C) reasonable funeral expenses;

(2) the fiduciary has fully administered the estate by disbursing and distributing it to the persons entitled to it; and

(3) the fiduciary has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom the fiduciary is aware and has furnished a full accounting in writing of the administration to the distributees whose interests are affected.

(c) If no actions, claims, objections, or proceedings involving the fiduciary are filed in the court within two (2) months after the closing statement is filed, the fiduciary may immediately disburse and

distribute the estate free from claims to the persons entitled to the disbursement and distribution. After disbursing and distributing an estate, the fiduciary must file a report in the court of the disbursement and distribution. The appointment of the personal representative or the duties of the fiduciary, as applicable, shall terminate upon the filing of the report.

(d) A closing statement filed under this section has the same effect as one (1) filed under IC 29-1-7.5-4.

(e) A copy of any affidavit recorded under section 3(c) of this chapter must be attached to the closing statement filed under this section.

SECTION 7. IC 29-3-9-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 7. (a) Whenever it is proposed to compromise any claim by or against a protected person or the protected person's property, the court, on petition of the guardian, may enter an order authorizing the compromise to be made if satisfied that the compromise will be in the best interest of the protected person.

(b) Whenever a minor has a disputed claim against another person, whether arising in contract, tort, or otherwise, and a guardian for the minor and the minor's property has not been appointed, the parents of the minor may compromise the claim. However, before the compromise is valid, it must be approved by the court upon filing of a petition requesting the court's approval. If the court approves the compromise, it may direct that the settlement be paid in accordance with IC 29-3-3-1. If IC 29-3-3-1 is not applicable, the court shall require that a guardian be appointed and that the settlement be delivered to the guardian upon the terms that the court directs.

(c) Any exhibit demonstrating a compromise on behalf of a protected person or a minor and any testimony related to such compromise that is offered or admitted into evidence in a legal proceeding commenced under this section shall be maintained by the court as a confidential court record. The confidential exhibits and record may not be used in any other proceeding or for any other person.

(d) Subsection (c) does not prohibit the following persons from having access to the confidential exhibits and record for the purpose of learning, confirming, and enforcing the economic terms of the compromise, for the purpose of enforcing or modifying any trust that is funded under the compromise, or for the purpose of obtaining a qualified order with respect to a structured settlement under IC 34-50-2 and 26 U.S.C. 5891(b):

(1) The attorney of record for the incapacitated person or

minor.

(2) A guardian or guardian ad litem appointed for the incapacitated person or minor by a court of competent jurisdiction, and the attorney, if any, for the guardian or guardian ad litem.

(3) Each current trustee or trust director that participates in the administration of a trust funded under the compromise and the attorneys of record for each current trustee or trust director.

(4) A prospective successor trustee or successor trust director that is proposed to serve in the administration of a trust funded under the compromise.

SECTION 8. IC 30-4-1.5-4, AS ADDED BY P.L.40-2018, SECTION 3, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 4. (a) Any of the following persons may create a valid inter vivos trust by electronically signing an electronic trust instrument, **with no witness requirement or acknowledgment before any notary public,** ~~that~~ **if the electronic trust instrument** sufficiently states the terms of the trust in compliance with IC 30-4-2-1(b):

(1) A settlor.

(2) An agent of a settlor who is an attorney in fact.

(3) A person who holds a power of appointment that is exercisable by appointing money or property to the trustee of a trust.

(4) An adult who:

(A) is not a trustee named in the electronic trust instrument; and

(B) electronically signs the electronic trust instrument:

(i) at the settlor's direction; and

(ii) in the direct physical presence of the settlor.

If an adult electronically signs the trust instrument under subdivision (4), the trust instrument must indicate that the adult signer is signing at the direction of the settlor and in the settlor's direct physical presence. For all purposes under this article, a trust instrument electronically signed under subdivisions (1), (2), or (4) is the creation of the named settlor.

~~The electronic signature of the settlor or other person creating the trust is not required to be acknowledged or witnessed by a notary.~~

(b) The following persons may use the electronic record associated with an electronic trust instrument to make a complete converted copy of an electronic trust instrument immediately after its execution or at a later time when a complete and intact electronic record is available:

(1) The settlor.

(2) A trustee who accepts appointment under the electronic trust instrument.

(3) An attorney representing the settlor or the trustee.

(4) Any other person authorized by the settlor.

If a complete converted copy is generated from a complete and intact electronic record associated with an electronic trust instrument, the person who generates the complete converted copy is not required to sign the affidavit described in subsection (d).

(c) If:

(1) a person discovers an accurate but incomplete copy of an electronic trust instrument;

(2) the electronic record for the electronic trust instrument becomes:

(A) lost; or

(B) corrupted; or

(3) freedom from tampering or unauthorized alteration cannot be authenticated or verified;

a living settlor, attorney, custodian, or person responsible for the discovery of the incomplete electronic trust instrument may prepare a complete converted copy of the electronic trust instrument using all available information if the person creating the complete converted copy of the electronic trust instrument has access to a substantially complete, nonelectronic copy of the electronic trust instrument.

(d) A person who creates a complete converted copy of an electronic trust instrument under subsection (c) shall sign an affidavit that affirms or specifies, as applicable, the following:

(1) The date the electronic trust instrument was created.

(2) The time the electronic trust instrument was created.

(3) How the incomplete electronic trust instrument was discovered.

(4) The method and format used to store the original electronic record associated with the electronic trust instrument.

(5) The methods used, if any, to prevent tampering or the making of unauthorized alterations to the electronic record or electronic trust instrument.

(6) Whether the electronic trust instrument has been altered since its creation.

(7) Confirmation that an electronic record, including the document integrity evidence, if any, was created at the time the settlor made the electronic trust instrument.

(8) Confirmation that the electronic record has not been altered

while in the custody of the current custodian or any prior custodian.

(9) Confirmation that the complete converted copy is a complete and correct duplication of the electronic trust instrument and the date, place, and time of its execution by the settlor or the settlor's authorized agent.

(e) A complete converted copy derived from a complete and correct electronic trust instrument may be docketed under IC 30-4-6-7 or, absent any objection, offered and admitted as evidence of the trust's terms in the same manner as the original and traditional paper trust instrument of the settlor. Whenever this article permits or requires the trustee of a trust to provide a copy of a trust instrument to a beneficiary or other interested person, the trustee may provide a complete converted copy of the electronic trust instrument. A complete and converted copy is conclusive evidence of the trust's terms unless otherwise determined by a court in an order entered upon notice to all interested persons and after an opportunity for a hearing.

SECTION 9. IC 30-4-2-1, AS AMENDED BY P.L.51-2014, SECTION 19, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 1. (a) A trust in either real or personal property is enforceable only if there is written evidence of the terms of the trust bearing the signature of **any of the following persons:**

(1) The settlor. ~~or~~

(2) The settlor's authorized agent.

(3) An adult who:

(A) is not a trustee named in the trust's written terms; and

(B) signs the trust's written terms:

(i) at the settlor's direction; and

(ii) in the direct physical presence of the settlor.

If an adult signs at the settlor's direction under subdivision (3), the written evidence of the trust's terms must identify that adult signer and must state that the adult is signing at the direction of the settlor and in the settlor's direct physical presence.

(b) Except as required in the applicable probate law for the execution of wills, no formal language is required to create a trust, but the terms of the trust must be sufficiently definite so that the trust property, the identity of the trustee, the nature of the trustee's interest, the identity of the beneficiary, the nature of the beneficiary's interest and the purpose of the trust may be ascertained with reasonable certainty.

(c) It is not necessary to the validity of a trust that the trust be funded with or have a corpus that includes property other than the

present or future, vested or contingent right of the trustee to receive proceeds or property, including:

(1) as beneficiary of an estate under IC 29-1-6-1;

(2) life insurance benefits under section 5 of this chapter;

(3) retirement plan benefits; or

(4) the proceeds of an individual retirement account.

(d) A trust created under:

(1) section 18 of this chapter for the care of an animal; or

(2) section 19 of this chapter for a noncharitable purpose;

has a beneficiary.

(e) A trust has a beneficiary if the beneficiary can be presently ascertained or ascertained in the future, subject to any applicable rule against perpetuities.

(f) A power of a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

(g) A trust may be created by exercise of a power of appointment in favor of a trustee.

SECTION 10. IC 30-4-3-6, AS AMENDED BY P.L.231-2019, SECTION 24, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 6. (a) The trustee has a duty to administer a trust according to the terms of the trust.

(b) Unless the terms of the trust or the provisions of section 1.3 of this chapter provide otherwise, the trustee also has a duty to do the following:

(1) Administer the trust in a manner consistent with IC 30-4-3.5.

(2) Take possession of and maintain control over the trust property.

(3) Preserve the trust property.

(4) Make the trust property productive for both the income and remainder beneficiary. As used in this subdivision, "productive" includes the production of income or investment for potential appreciation.

(5) Keep the trust property separate from the trustee's individual property and separate from or clearly identifiable from property subject to another trust.

(6) Maintain clear and accurate accounts with respect to the trust estate.

(7) Except as provided in subsection (c), keep the following beneficiaries reasonably informed about the administration of the trust and of the material facts necessary for the beneficiaries to

protect their interests:

(A) A current income beneficiary.

(B) A beneficiary who will become an income beneficiary upon the expiration of the term of the current income beneficiary, if the trust has become irrevocable by:

(i) the terms of the trust instrument; or

(ii) the death of the settlor.

A trustee satisfies the requirements of this subdivision by providing a beneficiary described in clause (A) or (B), upon the beneficiary's written request, access to the trust's accounting and financial records concerning the administration of trust property and the administration of the trust.

(8) Upon:

(A) the trust becoming irrevocable:

(i) by the terms of the trust instrument; or

(ii) by the death of the settlor; and

(B) the written request of an income beneficiary or remainderman;

promptly provide a copy of the complete trust instrument to the income beneficiary or remainderman. This subdivision does not prohibit the terms of the trust from requiring the trustee to separately provide each beneficiary only the portions of the trust instrument that describe or pertain to that beneficiary's interest in the trust and the administrative ~~provision~~ **provisions** of the trust instrument that ~~pertains~~ **pertain** to all beneficiaries of the trust.

(9) Take whatever action is reasonable to realize on claims constituting part of the trust property.

(10) Defend actions involving the trust estate.

(11) Supervise any person to whom authority has been delegated.

(12) Determine the trust beneficiaries by acting on information:

(A) the trustee, by reasonable inquiry, considers reliable; and

(B) with respect to heirship, relationship, survivorship, or any other issue relative to determining a trust beneficiary.

(c) The terms of a trust may expand, restrict, eliminate, or otherwise vary the right of a beneficiary to be informed of the beneficiary's interest in a trust for a period of time, including a period of time related to:

(1) the age of the beneficiary;

(2) the lifetime of a settlor or the spouse of a settlor;

(3) a term of years or a period of time ending on a specific date; or

(4) a specific event that is certain to occur.

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(d) During any period of time that the trust instrument restricts or eliminates the right of a beneficiary to be informed of the beneficiary's interest in a trust, a designated representative for the beneficiary:

(1) shall represent that beneficiary and bind that beneficiary's interests for purposes of any judiciary proceeding or nonjudicial matter involving the trust unless the court finds, after a hearing upon notice, that a conflict of interest exists between the beneficiary and the designated representative; ~~and~~

(2) has the authority to initiate or defend and participate in any proceeding relating to the trust under this article or under IC 30-2 on behalf of the beneficiary; **and**

(3) shall not disclose to the beneficiary the information provided by the trustee unless the court orders disclosure or the trustee agrees to the disclosure.

An alleged conflict of interest between a beneficiary and the beneficiary's designated representative may be asserted to the court by the beneficiary whose right to be informed of the beneficiary's interest in a trust is restricted or eliminated in the trust instrument or by any other person authorized to represent and bind that beneficiary's interest under IC 30-4-6-10.5.

(e) If:

(1) a beneficiary is an adult and has not been adjudicated to be an incapacitated person;

(2) the trust instrument restricts or eliminates the right of the beneficiary to be informed of the beneficiary's interest in a trust; and

(3) the beneficiary discovers **material** information about the beneficiary's interest in the trust from sources other than the trustee;

subsections (c) and (d) do not prohibit the beneficiary from demanding **or petitioning for an accounting or statement regarding the trust under IC 30-4-5-12(c), from receiving a copy of all relevant portions of the trust instrument, or from demanding** and receiving, **under subsection (b)(7), other** information about the trust and its administration ~~under subsection (b)(7), including a copy of all relevant portions of the trust instrument, or an accounting or statement regarding the trust under IC 30-4-5-12(c).~~ **that is consistent with the content and scope of the information that the beneficiary received from sources other than the trustee.** The beneficiary may also initiate and participate in any proceeding against or with the trustee under this chapter.

SECTION 11. IC 30-4-5-14.5, AS AMENDED BY P.L.231-2019,

SECTION 27, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 14.5. (a) A trustee may obtain a nonjudicial settlement of its accounts in accordance with subsection (b) when:

(1) a trust terminates pursuant to the terms of the trust;

(2) a trust terminates early pursuant to IC 30-4-3-24.5;

(3) a trustee resigns or is removed; or

(4) a trustee seeks discharge of an interim accounting period when the trust is continuing.

(b) A trustee who elects to proceed under this section shall provide the following to the qualified beneficiaries of the trust and a successor trustee, if applicable, within a reasonable time after termination of the trust pursuant to its terms, the resignation or removal of the trustee, or the end of the period for which the trustee is seeking discharge:

(1) A statement showing the fair market value of the ~~new~~ **net** assets to be distributed from a terminating trust or to a successor trustee.

(2) A trust accounting for the prior three (3) years showing all receipts and disbursements and inventory value of the net assets.

(3) An estimate for any items reasonably anticipated to be received or disbursed.

(4) The amount of any fees, including trustee fees, remaining to be paid.

(5) Notice that the trust is terminating, or that the trustee has resigned or been removed, the time period for which the trustee seeks discharge of its accounts, and a statement providing that claims against a trustee under IC 30-4-6-12 and IC 30-4-6-14, if applicable, shall be barred if no objections are received within the time period described in subsection (c).

(6) The name and mailing address of the trustee.

(7) The name and telephone number of a person who may be contacted for additional information.

The trustee may also provide the statement and notice described in this subsection to any other person who the trustee reasonably believes may have an interest in the trust.

(c) If, after receiving the notice and trust information described in subsection (b), a qualified beneficiary objects to a disclosed act or omission, the qualified beneficiary shall provide written notice of the objection to the trustee not later than sixty (60) days after the notice was sent by the trustee. If no written objection is provided in the sixty (60) day time period, the information provided under subsection (b) shall be considered approved by the recipient. The trustee shall, in the case of a trust terminating pursuant to the terms of the trust or the

trustee's resignation or removal, within a reasonable period of time following the expiration of the sixty (60) day time period, distribute the assets as provided in the trust or to the successor trustee. If a qualified beneficiary gives the trustee a written objection within the applicable sixty (60) day time period, the trustee or the qualified beneficiary may:

(1) submit the written objection to the court for resolution and charge the expense of commencing a proceeding to the trust; or

(2) resolve the objection by a nonjudicial settlement agreement under section 25 of this chapter, or otherwise.

Any agreement entered into pursuant to subdivision (2) may include a release, an indemnity clause, or both, on the part of the beneficiary against the trustee relating to the trust. If the parties agree to a nonjudicial settlement agreement under section 25 of this chapter, any related expenses shall be charged to the trust. Upon a resolution of an objection under this subsection, within a reasonable period of time, the trustee shall distribute the remaining trust assets as provided in the trust or to the successor trustee.

(d) The trustee may rely upon the written statement of a person receiving notice that the person does not object.

(e) When a trustee distributes assets of a terminating trust or to a successor trustee after complying with the provisions of this article and having received no objections, each person who received notice and either consented or failed to object pursuant to this section is barred from:

(1) bringing a claim against the trustee or challenging the validity of the trust to the same extent and with the same preclusive effect as if the court had entered a final order approving the trustee's final account; or

(2) bringing a claim against the trustee for the period of such interim accounts to the same extent and with the same preclusive effect as if the court had entered a final order approving the trustee's interim accounts.

(f) A trustee may not request that a beneficiary indemnify the trustee against loss in exchange for the trustee forgoing a request to the court to approve its accounts at the time that the trust terminates, or at the time the trustee resigns or is removed, except as agreed upon by the parties pursuant to subsection (c).

(g) The court that exercises probate jurisdiction shall have exclusive jurisdiction over matters under this section.

(h) IC 30-4-6-10.5 shall apply to this section.

(i) Nothing in this section shall preclude a trustee from proceeding under IC 30-4-3-18(b) to have the trustee's accounts reviewed and

settled by the court.

SECTION 12. IC 30-4-8-1, AS ADDED BY P.L.221-2019, SECTION 9, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 1. (a) Subject to the limitations set forth in subsection (b), this chapter applies to:

(1) qualified dispositions to legacy trusts; and

(2) dispositions by transferors who are trustees;

that are made after June 30, 2019.

(b) This chapter does not apply to:

(1) any assets that are listed on an application or financial statement completed by the transferor and which is submitted to a lender in connection with a request to obtain or maintain credit from the lender; or

(2) any assets of a legacy trust that are listed on an application or financial statement completed on behalf of the legacy trust and which is submitted to a lender in connection with a request to obtain or maintain credit from the lender on behalf of the legacy trust.

In the event that assets described in subsection (b)(1) are later transferred to a legacy trust and a default occurs under the loan or extension of credit, either before or after the transfer or disposition under the legacy trust, the lender shall be entitled to proceed against any assets listed on the applications or financial statements which were submitted in connection with the loan, or any modifications, amendments, or renewals of the loan. Nothing in this chapter shall prohibit such action. A change in the character, form, or ownership of the assets described in subsection (b)(1) shall in no way make subsection (b)(1) inapplicable. **This subsection shall apply only to the lender that extended credit based on the application or financial statement submitted to the lender and the indebtedness or any portion of the indebtedness owed to the lender remains unpaid.**

SECTION 13. IC 30-4-8-8, AS AMENDED BY P.L.231-2019, SECTION 30, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 8. (a) Except as provided in subsection (e), a claim against property that is the subject of a qualified disposition to a legacy trust is barred by section 7 of this chapter unless the claim is one (1) of the following:

(1) Except as provided in subsection (b), an action brought in Indiana under the Uniform Fraudulent Transfer Act (IC 32-18-2) in which the requirements for recovery under the act are met by clear and convincing evidence.

(2) An action to enforce the child support obligations of the

transferor under a judgment or court order.

(3) A court judgment or order for the division of property in a dissolution of the transferor's marriage or a legal separation between the transferor and the transferor's spouse, if the transferor's **qualified** distribution to the legacy trust was made:

(A) after the date of the transferor's marriage that is subject to the dissolution or legal separation; or

(B) within thirty (30) days before the date of the transferor's marriage that is subject to the dissolution or legal separation unless the transferor provided written notice of the qualified disposition to the other party to the marriage at least three (3) days before making the qualified disposition.

(b) A claim brought under an action described in subsection (a)(1) is extinguished unless:

(1) the creditor's claim arose before the qualified disposition to a legacy trust was made and the action is brought not later than the later of:

(A) two (2) years after the transfer was made; or

(B) six (6) months after the transfer:

(i) was recorded or made a public record; or

(ii) if not recorded or made a public record, was discovered or could have reasonably been discovered by the creditor; or

(2) notwithstanding IC 32-18-2-19, the creditor's claim arose concurrent with or after the qualified disposition and the action is brought not more than two (2) years after the date of the qualified disposition.

(c) A qualified disposition made by a transferor who is a trustee is considered for purposes of this chapter to have been made on the date that the property that is subject to the qualified disposition was originally transferred in trust to the trustee or any predecessor trustee and the condition set forth in section 4(3) of this chapter is satisfied.

(d) If more than one (1) qualified disposition is made by means of the same legacy trust:

(1) the making of a subsequent qualified disposition is disregarded when determining whether a creditor's claim with respect to a prior qualified disposition is extinguished under subsection (b); and

(2) any distribution to a beneficiary is considered to have been made from the latest qualified disposition.

(e) If the state of Indiana is a creditor of a transferor, then notwithstanding subsection (a)(1) and subsection (b), the state of Indiana may bring an action against a qualified trustee to assert a claim

against or to recover property that is the subject of a qualified disposition by proceeding under the Indiana Uniform Fraudulent Transfer Act, subject to the standard of evidence in IC 32-18-2-14 and IC 32-18-2-15, and the limitation periods in IC 32-18-2-19.

SECTION 14. IC 30-4-8-16, AS AMENDED BY P.L.231-2019, SECTION 32, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 16. (a) Nothing in this chapter shall be construed to prohibit a lender from enforcing its rights in property identified in section 1(b) of this chapter and, to the extent necessary, naming the legacy trust or trustee of the trust as a defendant to the action or proceeding.

(b) If an asset described in section 1(b)(1) of this chapter is transferred to a legacy trust or trustee of a legacy trust, the transferor of that asset must send written notice of the transfer to the pertinent lender within fifteen (15) days after that transfer. The transferor must send the notice by certified mail, return receipt requested, to the registered agent for the lender. If there is no registered agent for the lender, the transferor must send notice to one (1) of the following:

(1) The last known address of the lender.

(2) The last address specified by the lender for mailing payments on the obligations.

(3) The address specified by the lender for general inquiries by customers.

The notice must include the name of the transferor, a description of the asset transferred, the name of the trustee, and the date that the transfer was completed. Upon request, the transferor or trustee shall provide the lender with a certification of the trust under IC 30-4-4-5, the names and addresses of the qualified beneficiaries of the trust, and copies of the pages from the trust instrument that identify the current trustee and describe the trustee's administrative powers and duties.

(c) Nothing in this chapter shall be construed to authorize any disposition that is prohibited by the terms of any agreements, notes, guaranties, mortgages, indentures, instruments, undertakings, or other documents. Any provisions that prohibit such transfer or disposition shall be binding and shall make this chapter inapplicable, **so long as any indebtedness remains outstanding in connection with such agreements, notes, guaranties, mortgages, indentures, instruments, undertakes, or other similar documents.**

(d) In the event of a conflict between this section and any other provision of this chapter, this section shall control.

SECTION 15. IC 32-17-13-7, AS AMENDED BY P.L.231-2019, SECTION 41, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE

JULY 1, 2020]: Sec. 7. (a) This subsection applies to a proceeding commenced under this chapter and a deceased transferor who died before July 1, 2018, if the personal representative or claimant commences the proceeding before January 1, 2020. A proceeding under this chapter may not be commenced unless the personal representative of the deceased transferor's estate has received a written demand for the proceeding from ~~the surviving spouse or a surviving child to the extent that statutory allowances or a creditor are affected.~~ **a claimant.**

(b) This subsection applies to a proceeding commenced under this chapter and a deceased transferor who died before July 1, 2018, if the personal representative or claimant commences the proceeding before January 1, 2020, and the claimant files a timely claim in the deceased transferor's estate before July 1, 2018. If the personal representative declines or fails to commence a proceeding within sixty (60) days after receiving the demand, a person making the demand may commence the proceeding in the name of the decedent's estate at the expense of the person making the demand.

(c) This subsection applies to a proceeding commenced under this chapter and a deceased transferor who died before July 1, 2018, if the personal representative or claimant commences the proceeding before January 1, 2020, and the claimant files a timely claim in the deceased transferor's estate before July 1, 2018. A personal representative who declines, in good faith, to commence a requested proceeding incurs no personal liability for declining to commence a proceeding.

(d) This subsection applies to a proceeding commenced under this chapter with respect to a deceased transferor who dies ~~on or~~ after June 30, 2018. A proceeding under this chapter may not be commenced unless:

(1) the claimant files a claim in the deceased transferor's estate and delivers a copy of the claim to each nonprobate transferee known by the claimant not later than five (5) months after the deceased transferor's death;

(2) the claimant delivers a written demand for the proceeding to:

(A) the personal representative of the deceased transferor's estate; and

(B) each known nonprobate transferee; and

(3) except as provided in subsection (j), the written demand has been filed in the estate not later than seven (7) months after the deceased transferor's death.

(e) This subsection applies to a proceeding commenced under this chapter and concerning a deceased transferor who dies ~~on or~~ after June

30, 2018. The written demand must include the following information:

(1) The cause number of the deceased transferor's estate.

(2) A statement of the claimant's interest in the deceased transferor's estate and nonprobate transfers, including the date on which the claimant filed a claim in the deceased transferor's estate.

(3) A copy of the claim attached as an exhibit to the written demand.

(4) A description of the nonprobate transfer, including:

(A) a description of the transferred asset, as the asset would be described under IC 29-1-12-1, regardless of whether the asset is part of the decedent's probate estate, subject to the redaction requirements of the Indiana administrative rules, established by the Indiana supreme court;

(B) a description or copy of the instrument by which the deceased transferor established the nonprobate transfer, subject to the redaction requirements of the Indiana administrative rules, established by the Indiana supreme court; and

(C) the name and mailing address of each nonprobate transferee known by the claimant.

(f) This subsection applies to a proceeding commenced under this chapter and concerning a deceased transferor who dies ~~on or~~ after June 30, 2018. A proceeding under this chapter may not be commenced on behalf of a claimant if the personal representative has neither allowed nor disallowed the claimant's claim within the deadlines in IC 29-1-14-10(a) and IC 29-1-14-10(b), unless the claimant's petition to set the claim for trial in the probate court under IC 29-1-14-10(e) has been filed within thirty (30) days after the expiration of the deadlines applicable to the allowance or disallowance of claims under IC 29-1-14-10(a) and IC 29-1-14-10(b).

(g) If the personal representative declines or fails to commence a proceeding under this chapter within thirty (30) days after receiving the written demand required under subsection (a) or (d), a person making the demand may commence the proceeding in the name of the deceased transferor's estate at the expense of the person making the demand and not of the estate.

(h) A personal representative who declines in good faith to commence a requested proceeding incurs no personal liability for declining.

(i) Nothing in this section shall affect or prevent any action or proceeding to enforce a valid and otherwise enforceable lien, warrant,

mortgage, pledge, security interest, or other comparable interest against property included in a nonprobate transfer.

(j) This subsection applies to a proceeding commenced under this chapter and concerning a deceased transferor who dies ~~on or~~ after June 30, 2018. A claimant may file the written demand required in subsection (a) or (d) concurrently with the claimant's filing of a claim in the deceased transferor's estate, but the claimant shall deliver the written demand not later than the later of:

(1) seven (7) months after the deceased transferor's death; or

(2) thirty (30) days after the final allowance of the claimant's claim.

President of the Senate

President Pro Tempore

Speaker of the House of Representatives

Governor of the State of Indiana

Date: _____ Time: _____

SEA 50 — Concur

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type.~~

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~*this style type*~~ reconciles conflicts between statutes enacted by the 2019 Regular Session of the General Assembly.

SENATE ENROLLED ACT No. 249

AN ACT to amend the Indiana Code concerning criminal law and procedure.

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

SECTION 1. IC 35-31.5-2-235.2 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: **Sec. 235.2. "Person in a position of trust", for purposes of IC 35-46-1-12, has the meaning set forth in IC 35-46-1-12.**

SECTION 2. IC 35-31.5-2-290.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: **Sec. 290.5. "Self-dealing", for purposes of IC 35-46-1-12, has the meaning set forth in IC 35-46-1-12.**

SECTION 3. IC 35-46-1-12, AS AMENDED BY P.L.158-2013, SECTION 556, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2020]: Sec. 12. **(a) The following definitions apply throughout this section:**

(1) "Person in a position of trust" means a person who has or had:

(A) the care of:

(i) an endangered adult; or

(ii) a dependent;

whether assumed voluntarily or because of a legal obligation; or

(B) a professional relationship with:

(i) an endangered adult; or

(ii) a dependent;

that may permit the person to exert undue influence over the endangered adult or dependent.

(2) "Self-dealing" means a person using the property of another person to gain a benefit that is grossly disproportionate to the goods or services provided to the other person. The term does not include an incidental benefit.

~~(a)~~ **(b)** ~~Except as provided in subsection (b),~~ A person who recklessly ~~knowingly, or intentionally~~ **uses or** exerts **control** ~~unauthorized use of~~ **over** the personal services or the property of:

(1) an endangered adult; or

(2) a dependent; ~~eighteen (18) years of age or older;~~

for the person's own profit or advantage or for the profit or advantage of another person, **but not for the profit or advantage of a person described in subdivision (1) or (2),** commits exploitation of a dependent or an endangered adult, a Class A misdemeanor. **However, the offense is a Level 6 felony if the person has a prior unrelated conviction under this section.**

(c) A person in a position of trust who recklessly engages in self-dealing with the property of:

(1) an endangered adult; or

(2) a dependent;

commits exploitation of a dependent or an endangered adult, a Class A misdemeanor. However, the offense is a Level 6 felony if the person has a prior unrelated conviction under this section.

~~(b) The offense described in subsection (a) is a Level 6 felony if:~~

~~(1) the fair market value of the personal services or property is more than ten thousand dollars ($10,000); or~~

~~(2) the endangered adult or dependent is at least sixty (60) years of age.~~

~~(c) Except as provided in subsection (d), a person who recklessly, knowingly, or intentionally deprives an endangered adult or a dependent of the proceeds of the endangered adult's or the dependent's benefits under the Social Security Act or other retirement program that the division of family resources has budgeted for the endangered adult's or dependent's health care commits financial exploitation of an endangered adult or a dependent, a Class A misdemeanor.~~

~~(d) The offense described in subsection (c) is a Level 6 felony if:~~

~~(1) the amount of the proceeds is more than ten thousand dollars ($10,000); or~~

~~(2) the endangered adult or dependent is at least sixty (60) years of age.~~

~~(c) It is not a defense to an offense committed under subsection (b)(2) or (d)(2) that the accused person reasonably believed that the endangered adult or dependent was less than sixty (60) years of age at the time of the offense.~~

~~(d)~~ **(d)** It is a defense to an offense committed under ~~subsection (a), (b), or (c)~~ **this section** if the accused person:

(1) has been granted a durable power of attorney or has been appointed a legal guardian to manage the affairs of an endangered adult or a dependent; and

(2) was acting within the scope of the accused person's fiduciary responsibility.

President of the Senate

President Pro Tempore

Speaker of the House of Representatives

Governor of the State of Indiana

Date: _____ Time: _____

SEA 249

Section Three

ELDER LAW DEVELOPMENTS

September 15, 2020
10:45 a.m.
ICLEF
42nd Annual Judge Robert H. Staton
Indiana Law Update
Indiana Convention Center
500 Ballroom
100 S. Capitol Avenue
Indianapolis, Indiana 46225

BY

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Section Three

Elder Law Developments……Randall K. Craig, J.D., CELA, CAP

ELDER LAW DEVELOPMENTS

I. The SECURE Act.

A. The Setting Every Community Up for Retirement Enhancement Act (the SECURE Act), was signed into law on December 20, 2019.

1. Modifies requirements for employer-provided retirement plans, IRAs, and other tax-favored accounts.

2. This outline will provide details of the provisions affecting individuals.

B. Reduction of stretch IRAs.

1. For plan or IRA participants who die after 2019, distributions to most non-spouse beneficiaries must generally be made within ten years following the plan participant's or IRA owner's death.

2. Exceptions are allowed for distributions to (i) the surviving spouse; (ii) a child who has not reached majority; (iii) a chronically ill individual; (iv) a "Qualified Special Needs Trust" ("QSNT") as defined by IRC § 401(a)(9)(H)(iv)(11); and (v) any other individual who is not more than ten years younger than the plan participant or IRA owner.

3. Those younger beneficiaries may still take their distributions over their life expectancy as allowed under the current rules in effect for deaths occurring before 2020.

4. Section 403(b) and Section 457 plans for government workers and the Thrift Savings Plan for federal employees have two extra years in which to comply with the new law's stretch IRA elimination period.

a. If a person inherits one of those accounts from someone who died before January 1, 2022, the beneficiary can take the required distribution over his or her lifetime.

b. Such beneficiaries have essentially two additional years before the ten-year limitation will apply.

5. Note that for planning purposes, the payout over the ten-year period does not have to be in equal installments.

a. The beneficiary who has larger deductions in a particular year might want to take more money out during those years of the ten-year stretch-out period to shield the distributions from tax.

b. A beneficiary who plans to retire in five years might want to wait to take more until he or she is in a lower tax bracket.

6. The Secure Act did not change the rules for estates, or for trusts in regard to which there is not a qualified "designated beneficiary."

a. In the case of estates, or trusts when there is not a "designated beneficiary", the distribution period is five years.

b. In the case of trusts, when there are multiple "designated beneficiaries", the age of the oldest beneficiary must be used.

c. Two special provisions permit QSNTs to use a lifetime distribution.

(1) A QSNT that benefits one or more disabled or chronically ill persons for their lifetimes, when there are no other persons who may receive benefits during that time, qualifies to take RMDs over the life expectancy of the oldest disabled beneficiary.

(2) In the case of a revocable trust in regard to which the retirement plan is divided at the owner's death into one or more shares for QSNTs and shares for non-disabled beneficiaries, the QSNT beneficiary is referenced to determine the distribution period for the QSNT.

(3) To be a QSNT, all of the current beneficiaries from inception until the death of the last of them must be disabled beneficiaries and no other person can benefit during that time period.

7. Example: D dies in 2020 at age 78 naming her revocable trust as beneficiary of three IRAs which provides for distribution at her death as follows: 25% to discretionary trust for a 75 year old brother who is disabled and on SSDI; 25% to a 55 year old friend outright who is disabled and on SSDI; and the balance to a pot trust for a 63 year old friend who is disabled and on SSDI, but which also includes as beneficiaries the friend's wife and children.

a. The 25% outright to the 55 year old disabled friend is eligible for the life expectancy pay-out beginning in 2021 with no RMD required in 2020 pursuant to the Cares Act.

b. The 25% to the 75 year old disabled brother's trust is not eligible for the life expectancy pay-out, even though he is not more than ten years younger, unless the trust is a conduit trust, but could use the life expectancy pay-out beginning in 2021 based on disability if the trust is a QSNT.

c. The 50% for the disabled 63 year old friend, spouse and children does not qualify for the life expectancy pay-out as it is not a QSNT.

d. Please note that if a QSNT has non-disabled remainder beneficiaries, then it is possible that their life expectancies must be taken into account when determining the oldest beneficiary for the purpose of determining the life expectancy pay-out.

e. New life expectancy tables will apply for 2021 and thereafter.

8. What if a trust other than a QSNT is a designated beneficiary?

a. Many trusts are written to contemplate that at least the RMD will be distributed each year, but if a trust is written to restrict distributions to the annual RMD, the trust should be amended or reformed.

b. Because trusts are taxed at the highest 37% rate once the trust's taxable income exceeds $12,950, while individuals do not reach the 37% bracket until taxable income exceeds $518,400, it is very important to coordinate distributions to a trust and from the trust to the trust beneficiary or beneficiaries.

c. The shorter stretch-out period may make IRAs an even better source of distributions to qualified charities.

C. Repeal of maximum age for traditional IRA contributions.

1. Beginning in 2020, an individual of any age may make contributions to a traditional IRA, as long as the individual has compensation, subject to income limitations.

2. Before 2020, contributions were not allowed once the individual attained age 70½.

D. Required minimum distribution age raised to 72.

1. For distributions required after December 31, 2019, for individuals who attained age 70½ after that date, the age at which individuals must begin taking RMDs from their retirement plan or IRA is increased from 70½ to 72.

2. Before 2020, plan participants and IRA owners were generally required to begin taking RMDs by April 1st of the year following the year they reach age 70½.

E. Penalty-free retirement plan withdrawals for expenses related to the birth or adoption of a child.

1. Starting in 2020, plan distributions of up to $5,000 are allowed to pay for expenses related to the birth or adoption of a child.

   a. There is no penalty for such an early distribution.

   b. The $5,000 limitation applies on an individual basis, so for a married couple, each spouse may receive a penalty-free distribution of up to $5,000 for a qualified birth or adoption.

2. Distributions from retirement plans must be included in income, and in addition, unless an exception applies (such as for financial hardship or the new birth or adoption exceptions), a distribution before the age of 59½ is subject to a 10% early withdrawal penalty.

F. Expansion of Section 529 education savings plans.

1. Also known as qualified tuition programs, a 529 plan is a tax exempt program established and maintained by a state or one or more eligible educational institutions (public or private).

2. Any person can make a nondeductible cash contribution to a 529 plan on behalf of a designated beneficiary.

a. The earnings on the contributions accumulate tax-free.

b. Distributions from a 529 plan are excludable up to the amount of the designated beneficiary's qualified higher education expenses.

3. Before 2019, "qualified higher education expenses" did not include the expenses of registered apprenticeships or student loan repayments.

a. Under the SECURE Act, however, for distributions made after 12/31/2018 (the effective date is retroactive), tax-free distributions from 529 plans can be used to pay for fees, books, supplies, and equipment required for participation in an apprenticeship program.

b. In addition, tax-free distributions of up to $10,000 are allowed to pay the principal or interest on a qualified education loan of the designated beneficiary or a sibling of the designated beneficiary.

G. Planning opportunities.

1. For non-disabled beneficiaries, distributions outright or via a conduit trust will qualify for the 10-year rule.

a. A conduit trust for an older beneficiary could produce a less than 10-year distribution period.

b. A conduit trust for minor children would allow a longer term pay-out, but the life expectancy distribution period only lasts until the age of majority; beginning at the age of 18, 100% of the plan must be distributed out from the trust to the child between the ages of 18 and 28.

c. If the trust is a "see through" accumulation trust, and conduit provisions are not used, then even though all assets would have to come out of the plan

within 10 years of the owner's death, the retirement plan assets could be retained in the trust for as long as desired.

d. For each child to get the extended pay-out period until the age of majority, each child's sub-trust under the revocable trust must be named as the beneficiary.

2. In the case of an QSNT, no one can benefit from the retirement plans and retirement plan accumulations other than the initial special needs beneficiary or beneficiaries during his, her or their lifetime or lifetimes.

a. There can be no discretionary distributions to descendants.

b. However, a similar restriction would not apply to other assets in the SNT.

c. Presumably the QSNT remaindermen must be individuals and presumably the individuals must be identifiable.

d. If there are shares to be allocated for an QSNT and shares for non-disabled children, it might be appropriate to utilize an allocation clause to the revocable trust funding so that the QSNT receives more or even all of the Roth retirement plan assets.

(1) In the case of a Roth, there are no required minimum distributions and there will be no taxable income when money comes out of the plan.

(2) This could be very favorable in the case of a special needs beneficiary.

II. Medicaid Exemption of Community Spouse's IRA.

A. Since June of 2014, when Indiana began to enroll individuals automatically for Medicaid whom the Social Security Administration determined to be eligible for SSI, Indiana has recognized the exemption of the community spouse's IRAs and other retirement accounts.

1. The Code of Federal Regulations, 20 CFR § 416.1202(a)(1), states specifically that for SSI purposes an individual's resources do not include pension funds held by the ineligible spouse.

a. Pension funds are defined as funds held in an individual retirement account ("IRA") or in work-related pension plans.

b. Similarly, the Social Security Administration's Program Operations Manual System ("POMS"), SI 01330.120, states specifically that pension funds owned by an ineligible spouse are excluded from resources for SSI purposes.

c. Income earned on pension funds owned by the ineligible spouse are also excluded from income for SSI purposes.

2. The Indiana Health Care Program Policy Manual (IHCPPM) 2615.15.00 states specifically that there is an exception to retirement accounts counting as an available resource - this applies to an IRA or work-related pension owned by a non-recipient spouse which are specifically exempted as a resource.

B. In a Medicaid case that I filed very early this year, the Indiana Family and Social Services Administration ("FSSA") had preliminarily determined that the community spouse's IRA would no longer be treated as exempt.

1. There was no change in the IHCPPM, in federal law or regulations, any Indiana regulations, or otherwise, that suggested any reason for such a change.

a. The position of the FSSA was that 42 USC § 1396r–5 requires that the community spouse's qualified retirement accounts be included as countable both at the time of the snapshot date and as of the eligibility date (see Exhibit "A").

b. However, 42 USC § 1396r–5 provides the basis for the snapshot date assessment and establishes special rules for a community spouse and does not address the countability or exclusion of specific resources.

2. There was later a great deal of communication in this area and other attorneys began to experience similar problems.

a. In my case, the application was withdrawn for other reasons (primarily related to the death of the community spouse), but there continued to be a great deal of dialogue between practitioners and the FSSA.

b. The FSSA took the position that it did not need to make the proposed change by the rule-making process because its policy mirrors the federal requirements.

3. In March of this year, the FSSA backed off its stated intent to change the policy to count the community spouse's IRAs and other retirement accounts, although the FSSA appears to contemplate making this policy change in the future.

a. The decision regarding continued exclusion originated from the FSSA's Office of General Counsel.

b. The FSSA appears to acknowledge that IRAs and other qualified plans are still exempt until the State of Indiana invokes the appropriate rule-making process.

c. The FSSA appears to be working on a way to roll out its new policy and has assured Elder Law practitioners that they will be informed of the policy change.

(1) The pandemic may cause a delay in this process.

(2) Elder Law practitioners will continue to try to convince the FSSA that any such change should not be made.

III. Internal Revenue Service Issues Proposed Regulations On ABLE Account Contributions.

A. ABLE Accounts have been addressed at this program in previous years on several occasions.

1. Refer to the Elder Law Developments materials presented at this program previously each year from 2015 through 2018.

2. Refer also to the Articles and Links section of my website, *www.rkcraiglaw.com*, containing those Elder Law Developments materials as well as other information regarding ABLE Accounts.

B. ABLE Accounts are derived from the Achieving A Better Life Experience Act of 2015 (the "ABLE Act").

1. ABLE Accounts are tax-favored accounts that can be set up for a disabled beneficiary in an amount equal to the annual gift tax exclusion (currently $15,000 per donee per year).

2. The maximum amount to be contributed based on the annual donee exclusion is a maximum amount from all sources.

a. ABLE Accounts are modeled after Section 529 accounts.

b. ABLE programs must be implemented by the various states.

3. In general, contributions to an ABLE Account can be made by any person and are not tax deductible.

a. Income earned by the accounts is not taxed.

b. Any designated beneficiary may, directly or indirectly, direct the investment of any contributions to the program (or any earnings thereon) no more than twice in any calendar year.

c. Distributions to an eligible individual, including portions attributable to investment earnings generated by the account, for qualified disability expenses, will not be taxable.

C. Other ABLE Account requirements.

1. Only a qualified disabled beneficiary can benefit from an ABLE Account.

a. A qualified disabled beneficiary is a person who is eligible for SSI on the basis of blindness or a disability when the individual's blindness or disability would have occurred prior to age 26.

b. Another eligible qualified beneficiary is one entitled to disability insurance benefits, childhood disability benefits, or a disabled widow or widower's benefit on the basis of a serious, disabling condition that began prior to age 26.

c. An individual may also be eligible on the basis of a certification that the individual has a medically determinable impairment meeting the statutory requirement for a disability determination (i.e., marked and severe functional limitations), or is blind, and the blindness or disability was incurred prior to age 26.

2. For an individual who is eligible for SSI, the balance in the ABLE Account cannot exceed $100,000.

    a. SSI eligibility will be lost during the time when the $100,000 limitation is exceeded.

    b. Medicaid eligibility will not be affected.

    c. A qualified disabled beneficiary who is not receiving SSI is not subject to the $100,000 SSI threshold, but the funds in the ABLE Account must remain less than the federal Internal Revenue Code § 529 contribution limit for his or her state of residence.

3. Funds on deposit in the ABLE Account after the death of the qualified beneficiary, and after the payment of all outstanding qualified disability expenses, will be subject to a Medicaid payback.

    a. The Medicaid payback is limited to all of the expenses incurred by the various states' Medicaid agency or agencies on behalf of the disabled beneficiary after the date of the establishment of the ABLE Account.

    b. Qualified disability expenses include those for education, housing, transportation, employment training, assistive technology, personal support services, health, prevention and wellness, financial management and administrative services, legal fees, and expenses for the beneficiary's funeral and burial.

    c. Purchases of food from the funds distributed from an ABLE Account will be considered as a non-housing-related qualified disability expense.

D. Under the Tax Cuts and Jobs Act, account owners who work and earn income are permitted to make contributions to their ABLE Accounts in excess of the $15,000 annual contribution limit under certain circumstances.

a. The maximum additional contribution as a result of employment above the $15,000 annual limit was originally $12,060 in 2018, but is adjusted each year based on federal poverty guidelines.

b. The federal Tax Savers Credit was also extended to include contributions to ABLE Accounts to allow low-to-moderate income workers to take advantage of a special tax credit of up to $1,000 for an individual or $2,000 for a married couple.

(1) Income limits apply based on filing status.

(2) The taxpayer must be at least 18 years of age, cannot have been a full-time student, and cannot be claimed as a dependent by another person.

E. On October 10, 2019, the Internal Revenue Service published proposed regulations governing ABLE Account contribution limits.

1. The regulations will not be effective until publication in the Federal Register in final form.

2. Comments on the proposed regulations were due by January 8, 2020.

a. The proposed rule adds T.R. § 1.529A-8, which limits the annual ABLE Account contribution limit for a qualified ABLE Account beneficiary to the lesser of either the beneficiary's compensation as computed under I.R.C. § 291(F)(1) for the taxable year or an amount equal to the applicable federal

poverty guideline in effect for a one-person household for the calendar year preceding the calendar year in which the designated beneficiary's taxable year begins.

(1) Assume an ABLE Account beneficiary has compensation of $20,000 and that the federal poverty guideline for a one-person household in the particular state for the applicable year is $13,960.

(2) The lesser of the two amounts is the local poverty guideline amount for the prior year.

(3) Therefore, in the particular year, the beneficiary can contribute the full $15,000 annual contribution limit to his ABLE Account, and in addition, can also contribute an additional sum of up to $13,960 to his ABLE Account, without being deemed to have made an excess contribution.

(4) Any excess contributions, and all of the net income attributable to the excess contributions, must be returned to the beneficiary from the ABLE Account within a strict time frame.

b. Please note that the ability to make larger contributions based on earnings will sunset in 2025 under the Tax Cuts and Jobs Act of 2017.

IV. SSA POMS Update Regarding ABLE Accounts.

A. The SSA issued a new update to its Program Operations Manual System (POMS) effective March 13, 2020.

1. The POMS is the manual used by employees of the SSA in processing SSI claims.

a. While it does not have the force of law, it is persuasive authority.

b. The new guidance found at SI § 01130.740 clarifies the types of expenses that constitute qualified disability expenses with respect to an ABLE Account for both income tax and public benefits eligibility purposes.

B. Much of the new guidance reiterates settled rules, but it clarifies that food may be purchased with funds from ABLE Accounts, and that such purchases will be treated as a non-shelter-related qualified disability expense and disregarded for the purpose of determining eligibility for SSI and other means-tested federal benefits.

1. The distribution from the ABLE Account, to the extent used to purchase food, will not be considered in-kind support and maintenance, and will not affect the SSI income limit.

2. The ABLE Account beneficiary will not be disqualified for SSI benefits and will not suffer a reduction of SSI benefits due to in-kind support and maintenance, i.e., for food or shelter expenditures.

C. Without an ABLE Account, a disabled beneficiary who receives an SSI cash benefit and who also receives additional cash from a family member or from a trust, or who is also provided with food or shelter by a family member or another source, could be in jeopardy of losing the SSI benefit or having it reduced.

1. If the assistance is not structured as a loan with a definite obligation to repay, the assistance may disqualify the SSI beneficiary from further benefits or may reduce the benefit (see POMS SI § 00835.482.B.3).

2. Similarly, if the beneficiary receives a monthly cash distribution from a special needs trust, or if the payment is made to a guardian of the incapacitated disabled beneficiary, the receipt of that cash, or the use of that cash to pay for food or housing,

may have the effect of placing the disabled beneficiary in excess of the SSI monthly income limit and disqualify the beneficiary for the SSI benefit, or reduce the monthly benefit.

a. Under the new guidance, an ABLE Account providing food will not be treated as providing in-kind support and maintenance.

b. In order for a special needs trust to be used properly and in tandem with an ABLE Account, the SNT should distribute funds from the trust to the ABLE Account which can then be used to provide for the food and shelter.

c. The amount used to fund the ABLE Account should not exceed the current $15,000 annual contribution limit, unless an additional contribution limit would apply due to the Tax Cuts and Jobs Act of 2017 as addressed by the proposed IRS regulations as explained in the previous section of these materials.

3. If the special needs plan contemplates that an ABLE Account will be used in tandem with a special needs trust, it is important to incorporate provisions in the SNT authorizing the Trustee to make contributions from the trust to the ABLE Account.

a. If the distribution from an ABLE Account will be used for food or the cost of housing, the timing of the distribution and the timing of the payment of the food or housing expense is important.

b. If the distribution for food or shelter expenses is retained after the end of the month in which the distribution is made and not paid over to the third-party vendor in the same calendar month as the distribution is made, it will be

counted as a resource that remains in the beneficiary's savings or checking account on the first day of the following month.

V. Status of SSA Approval of Legal Fees for SNTs.

A. Effective June 25, 2019, the SSA issued updates to its POMS pertaining to attorney fees for performing legal services subject to SSA's fee authorization process.

1. See POMS GN 03920.007.

2. The examples in the POMS indicated that attorneys may be required to submit an SSA fee authorization request when they draft or amend trusts "for the purpose of affecting [their] clients' eligibility for benefits."

B. The examples did not appear to limit the fee authorization requirement to those attorneys who represent claimants before the SSA and may have included attorneys who simply consult with a person with a disability, those who draft an SNT, and possibly those who prepare a third party SNT for parents of a child who may one day be eligible for SSI.

1. If the SSA had broadly interpreted its new POMS rules and was aggressive in enforcement, the consequences could be serious.

2. Violations could result in a misdemeanor conviction, a $500 fine, and up to one year in jail for each occurrence, as well as the possible loss of the license to practice law, for the crime of conducting special needs planning for persons with disabilities.

C. It is impossible at this point to articulate rules to be followed in order to comply with the originally published POMS.

1. The SSA did not previously require attorneys who drafted SNTs to request fee authorization.

2. In several SSA regions, SSA officials have stated that the fee authorization process was unnecessary for attorneys who drafted SNTs and had no intention of representing the clients before the SSA.

D. 42 U.S.C. § 406 states in part:

> The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void.

1. Although the POMS rules represent internal policy guidelines and are not legally binding on the SSA or the courts, the Supreme Court has stated that the POMS cannot be ignored entirely.

2. Various cases have held that courts must determine whether the agency's interpretation is persuasive and must consider a number of factors.

   a. In SNT cases, the courts generally defer to the POMS concerning SNTs.

   b. For an in-depth analysis of the new POMS provisions and for a summary of the historic development of the law in the area of Social Security representation, see *New POMS on Attorney Fees*, NAELA NEWS, by Kevin Urbatsch, Esq. (NAELA NEWS ONLINE, August 2019).

E. The United States Supreme Court recently ruled that the attorney fee cap in Social Security disability cases applies only to legal fees for work relating to court proceedings,

as opposed to fees incurred in both administrative matters and court proceedings. ***Culbertson v. Berryhill***, 139 S. Ct. 517 (2019).

1. However, the new POMS included examples of scenarios in which attorneys were previously required to obtain the SSA's approval of their fees in matters concerning SSI eligibility which have made the legal analysis in these matters significantly more uncertain.

2. The new POMS essentially stated that attorney fee approval was not required for services that were performed separately from, and not in connection with, a claim for benefits before the SSA, such as representing clients in guardianship applications, employment, tax matters, inheritances, and establishing trust accounts, as general examples of legal services for which attorney fee approval was not required.

    a. However, the POMS stated that fee authorization would be required whenever a trust is prepared (or, by inference, amended) in order to affect someone's eligibility for benefits.

    b. The cautious practitioner would need to consider dividing new matters into separate tracks, i.e., SSI versus other services, and keeping detailed time records for all work in each file, even those for flat fees.

    c. Engagement letters for non-SSI matters presumably could be revised to state that the attorney will not perform any work in connection with a claim for SSI before a court or an administrative agency or any litigation.

3. The National Academy of Elder Law Attorneys (NAELA) formed a working group with other organizations, including the Special Needs Alliance, the

Academy of Special Needs Planners, and the National Organization for Social Security Representatives.

a. Members of the group were in contact with the SSA.

b. The working group received the following statement from Janet Walker, Associate Commissioner, Office of Public Service and Operation Support, at the SSA:

> "Our current policy requires us to authorize a representative's fee when the representative's services are performed in connection with a claim before the agency. The types of services that generally require us to authorize a fee include, but are not limited to an application for benefits, requests for revised earnings record, etc. We are generally not required to authorize a fee for services that are separate from a claim such as preparation of legal documents for adoption, guardianship, etc. Regarding special needs trusts, when the modification or creation of a trust, in connection with a claim, impacts SSI eligibility, we must authorize the fee. Alternatively, an attorney may establish a trust for an individual who is receiving benefits without the need for our

authorization of the fee, so long as the trust wasn't established to protect SSI eligibility."

4. This official's interpretation of the new POMS indicated that the SSA would have required fee petitions in cases involving an attorney who drafted a special needs trust for an SSI recipient regardless of whether the attorney actually represented the SSI claimant before the SSA.

5. NAELA's concern was that the new POMS would have had a chilling effect on the practice of special needs planning due to the threat of disbarment or criminal penalties.

   a. Without these attorneys, SSI beneficiaries would have had fewer or no options when seeking assistance with trust drafting.

   b. The average wait time for fee approval varies by region, but SSA usually takes months and sometimes over a year to grant or deny fee petitions.

   c. The SSA offered no fee schedule to guide caseworkers in assessing whether a fee would be considered reasonable for trust drafting services.

   d. NAELA's practice suggestions were:

      (1) If an attorney has formally been authorized as a representative by the SSA (i.e. filled out an appointment of representative form), the attorney should seriously consider having fees approved when the attorney advises clients about eligibility and prepares trust documents; it may not be adequate under

the new POMS to seek approval only when the attorney represents a claimant in an SSA application, redetermination, hearing, or appeal.

(2) If the attorney believes after reviewing the POMS and the Code of Federal Regulations that approval is required, then the new POMS would require the attorney to follow the fee approval process when drafting trusts for clients who are receiving SSI in addition to when the attorney represent clients before the SSA.

(3) If the attorney chooses not to seek fee approval in particular cases that appear to be less clear-cut, the attorney should take measures to ensure that the work done is not within the new POMS requirements, i.e., the attorney should build effective administration systems (through documents and fee agreements) which may be used to defend the attorney should the SSA consider the attorney a representative or otherwise subject to the new POMS.

(4) Detailed timekeeping, separate files for trust-related and non-trust related work for the same clients, and fee approval by state courts with jurisdiction over a claimant, may be helpful.

F. The SSA withdrew the alarming fee authorization POMS provision three months to the day after issuing it, announcing that it had "archived" the POMS provision issued on June 25, 2019.

1. This move was in response to the concern expressed by many practitioners and organizations regarding interpretation of the new POMS.

2. While intended to make the issue of fee authorization clear, the SSA's guidance actually created a great deal of confusion.

    a. It appeared that drafters of SNT's might be required to obtain authorization from the SSA to be paid or risk going to jail.

    b. NAELA reported that at least two attorneys had been requested to provide retainer agreements for trust preparation by the SSA in the Chicago region.

3. Although archived, the SSA indicated that it is still considering the matter and may issue new POMS in the future.

VI. Updates to the SSA Representative Payee Program.

A. The SSA published a Paperwork Reduction Act Notice in the *Federal Register* for its proposed Advanced Designation of Representative Payee internet screens and forms.

1. These changes derived from the Strengthening Protections for Social Security Beneficiaries Act of 2018, signed into law on April 13, 2018.

    a. Section 201 of the new law allows beneficiaries to designate an individual(s) to serve as a payee should the need arise, and requires the SSA to select the designated individual with certain exceptions.

    b. It also requires the SSA to notify beneficiaries annually that have chosen to Advance Designate of the information provided on their Advance Designees.

2. To request copies of the draft screens and forms, see OR.Reports.Clearance@ssa.gov.

B. Advance Designation requirements.

1. SSA only offers the option to Advance Designate to capable adults and emancipated minors.

2. Beneficiary's who have an assigned Representative Payee, or have a representative application in process, cannot Advance Designate.

3. Form SSA-4547, Advance Designation of Representative Payee, allows beneficiaries or applicants the option to designate individuals in order of priority to serve as a representative.

VII. Nursing Home Arbitration Agreements.

A. Background.

1. At the 41st Annual Staton Indiana Law Update program in 2019, my Elder Law Developments materials addressed the revised Centers for Medicare and Medicaid Services ("CMS") regulations that were issued on October 4, 2016.

a. Phase I of the regulations took effect on November 28, 2016.

b. Phases II and III were scheduled to become effective on November 28, 2017, and November 28, 2019.

2. On June 30, 2017, CMS announced it would delay for one year the use of enforcement of remedies, including monetary penalties, denial of payment, and termination of Medicare and/or Medicaid participation for failure to meet certain Phase II requirements.

a. On November 24, 2017, CMS announced it would delay enforcement for 18 months.

b. The effective date of the new requirements was later again delayed until November 28, 2019 for Phases II and III.

3. The revised regulations would have prohibited the use of pre-dispute arbitration agreements.

a. The ban on arbitration was enjoined by a lawsuit brought by a nursing facility trade association, and CMS declined to pursue an appeal.

b. CMS then solicited comments on a revision of the regulations that would not only reverse the prohibition, but instead would consider a framework to allow nursing facilities to require arbitration agreements as a condition for admission.

B. On July 16, 2019, the CMS released a new final rule governing long term care facilities participating in the Medicare and Medicaid programs which allow the facilities to use arbitration agreements with residents or prospective residents.

1. Long term care facilities may now incorporate a voluntary provision for pre-dispute arbitration with the resident in an admission agreement.

a. However, the resident's admission or continued care at the facility cannot be conditioned on consent to pre-dispute, binding arbitration.

b. The new regulations also incorporate requirements to increase the transparency of arbitration agreements and arbitration proceedings between residents and long term care facilities in order to facilitate informed choices about important aspects of their health care.

2. Current arbitration agreements that are valid under state law remain valid.

    a. However, there may be the ability to negotiate on behalf of current residents to provide a new agreement that conforms to the new rule.

    b. An arbitration agreement that is not signed by the resident, but rather by the family or others under a durable general power of attorney, may be unenforceable based on principles of unconscionability and lack of authority.

3. Long term care facilities are now allowed to utilize pre-dispute, binding arbitration in a facility's admission agreement as long as a resident or resident's representative has the ability to decline to enter into the agreement without being denied admission or continued care.

    a. The facility's representative must explicitly inform the resident or the resident's representative that signing the agreement is not a condition of admission.

    b. The language in the admission agreement itself must contain such language that the resident or the resident's representative understands, and any individual signing the agreement on behalf of the resident must acknowledge his or her understanding of the agreement.

    c. A facility that transfers or discharges a resident for failure to sign an arbitration agreement (whether pre- or post-dispute) would risk termination from the Medicare and Medicaid programs.

4. *Query*: Does the final rule address sufficiently the ability of an elderly and frail nursing home resident to comprehend the agreement so as to understand the ability to rescind an agreement?

    a. CMS suggests that a resident's ability to challenge arbitration agreements in court under state law provides adequate protection, except as to Medicare or Medicaid beneficiaries who may not be able to afford legal representation.

    b. Elder Law attorneys should consider advising clients and prospective clients of the right to rescind an arbitration provision in a previously signed admissions agreement.

5. Long term care facilities must retain arbitration documents for five years.

    a. Copies of the signed agreement and an arbitrator's final decision must be retained for five years after resolution of each dispute through arbitration.

    b. Those documents must be available for inspection by CMS.

VIII. *Hotmer v. Ind. Family & Soc. Servs. Admin*., Ind. Ct. App. 19A-PL-2694 (June 30, 2020).

A. Hotmer purchased two irrevocable annuities requiring monthly payments to his wife and then later applied for Medicaid.

1. FSSA ruled that because Hotmer was the owner of the annuities, the income must be attributed to him, which caused his income to exceed the limit for Medicaid eligibility.

2. When FSSA denied his application, he petitioned for judicial review, and the trial court affirmed. The Court of Appeals reversed and remanded for further proceedings.

B. On the annuity applications, Hotmer directed that the monthly checks be paid to his wife as the payee and also named her as the primary beneficiary to receive any remaining payments after death.

1. Although the annuity documents showed Hotmer as the annuitant and owner, the wife was the payee and the beneficiary.

2. The contracts stated that they were irrevocable and could not be transferred, assigned, surrendered, or commuted, and that neither the annuitant nor the beneficiary could be changed.

3. An administrative law judge had overturned the original denial based on 42 U.S.C. § 1396r-5(b)(2)(A)(i) which states:

> ...in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides[,] if payment of income is made solely in the name of the institutionalized spouse [Hotmer] or the community spouse [his wife], the income shall be considered available only to that respective spouse[.]

4. The ALJ determined that because the annuity payments were made solely in the name of Hotmer's wife, they were available only to the wife and not him.
    a. His income, therefore, did not exceed the limit.
    b. When the FSSA petitioned for review, the FSSA's ultimate authority remanded to the ALJ with instructions to examine the evidence and Section 1396r-5 in their entirety.
5. On remand, the ALJ again determined that the annuity income would not be countable as Hotmer's income.
    a. The FSSA then again petitioned for review, and the FSSA's ultimate authority issued a decision that found that the denial was appropriate.
    b. Hotmer then petitioned for judicial review pursuant to the Indiana Administrative Orders and Procedures Act, and the trial court affirmed the FSSA's decision.
6. The Court of Appeals rendered a relatively short analysis of the case and the standard of review.
    a. The court noted that pursuant to 42 U.S.C. § 1396p(c)(2)(B)(i), an individual who has applied for Medicaid benefits "shall not be ineligible for medical assistance ... to the extent that ... assets" – such as annuity payments – "were transferred to the individual's spouse ... for the sole benefit of the individual's spouse."
    b. In this case, the payments were transferred to Hotmer's wife, and they were made solely in her name, and the income should not be considered to be available to Hotmer.

c. The Court of Appeals determined that the denial was arbitrary and capricious, and the court reversed and remanded for further proceedings consistent with its decision.

C. This case involved the so-called "Name on the Check" rule, which generally holds that the income belongs to the person to whom the check has been issued.

1. Annuities, which are covered under IHCPPM § 2615.15.00 as "retirement" accounts, would be treated as a resource to the extent that funds can be withdrawn or assigned.

a. If it cannot be liquidated, then the monthly payment would be treated as income.

b. Under 42 U.S.C. 1396p(c)(1)(F), the purchase of an annuity which does not name the State of Indiana as a remainder beneficiary in the first position (or in the second position after the community spouse or minor disabled child) may be considered as a transfer of assets for less than fair market value.

2. The Hotmer case did not address the possible issue of the purchase of the annuity constituting a penalizable transfer.

IX. Medicaid Changes Regarding Funeral Trusts And Other Matters.

A. FSSA has published a 45-page proposed rule representing a major rewrite of 405 IAC Article 2.

1. May be found at: iac.iga.in.gov/iac//20200722-IR-405190602PRA.xml.pdf.

2. Many changes are in terminology, but substantive changes also included.

B. Adds a new section on funeral expenses at 405 IAC 2-4-3 (pp. 29-30) that appears to limit funeral trusts, funeral agreements, and funerals funded by life insurance to $10,000.

1. States that anything in the plan above $10,000 will be treated as a countable resource.

a. It does not address how plans already in existence will be treated.

b. Although IC 12-15-2-17 has a $10,000 limit, the Division of Family Resources (DFR) does not currently apply this limit when the agreement is irrevocable and when the plan pays for services, etc., costing more than $10,000.

c. Currently it is not a penalizable transfer because one receives adequate services in return.

2. However, this $10,000 limitation may not in fact apply to prepaid funeral trusts which are governed by IC 12-15-3-7.

a. IC 12-15-3-7(c) states that it is subject to subsections (d) and (f) before the $10,000 limit applies.

b. (d) states that if an applicant for or a recipient of Medicaid establishes an irrevocable trust or escrow under IC 30-2-12, the entire value of the trust or escrow may not be considered as a resource.

C. Adds a new section 405 IAC 2-4-2 (p. 29) on the purchase of burial spaces for immediate family members.

1. Describes the purchase of a burial space or burial expenses (expenses are limited) as an exempt resource rather than as an exempt transfer.

2. Language is similar to the Code of Federal Regulations, but seems to expand what is allowed to include the transfer of the deceased, the use of a hearse, and the purchase of death certificates, but does not allow for "full funerals."

D. Completely revises 405 IAC 2-3-12 (pp. 17-18) regarding contracts for the sale of real estate.

1. Still requires that the repayment terms be "actuarially sound," which makes it difficult for a buyer to afford monthly payments if the payments must be made within the life expectancy of an elderly seller.

2. Does not allow balloon payments and raises the question whether additional payments or prepayments are allowed.

3. It should be noted that there does not appear to be any basis in federal law or regulations for these limitations.

E. If a retirement account has been annuitized and regular, periodic payments are being received, the account is not a countable resource.

1. Note, however, that the payments would still be treated as income.

2. Annuitized payments preclude protecting the lump sum of the account and make it very difficult to protect the accumulated annuitized payments.

42 USC 1396r-5 : Treatment of income and resources for certain institutionalized spouses
Text contains those laws in effect on January 2, 2020

From Title 42-THE PUBLIC HEALTH AND WELFARE
CHAPTER 7-SOCIAL SECURITY
SUBCHAPTER XIX-GRANTS TO STATES FOR MEDICAL ASSISTANCE PROGRAMS
Jump To:

§1396r–5. Treatment of income and resources for certain institutionalized spouses

(a) Special treatment for institutionalized spouses

(1) Supersedes other provisions

In determining the eligibility for medical assistance of an institutionalized spouse (as defined in subsection (h)(1)), the provisions of this section supersede any other provision of this subchapter (including sections 1396a(a)(17) and 1396a(f) of this title) which is inconsistent with them.

(2) No comparable treatment required

Any different treatment provided under this section for institutionalized spouses shall not, by reason of paragraph (10) or (17) of section 1396a(a) of this title, require such treatment for other individuals.

(3) Does not affect certain determinations

Except as this section specifically provides, this section does not apply to-
(A) the determination of what constitutes income or resources, or
(B) the methodology and standards for determining and evaluating income and resources.

(4) Application in certain States and territories

(A) Application in States operating under demonstration projects

In the case of any State which is providing medical assistance to its residents under a waiver granted under section 1315 of this title, the Secretary shall require the State to meet the requirements of this section in the same manner as the State would be required to meet such requirement if the State had in effect a plan approved under this subchapter.

(B) No application in commonwealths and territories

This section shall only apply to a State that is one of the 50 States or the District of Columbia.

(5) Application to individuals receiving services under PACE programs

This section applies to individuals receiving institutional or noninstitutional services under a PACE demonstration waiver program (as defined in section 1396u–4(a)(7) of this title) or under a PACE program under section 1396u–4 or 1395eee of this title.

(b) Rules for treatment of income

(1) Separate treatment of income

During any month in which an institutionalized spouse is in the institution, except as provided in paragraph (2), no income of the community spouse shall be deemed available to the institutionalized spouse.

(2) Attribution of income

In determining the income of an institutionalized spouse or community spouse for purposes of the post-eligibility income determination described in subsection (d), except as otherwise provided in this section and regardless of any State laws relating to community property or the division of marital property, the following rules apply:

(A) Non-trust property

Subject to subparagraphs (C) and (D), in the case of income not from a trust, unless the instrument providing the income otherwise specifically provides-

(i) if payment of income is made solely in the name of the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

EXHIBIT "A"

(ii) if payment of income is made in the names of the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(iii) if payment of income is made in the names of the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(B) Trust property

In the case of a trust-

(i) except as provided in clause (ii), income shall be attributed in accordance with the provisions of this subchapter (including sections 1396a(a)(17) and 1396p(d) of this title), and

(ii) income shall be considered available to each spouse as provided in the trust, or, in the absence of a specific provision in the trust-

(I) if payment of income is made solely to the institutionalized spouse or the community spouse, the income shall be considered available only to that respective spouse;

(II) if payment of income is made to both the institutionalized spouse and the community spouse, one-half of the income shall be considered available to each of them; and

(III) if payment of income is made to the institutionalized spouse or the community spouse, or both, and to another person or persons, the income shall be considered available to each spouse in proportion to the spouse's interest (or, if payment is made with respect to both spouses and no such interest is specified, one-half of the joint interest shall be considered available to each spouse).

(C) Property with no instrument

In the case of income not from a trust in which there is no instrument establishing ownership, subject to subparagraph (D), one-half of the income shall be considered to be available to the institutionalized spouse and one-half to the community spouse.

(D) Rebutting ownership

The rules of subparagraphs (A) and (C) are superseded to the extent that an institutionalized spouse can establish, by a preponderance of the evidence, that the ownership interests in income are other than as provided under such subparagraphs.

(c) Rules for treatment of resources

(1) Computation of spousal share at time of institutionalization

(A) Total joint resources

There shall be computed (as of the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse)-

(i) the total value of the resources to the extent either the institutionalized spouse or the community spouse has an ownership interest, and

(ii) a spousal share which is equal to ½ of such total value.

(B) Assessment

At the request of an institutionalized spouse or community spouse, at the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse and upon the receipt of relevant documentation of resources, the State shall promptly assess and document the total value described in subparagraph (A)(i) and shall provide a copy of such assessment and documentation to each spouse and shall retain a copy of the assessment for use under this section. If the request is not part of an application for medical assistance under this subchapter, the State may, at its option as a condition of providing the assessment, require payment of a fee not exceeding the reasonable expenses of providing and documenting the assessment. At the time of providing the copy of the assessment, the State shall include a notice indicating that the spouse will have a right to a fair hearing under subsection (e)(2).

(2) Attribution of resources at time of initial eligibility determination

In determining the resources of an institutionalized spouse at the time of application for benefits under this subchapter, regardless of any State laws relating to community property or the division of marital property-

(A) except as provided in subparagraph (B), all the resources held by either the institutionalized spouse, community spouse, or both, shall be considered to be available to the institutionalized spouse, and

(B) resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds the amount computed under subsection (f)(2)(A) (as of the time of application for benefits).

(3) Assignment of support rights

The institutionalized spouse shall not be ineligible by reason of resources determined under paragraph (2) to be available for the cost of care where-

(A) the institutionalized spouse has assigned to the State any rights to support from the community spouse;

(B) the institutionalized spouse lacks the ability to execute an assignment due to physical or mental impairment but the State has the right to bring a support proceeding against a community spouse without such assignment; or

(C) the State determines that denial of eligibility would work an undue hardship.

(4) Separate treatment of resources after eligibility for benefits established

During the continuous period in which an institutionalized spouse is in an institution and after the month in which an institutionalized spouse is determined to be eligible for benefits under this subchapter, no resources of the community spouse shall be deemed available to the institutionalized spouse.

(5) Resources defined

In this section, the term "resources" does not include-

(A) resources excluded under subsection (a) or (d) of section 1382b of this title, and

(B) resources that would be excluded under section 1382b(a)(2)(A) of this title but for the limitation on total value described in such section.

(d) Protecting income for community spouse

(1) Allowances to be offset from income of institutionalized spouse

After an institutionalized spouse is determined or redetermined to be eligible for medical assistance, in determining the amount of the spouse's income that is to be applied monthly to payment for the costs of care in the institution, there shall be deducted from the spouse's monthly income the following amounts in the following order:

(A) A personal needs allowance (described in section 1396a(q)(1) of this title), in an amount not less than the amount specified in section 1396a(q)(2) of this title.

(B) A community spouse monthly income allowance (as defined in paragraph (2)), but only to the extent income of the institutionalized spouse is made available to (or for the benefit of) the community spouse.

(C) A family allowance, for each family member, equal to at least 1/3 of the amount by which the amount described in paragraph (3)(A)(i) exceeds the amount of the monthly income of that family member.

(D) Amounts for incurred expenses for medical or remedial care for the institutionalized spouse (as provided under section 1396a(r) of this title).

In subparagraph (C), the term "family member" only includes minor or dependent children, dependent parents, or dependent siblings of the institutionalized or community spouse who are residing with the community spouse.

(2) Community spouse monthly income allowance defined

In this section (except as provided in paragraph (5)), the "community spouse monthly income allowance" for a community spouse is an amount by which-

(A) except as provided in subsection (e), the minimum monthly maintenance needs allowance (established under and in accordance with paragraph (3)) for the spouse, exceeds

(B) the amount of monthly income otherwise available to the community spouse (determined without regard to such an allowance).

(3) Establishment of minimum monthly maintenance needs allowance

(A) In general

Each State shall establish a minimum monthly maintenance needs allowance for each community spouse which, subject to subparagraph (C), is equal to or exceeds-

(i) the applicable percent (described in subparagraph (B)) of 1/12 of the income official poverty line (defined by the Office of Management and Budget and revised annually in accordance with section 9902(2) of this title) for a family unit of 2 members; plus

(ii) an excess shelter allowance (as defined in paragraph (4)).

A revision of the official poverty line referred to in clause (i) shall apply to medical assistance furnished during and after the second calendar quarter that begins after the date of publication of the revision.

(B) Applicable percent

For purposes of subparagraph (A)(i), the "applicable percent" described in this paragraph, effective as of-

(i) September 30, 1989, is 122 percent,

(ii) July 1, 1991, is 133 percent, and

(iii) July 1, 1992, is 150 percent.

(C) Cap on minimum monthly maintenance needs allowance

The minimum monthly maintenance needs allowance established under subparagraph (A) may not exceed $1,500 (subject to adjustment under subsections (e) and (g)).

(4) Excess shelter allowance defined

In paragraph (3)(A)(ii), the term "excess shelter allowance" means, for a community spouse, the amount by which the sum of-

(A) the spouse's expenses for rent or mortgage payment (including principal and interest), taxes and insurance and, in the case of a condominium or cooperative, required maintenance charge, for the community spouse's principal residence, and

(B) the standard utility allowance (used by the State under section 2014(e) of title 7) or, if the State does not use such an allowance, the spouse's actual utility expenses,

exceeds 30 percent of the amount described in paragraph (3)(A)(I), except that, in the case of a condominium or cooperative, for which a maintenance charge is included under subparagraph (A), any allowance under subparagraph (B) shall be reduced to the extent the maintenance charge includes utility expenses.

(5) Court ordered support

If a court has entered an order against an institutionalized spouse for monthly income for the support of the community spouse, the community spouse monthly income allowance for the spouse shall be not less than the amount of the monthly income so ordered.

(6) Application of "income first" rule to revision of community spouse resource allowance

For purposes of this subsection and subsections (c) and (e), a State must consider that all income of the institutionalized spouse that could be made available to a community spouse, in accordance with the calculation of the community spouse monthly income allowance under this subsection, has been made available before the State allocates to the community spouse an amount of resources adequate to provide the difference between the minimum monthly maintenance needs allowance and all income available to the community spouse.

(e) Notice and fair hearing

(1) Notice

Upon-

(A) a determination of eligibility for medical assistance of an institutionalized spouse, or

(B) a request by either the institutionalized spouse, or the community spouse, or a representative acting on behalf of either spouse,

each State shall notify both spouses (in the case described in subparagraph (A)) or the spouse making the request (in the case described in subparagraph (B)) of the amount of the community spouse monthly income allowance (described in subsection (d)(1)(B)), of the amount of any family allowances (described in subsection (d)(1)(**C**)), of the method for computing the amount of the community spouse resources allowance permitted under subsection (f), and of the spouse's right to a fair hearing under this subsection respecting ownership or availability of income or resources, and the determination of the community spouse monthly income or resource allowance.

(2) Fair hearing

(A) In general

If either the institutionalized spouse or the community spouse is dissatisfied with a determination of-

(i) the community spouse monthly income allowance;

(ii) the amount of monthly income otherwise available to the community spouse (as applied under subsection (d)(2)(B));

(iii) the computation of the spousal share of resources under subsection (c)(1);

(iv) the attribution of resources under subsection (c)(2); or

(v) the determination of the community spouse resource allowance (as defined in subsection (f)(2));

such spouse is entitled to a fair hearing described in section 1396a(a)(3) of this title with respect to such determination if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse. Any such hearing respecting the determination of the community spouse resource allowance shall be held within 30 days of the date of the request for the hearing.

(B) Revision of minimum monthly maintenance needs allowance

If either such spouse establishes that the community spouse needs income, above the level otherwise provided by the minimum monthly maintenance needs allowance, due to exceptional circumstances resulting in significant financial duress, there shall be substituted, for the minimum monthly maintenance needs allowance in subsection (d)(2)(A), an amount adequate to provide such additional income as is necessary.

(C) Revision of community spouse resource allowance

If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, there shall be substituted, for the community spouse resource allowance under subsection (f)(2), an amount adequate to provide such a minimum monthly maintenance needs allowance.

(f) Permitting transfer of resources to community spouse

(1) In general

An institutionalized spouse may, without regard to section 1396p(c)(1) of this title, transfer an amount equal to the community spouse resource allowance (as defined in paragraph (2)), but only to the extent the resources of the institutionalized spouse are transferred to (or for the sole benefit of) the community spouse. The transfer under the

preceding sentence shall be made as soon as practicable after the date of the initial determination of eligibility, taking into account such time as may be necessary to obtain a court order under paragraph (3).

(2) Community spouse resource allowance defined

In paragraph (1), the "community spouse resource allowance" for a community spouse is an amount (if any) by which-

(A) the greatest of-

(i) $12,000 (subject to adjustment under subsection (g)), or, if greater (but not to exceed the amount specified in clause (ii)(II)) an amount specified under the State plan,

(ii) the lesser of (I) the spousal share computed under subsection (c)(1), or (II) $60,000 (subject to adjustment under subsection (g)),

(iii) the amount established under subsection (e)(2); or

(iv) the amount transferred under a court order under paragraph (3);

exceeds

(B) the amount of the resources otherwise available to the community spouse (determined without regard to such an allowance).

(3) Transfers under court orders

If a court has entered an order against an institutionalized spouse for the support of the community spouse, section 1396p of this title shall not apply to amounts of resources transferred pursuant to such order for the support of the spouse or a family member (as defined in subsection (d)(1)).

(g) Indexing dollar amounts

For services furnished during a calendar year after 1989, the dollar amounts specified in subsections (d)(3)(C), (f)(2)(A)(i), and (f)(2)(A)(ii)(II) shall be increased by the same percentage as the percentage increase in the consumer price index for all urban consumers (all items; U.S. city average) between September 1988 and the September before the calendar year involved.

(h) Definitions

In this section:

(1) The term "institutionalized spouse" means an individual who-

(A) is in a medical institution or nursing facility or who (at the option of the State) is described in section 1396a(a)(10)(A)(ii)(VI) of this title, and

(B) is married to a spouse who is not in a medical institution or nursing facility;

but does not include any such individual who is not likely to meet the requirements of subparagraph (A) for at least 30 consecutive days.

(2) The term "community spouse" means the spouse of an institutionalized spouse.

(Aug. 14, 1935, ch. 531, title XIX, §1924, as added Pub. L. 100–360, title III, §303(a)(1)(B), July 1, 1988, 102 Stat. 754 ; amended Pub. L. 100–485, title VI, §608(d)(16)(A), Oct. 13, 1988, 102 Stat. 2417 ; Pub. L. 101–239, title VI, §6411(e)(3), Dec. 19, 1989, 103 Stat. 2271 ; Pub. L. 101–508, title IV, §§4714(a)–(c), 4744(b)(1), Nov. 5, 1990, 104 Stat. 1388–192 , 1388-198; Pub. L. 103–66, title XIII, §§13611(d)(2), 13643(c)(1), Aug. 10, 1993, 107 Stat. 627 , 647; Pub. L. 103–252, title I, §125(b), May 18, 1994, 108 Stat. 650 ; Pub. L. 105–33, title IV, §4802(b)(1), Aug. 5, 1997, 111 Stat. 548 ; Pub. L. 109–171, title VI, §6013(a), Feb. 8, 2006, 120 Stat. 64 ; Pub. L. 110–234, title IV, §4002(b)(1)(B), (2)(V), May 22, 2008, 122 Stat. 1096 , 1097; Pub. L. 110–246, §4(a), title IV, §4002(b)(1)(B), (2)(V), June 18, 2008, 122 Stat. 1664 , 1857, 1858.)

CODIFICATION

Pub. L. 110–234 and Pub. L. 110–246 made identical amendments to this section. The amendments by Pub. L. 110–234 were repealed by section 4(a) of Pub. L. 110–246.

PRIOR PROVISIONS

A prior section 1924 of act Aug. 14, 1935, was renumbered section 1939 and is classified to section 1396v of this title.

AMENDMENTS

2008-Subsec. (d)(4)(B). Pub. L. 110–246, §4002(b)(1)(B), (2)(V), made technical amendment to reference in original act which appears in text as reference to section 2014(e) of title 7.

2006-Subsec. (d)(6). Pub. L. 109–171 added par. (6).

1997-Subsec. (a)(5). Pub. L. 105–33, in heading substituted "under PACE programs" for "from organizations receiving certain waivers" and in text substituted "under a PACE demonstration waiver program (as defined in section 1396u–4(a)(7) of this title) or under a PACE program under section 1396u–4 or 1395eee of this title," for "from any organization receiving a frail elderly demonstration project waiver under

section 9412(b) of the Omnibus Budget Reconciliation Act of 1986 or a waiver under section 603(c) of the Social Security Amendments of 1983."

1994-Subsec. (d)(3)(A)(i). Pub. L. 103–252 substituted "section 9902(2)" for "sections 9847 and 9902(2)".

1993-Subsec. (a)(5). Pub. L. 103–66, §13643(c)(1), substituted "1986 or a waiver under section 603(c) of the Social Security Amendments of 1983" for "1986".

Subsec. (b)(2)(B)(i). Pub. L. 103–66, §13611(d)(2), substituted "1396p(d) of this title" for "1396a(k) of this title".

1990-Subsec. (a)(5). Pub. L. 101–508, §4744(b)(1), added par. (5).

Subsec. (b)(2). Pub. L. 101–508, §4714(a), substituted "for purposes of the post-eligibility income determination described in subsection (d)" for ", after the institutionalized spouse has been determined or redetermined to be eligible for medical assistance".

Subsec. (c)(1). Pub. L. 101–508, §4714(c), substituted "the beginning of the first continuous period of institutionalization (beginning on or after September 30, 1989) of the institutionalized spouse" for "the beginning of a continuous period of institutionalization of the institutionalized spouse" in subpars. (A) and (B).

Subsec. (f)(1). Pub. L. 101–508, §4714(b), substituted "section 1396p(c)(1)" for "section 1396p".

1989-Subsecs. (b)(2), (d)(1). Pub. L. 101–239 inserted "or redetermined" after "determined".

1988-Subsec. (c)(1)(B). Pub. L. 100–485, §608(d)(16)(A)(i), substituted "will have a right to a fair hearing under subsection (e)(2)" for "has right to a fair hearing under subsection (e)(2)(E) with respect to the determination of the community spouse resource allowance, to provide for an allowance adequate to raise the spouse's income to the minimum monthly maintenance needs allowance".

Subsec. (c)(2)(B). Pub. L. 100–485, §608(d)(16)(A)(ii), substituted "resources shall be considered to be available to an institutionalized spouse, but only to the extent that the amount of such resources exceeds" for "resources shall not be considered to be available to an institutionalized spouse, to the extent that the amount of such resources does not exceed".

Subsec. (d)(3)(A)(i). Pub. L. 100–485, §608(d)(16)(A)(iii), struck out "nonfarm" before "official poverty line".

Subsec. (d)(4). Pub. L. 100–485, §608(d)(16)(A)(iv), substituted "subparagraph (B)" for "subparagraph (C)" in concluding provisions.

Subsec. (e)(2)(A). Pub. L. 100–485, §608(d)(16)(A)(v), inserted "if an application for benefits under this subchapter has been made on behalf of the institutionalized spouse" after "with respect to such determination" before period at end of first sentence.

Subsec. (f)(1). Pub. L. 100–485, §608(d)(16)(A)(vi), substituted "transfer an amount" for "transfer to the community spouse (or to another for the sole benefit of the community spouse) an amount" and "as soon as practicable" for "as soon as pacticable".

Subsec. (f)(3). Pub. L. 100–485, §608(d)(16)(A)(vii), substituted "spouse or a family member" for "spouse of a family member".

Effective Date of 2008 Amendment

Amendment of this section and repeal of Pub. L. 110–234 by Pub. L. 110–246 effective May 22, 2008, the date of enactment of Pub. L. 110–234, except as otherwise provided, see section 4 of Pub. L. 110–246, set out as an Effective Date note under section 8701 of Title 7, Agriculture.

Amendment by section 4002(b)(1)(B), (2)(V) of Pub. L. 110–246 effective Oct. 1, 2008, see section 4407 of Pub. L. 110–246, set out as a note under section 1161 of Title 2, The Congress.

Effective Date of 2006 Amendment

Pub. L. 109–171, title VI, §6013(b), Feb. 8, 2006, 120 Stat. 64 , provided that: "The amendment made by subsection (a) [amending this section] shall apply to transfers and allocations made on or after the date of the enactment of this Act [Feb. 8, 2006] by individuals who become institutionalized spouses on or after such date."

Effective Date of 1994 Amendment

Amendment by Pub. L. 103–252 effective May 18, 1994, but not applicable to Head Start agencies and other recipients of financial assistance under the Head Start Act (42 U.S.C. 9831 et seq.) until Oct. 1, 1994, see section 127 of Pub. L. 103–252, set out as a note under section 9832 of this title.

Effective Date of 1993 Amendment

Amendment by section 13611(d)(2) of Pub. L. 103–66 applicable, except as otherwise provided, to payments under this subchapter for calendar quarters beginning on or after Oct. 1, 1993, without regard to whether or not final regulations to carry out the amendments by section 13611 of Pub. L. 103–66 have been promulgated by such date, see section 13611(e) of Pub. L. 103–66, set out as a note under section 1396p of this title.

Effective Date of 1990 Amendment

Pub. L. 101–508, title IV, §4714(d), Nov. 5, 1990, 104 Stat. 1388–192 , provided that: "The amendments made [by] this section [amending this section] shall take effect as if included in the enactment of section 303 of the Medicare Catastrophic Coverage Act of 1988 [Pub. L. 100–360]."

Effective Date of 1989 Amendment

Amendment by Pub. L. 101–239 applicable as if included in the enactment of section 303 of Pub. L. 100–360, see section 6411(e)(4)(B) of Pub. L. 101–239, set out as a note under section 1396a of this title.

Effective Date of 1988 Amendment

Amendment by Pub. L. 100–485 effective as if included in the enactment of the Medicare Catastrophic Coverage Act of 1988, Pub. L. 100–360, see section 608(g)(1) of Pub. L. 100–485, set out as a note under section 704 of this title.

Effective Date

Pub. L. 100–360, title III, §303(g), July 1, 1988, 102 Stat. 763 , as amended by Pub. L. 100–485, title VI, §608(d)(16)(D), Oct. 13, 1988, 102 Stat. 2418 , provided that:

"(1)(A) The amendments made by this section [enacting this section and amending sections 1382, 1382b, 1396a, 1396p, 1396r, and 1396s of this title] apply (except as provided in this subsection) to payments under title XIX of the Social Security Act [42 U.S.C. 1396 et seq.] for calendar quarters beginning on or after September 30, 1989, without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.

"(B) Section 1924 of the Social Security Act [42 U.S.C. 1396r–5] (as inserted by subsection (a)) shall only apply to institutionalized individuals who begin continuous periods of institutionalization on or after September 30, 1989, except that subsections (b) and (d) of such section (and so much of subsection (e) of such section as relates to such other subsections) shall apply as of such date to individuals institutionalized on or after such date.

"(2)(A) The amendment made by subsection (b) [amending section 1396p of this title] and section 1902(a)(51)(B) of the Social Security Act [42 U.S.C. 1396a(a)(51)(B)], apply (except as provided in paragraph (5)) to payments under title XIX of the Social Security Act for calendar quarters beginning on or after July 1, 1988, or the date of the enactment of this Act [July 1, 1988], without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.

"(B) Section 1917(c) of the Social Security Act [42 U.S.C. 1396p(c)], as amended by subsection (b) of this section, shall apply to resources disposed of on or after July 1, 1988, except that such section shall not apply with respect to inter-spousal transfers occurring before October 1, 1989.

"(C) Notwithstanding subparagraphs (A) and (B), a State may continue to apply the policies contained in the State plan as of June 30, 1988, with respect to resources disposed of before July 1, 1988, and the laws and policies established by the State as of June 30, 1988, or provided for before July 1, 1988, shall continue to apply through September 30, 1989, (and may, at a State's option continue after such date) to inter-spousal transfers occurring before October 1, 1989.

"(3) The amendments made by subsection (c) [amending sections 1382 and 1382b of this title] shall apply to transfers occurring on or after July 1, 1988, without regard to whether or not final regulations to carry out such amendments have been promulgated by such date.

"(4) The amendment made by subsection (d) [amending section 1396a of this title] is effective on and after April 8, 1988. The final rule of the Health Care Financing Administration published on February 8, 1988 (53 Federal Register 3586) is superseded to the extent inconsistent with the amendment made by subsection (d).

"(5) In the case of a State plan for medical assistance under title XIX of the Social Security Act which the Secretary of Health and Human Services determines requires State legislation (other than legislation appropriating funds) in order for the plan to meet the additional requirements imposed by the amendments made by this section (other than paragraphs (1) and (5) of subsection (e) [amending section 1396a of this title]), the State plan shall not be regarded as failing to comply with the requirements of such title solely on the basis of its failure to meet these additional requirements before the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate regular session of the State legislature.

"(6) The amendments made by paragraphs (1) and (5) of subsection (e) [amending section 1396a of this title] shall apply to medical assistance furnished on or after October 1, 1982."

Rule of Construction

Pub. L. 116–16, §2(b), Apr. 18, 2019, 133 Stat. 852 , provided that:

"(1) PROTECTING STATE SPOUSAL INCOME AND ASSET DISREGARD FLEXIBILITY UNDER WAIVERS AND PLAN AMENDMENTS.-Nothing in section 2404 of Public Law 111–148 (42 U.S.**C. 1396r–5** note) or section 1924 of the Social Security Act (42 U.S.**C. 1396r–5**) shall be construed as prohibiting a State from disregarding an individual's spousal income and assets under a State waiver or plan amendment described in paragraph (2) for purposes of making determinations of eligibility for home and community-based services or home and community-based attendant services and supports under such waiver or plan amendment.

"(2) STATE WAIVER OR PLAN AMENDMENT DESCRIBED.-A State waiver or plan amendment described in this paragraph is any of the following:

"(A) A waiver or plan amendment to provide medical assistance for home and community-based services under a waiver or plan amendment under subsection (**c**), (d), or (i) of section 1915 of the Social Security Act (42 U.S.**C.** 1396n) or under section 1115 of such Act (42 U.S.**C.** 1315).

"(B) A plan amendment to provide medical assistance for home and community-based services for individuals by reason of being determined eligible under section 1902(a)(10)(**C**) of such Act (42 U.S.**C.** 1396a(a)(10)(**C**)) or by reason of section 1902(f) of such Act (42 U.S.**C.** 1396a(f)) or otherwise on the basis of a reduction of income based on costs incurred for medical or other remedial care under which the State disregarded the income and assets of the individual's spouse in determining the initial and ongoing financial eligibility of an individual for such services in place of the spousal impoverishment provisions applied under section 1924 of such Act (42 U.S.**C. 1396r–5**).

"(**C**) A plan amendment to provide medical assistance for home and community-based attendant services and supports under section 1915(k) of such Act (42 U.S.**C.** 1396n(k))."

Similar provisions were contained in the following prior act:

Pub. L. 116–3, §3(b), Jan. 24, 2019, 133 Stat. 7 .

PROTECTION FOR RECIPIENTS OF HOME AND COMMUNITY-BASED SERVICES AGAINST SPOUSAL IMPOVERISHMENT

Pub. L. 111–148, title II, §2404, Mar. 23, 2010, 124 Stat. 305 , as amended by Pub. L. 116–3, §3(a), Jan. 24, 2019, 133 Stat. 7 ; Pub. L. 116–16, §2(a), Apr. 18, 2019, 133 Stat. 852 ; Pub. L. 116–39, §3(a), Aug. 6, 2019, 133 Stat. 1061 , provided that: "During the period beginning on January 1, 2014, and ending on December 31, 2019, section 1924(h)(1)(A) of the Social Security Act (42 U.S.**C. 1396r–5**(h)(1)(A)) shall be applied as though 'is eligible for medical assistance for home and community-based services provided under subsection (**c**), (d), or (i) of section 1915 [42 U.S.**C.** 1396n], under a waiver approved under section 1115 [42 U.S.**C.** 1315], or who is eligible for such medical assistance by reason of being determined eligible under section 1902(a)(10)(**C**) [42 U.S.**C.** 1396a(a)(10)(**C**)] or by reason of section 1902(f) [42 U.S.**C.** 1396a(f)] or otherwise on the basis of a reduction of income based on costs incurred for medical or other remedial care, or who is eligible for medical assistance for home and community-based attendant services and supports under section 1915(k) [42 U.S.**C.** 1396n(k)]' were substituted in such section for '(at the option of the State) is described in section 1902(a)(10)(A)(ii)(VI) [42 U.S.**C.** 1396a(a)(10)(A)(ii)(VI)]'."

[For provisions relating to construction of section 2404 of Pub. L. 111–148, see section 3(b) of Pub. L. 116–39, set out as a Rule of Construction Related to Income or Resource Disregard Methodology note under section 1396a of this title.]

Section Four

2020 Juvenile Law Update

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Section Four

2020 Juvenile Law Update…… Elizabeth S. Traylor

PowerPoint Presentation

2020 Juvenile Law Update

Juvenile Update

Presented by Elizabeth Traylor

September 15, 2020

Juvenile Update

I. Department of Child Services Cases

II. Delinquency Cases

III. Waiver to Adult Court Cases

Juvenile Update

I. Department of Child Services Cases

Matter of F.A., 148 N.E.3d 353 (Ind. Ct. App. 2020)

- Decided May 7, 2020
- Five children found to be in need of services
- Parents ordered to permit home visits unannounced
- Children returned to home in 2018
- January 2019 DCS requested to close case
- Mother has altercation with one of the children
- DCS files to terminate
- Trial court terminated parental rights
- Both parents appealed

Matter of F.A., 148 N.E.3d 353 (Ind. Ct. App. 2020) (cont'd)

- Parents asserted they were deprived of due process
- Court recognized seriousness of altercation
- DCS moved to terminate
- Termination most extreme sanction and is a "last resort"
- DCS did not make reasonable efforts to reunify
- Court of Appeals reversed and remanded

Matter of M.S., 140 N.E.3d 279 (Ind. 2020)

- Decided February 2020
- Issue of first impression at Supreme Court
- Can the 120 day limit on a CHINS fact finding hearing be enlarged if a motion for a continuance is filed?
- Indiana statute provides a 120 day limit

Matter of M.S., 140 N.E.3d 279 (Ind. 2020) (cont'd)

- On November 12, 2017 report of neglect of M.S.
- M.S. removed to maternal grandmother
- November 14, 2017 CHINS petition filed; initial hearing held
- December 13, 2017 fact finding hearing held
  - 60 day requirement waived
  - Continued to February 23, 2018
- Discovery dispute
- February 16, 2018 hearing on discovery dispute
  - Mother requested continuance to resolve dispute
  - All parties agreed to waive deadline

Matter of M.S., 140 N.E.3d 279 (Ind. 2020) (cont'd)

- Fact finding hearing held March 16, 2018
- Mother moved for extension of time
- Fact finding hearing concluded on April 17, 2018
- Final ordered issued October 8, 2018
- At October 31, 2018 dispositional hearing mother requested dismissal
- Trial court denied and placed children with maternal grandmother
- Renewed motion to dismiss on 120 day timeframe
- Trial court denied

Matter of M.S., 140 N.E.3d 279 (Ind. 2020) (cont'd)

- Court of Appeals reversed trial court
  - Relied on I.C. 31-34-11-1 and *In re T.T.*, 110 N.E.3d 441 (Ind. Ct. App. 2018)
- Supreme Court:
  - Examined I.C. 31-34-11-1 and *In re T.T.*, 110 N.E.3d 441 (Ind. Ct. App. 2018)
  - Mother moved for continuance and then moved for dismissal
  - Implicitly waived both the 60 and 120 day deadline

Matter of J.C., 142 N.E.3d 427, 432 (Ind. 2020)

- Decided April 1, 2020
- Another deadline waiver case
- Termination of parental rights case
- Mother arrested on warrant
- Rights were termination and she appealed
- Evidentiary hearing not completed within 180 days of petition
- Supreme Court affirmed the denial of motion to dismiss
- Mother affirmatively waived the deadline
- Cannot take advantage of “invited error”

Matter of L.H., 142 N.E.3d 977 (Ind. Ct. App. 2020)

- Decided February 20, 2020
- Father moved to Florida shortly after birth of child
- Mother unable to care for child
- CHINS petition filed
- Father sought custody
- Interstate Compact on Placement of Children (ICPC)
- Home inspection did not occur
- DCS filed to terminate parental rights
- Father appealed

Matter of L.H., 142 N.E.3d 977 (Ind. Ct. App. 2020) (cont'd)

- Earlier case stated that ICPC does not apply to placement with out of state parent: *In re D.B.* (Ind. Ct. App. 2015)
- DCS said that it was unclear if ICPC applied
- DCS required to comply with law of *In re D.B.*
- This is well settled law
- DCS does not have the authority to set policy inconsistent with the law
- Child had a parent willing and able to take care of them
- Reversed and remanded

R.L. v. Ind. Dep't of Child Servs. et al., 144 N.E.3d 686 (Ind. 2020)

- Decided May 5, 2020
- Child born November 2, 2017
- CHINS petition filed and dismissed
- Mother refused DCS home inspection the following day
- Second CHINS petition filed
- Court of Appeals reversed based on *res judicata*
- State moved for rehearing based on *Matter of Eq.W* (Ind. 2019)
- Transferred to Supreme Court

R.L. v. Ind. Dep't of Child Servs. et al., 144 N.E.3d 686 (Ind. 2020) (cont'd)

- Supreme Court: *Eq.W* says DCS cannot engage in piecemeal litigation
- DCS failed to make its case during first hearing
- Second CHINS petition should have been barred by claim preclusion
- Need for predictability in these proceedings

Juvenile Update

I. Department of Child Services Cases

II. Delinquency Cases

KCG v. State of Indiana, 137 N.E.3d 1044 (Ind. Ct. App. 2019)

- Decided on December 26, 2019
- Transfer granted April 16, 2020
- In January 2019, KCG on probation
- Report that KCG threatened Day Reporting Center
- Home searched and rifle found
- State filed delinquency petition
- KCG put on suspended commitment to DOC

KCG v. State of Indiana, 137 N.E.3d 1044 (Ind. Ct. App. 2019) (cont'd)

- Two inconsistent statutes:
- Ind. Code § 35-47-10-5(a): dangerous possession
- Ind. Code § 31-37-1-2: governs juvenile delinquency
- An adult cannot be charged with dangerous possession

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KCG v. State of Indiana, 137 N.E.3d 1044 (Ind. Ct. App. 2019) (cont'd)

- *C.C. v. State*
  - Juvenile court has original jurisdiction over "other proceedings specified by law"
  - Ind. Code 31-30-1-1-(14)
- If *C.C. v. State* is incorrect then the Legislature would have remedied
- Upheld adjudication for possession of a dangerous firearm
- Legislature's intent
- Transfer has been granted

A.M. v. State, 134 N.E.3d 361 (Ind. 2019), *reh'g denied* (Jan. 24, 2020)

- Decided November 12, 2019
- What review standard controls juvenile ineffective assistance of counsel?
- History of delinquent act, enrolled in alternative school, expelled
- July 2017 fight causing serious injury and threatens victim
- True finding of disorderly conduct
- Supervised probation until 18
- Violated probation and placed in DOC
- Appeal: ineffective assistance of counsel

A.M. v. State, 134 N.E.3d 361 (Ind. 2019), *reh'g denied* (Jan. 24, 2020) (cont'd)

- COA denied and transfer granted
- Does the 6th or 14th Amendment standard apply?
- Supreme Court: 14th Amendment applies
  - Differences between juvenile and criminal systems
  - Juvenile rights come from 14th Amendment
  - Standard: "child's best interests"
- Standard was met here
- Petition for Cert to U.S. Supreme Court docketed

C.S. v. State, 131 N.E.3d 592 (Ind. 2019)

- Decided October 1, 2019
- Defendants each appeared by Skype at hearings
- Physically present at delinquency hearings
- Did not object to Skype
- Made wards of the state
- Challenged Skype hearing pursuant to Admin. R. 14
- Due Process violation

C.S. v. State, 131 N.E.3d 592 (Ind. 2019) (cont'd)

- Admin. Rule 14(B) applies to juvenile proceedings
- Trial court did not follow requirements of Rule 14(B)
  - No consent
  - No good cause
- But not fundamental error- Defendants had not objected
- Court provided guidance
  - Follow factors listed in rule
  - Consider child's best interests
  - Make sure to object
- Justice David dissent

Juvenile Update

I. Department of Child Services Cases

II. Delinquency Cases

III. Waiver to Adult Court Cases

Harris v. State, 148 N.E.3d 1107 (Ind. Ct. App. 2020)

- Decided May 13, 2020
- Harris 15 when accused of shooting man
- Charged with Level 1 and Level 3 felonies
- Waived to Elkhart circuit court based on history
- Separation of witnesses during trial
- Harris objected because wanted his mother in court room
- Trial court overruled
- Convicted and sentenced to 37 years in DOC

Harris v. State, 148 N.E.3d 1107 (Ind. Ct. App. 2020) (cont'd)

- Issue of first impression: is a parent essential and not subject to separation of witnesses?
- Court concluded mother was essential
- Despite waiver, child is still a juvenile
- Procedures should take youth into account
- Mother's presence was essential – Ind. R. Evid. 615
- Denial of due process rights
- Not harmless error

D.P. v. State, 136 N.E.3d 620 (Ind. Ct. App. 2019)

- Delinquency petition filed January 2019
- D.P. alleged to have committed felony when 16
- 23 years old now
- Motion to waive juvenile jurisdiction
- D.P. admit allegations
- Court would not accept with pending motion
- Approved delinquency petition and D.P. filed motion to dismiss

D.P. v. State, 136 N.E.3d 620 (Ind. Ct. App. 2019) (cont'd)

- D.P. relied on *M.C. v. State* – juvenile court does not have jurisdiction
- Supreme Court: age of the offender restriction on personal jurisdiction in criminal court
- Juvenile court had jurisdiction to waive to criminal court
- Not legislature's intent for act to go unpunished

Thank you

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Section Four

Indiana Law Update: Family and Juvenile Law

September 15, 2020

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Anyone interested in subscribing to the free, E-mail based Indiana Family Law Update that provides the enclosed case law digests in real time can subscribe by sending an email to familylawcases.us.dbg@dentons.com with "subscribe" in the subject line. Thank you!

Section Four

Indiana Law Update: Family and Juvenile Law……..James A. Reed
Michael R. Kohlhaas

2020 INDIANA FAMILY LAW UPDATE

Recent Family Law Cases:

A. Dissolution of Marriage/Property Division

- ***Smith v. Smith***
- ***Baglan v. Baglan***
- ***Smith v. Smith***
- ***Penley v. Penley***
- ***Crawford v. Crawford***
- ***In re: Marriage of Story and Story***
- ***Bringle v. Bringle***

B. Custody/Parenting Time

- ***T.R. v. E.R.***
- ***Arriaga v. State ex rel. De Landa***
- ***Rasheed v. Rasheed***
- ***Hecht v. Hecht***
- ***Jent v. Cave***
- ***Souders v. Powell***
- ***McDaniel v. McDaniel***
- ***Madden v. Phelps***

C. Child Support/Educational Support

- ***Scott v. Corcoran***
- ***Cunningham v. Barton***
- ***Anselm v. Anselm***
- ***Eldredge v. Ruch***

D. Paternity

- ***Gonzalez v. Ortiz***
- ***Hernandez v. Cortes***

E. Adoption

- ***J.F. v. L.K.***
- ***A.C.S. v. R.S.E (In re: C.A.H.)***
- ***J.P. v. V. B. (In re: L.B.)***

F. Name/Gender Change

- ***In re: Name and Gender Change of R.E.***

G. Attorney Fees

- ***C.B. v. Davis***

H. Statute and Rule Changes

- **Indiana Supreme Court's March 31 Covid-19 Order**

A. Dissolution of Marriage / Property Division

Smith v. Smith, 136 N.E.3d 275 (Ind. Ct. App. November 22, 2019)

HELD: The trial court did not abuse its discretion when it awarded Husband approximately 75% of the marital estate based upon Husband's significantly disproportionate contribution of premarital property.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife were married in October 2009. At the time of the marriage, Husband owned a house, pension accounts, and approximately $1,700,000 in additional assets. Wife's assets at the time of the marriage were worth approximately $900,000.

The parties spent a considerable amount of money during the marriage, including a substantial renovation of the marital residence. The parties also invested significant funds into various business ventures.

By the time dissolution proceedings were initiated in 2014, the parties' only remaining assets of material value were the marital residence and some of Husband's retirement. Those assets were offset by significant credit card debt, a home equity line of credit, and loans totaling over $350,000.

After a final hearing, the trial court concluded that Husband should receive approximately 75% of the remaining marital estate. The trial court's deviation from the statutorily-presumed equal division of the marital estate was based upon Husband's substantially greater premarital contributions to the marital estate. Wife appealed.

The Indiana Court of Appeals concluded that the trial court did not abuse its discretion when it deviated from an equal division in Husband's favor by awarding him approximately 75% of the marital estate, based upon the totality of the circumstances. Husband's premarital contributions, worth more than $1,000,000 in excess of Wife's premarital contributions, supported the trial court's deviation.

On appeal, the parties agreed that a Ford Raptor vehicle was omitted from the trial court's division of the marital estate. Therefore, that issue was remanded back to the trial court to assign a value to the vehicle and to distribute the value between the parties. However, in all other aspects the trial court's decision was affirmed.

Baglan v. Baglan, 137 N.E.3d 271 (Ind. Ct. App. November 27, 2019)

HELD: The trial court abused its discretion when it excluded, from the marital estate, property that was plainly owned by one of the parties on the date the petition for dissolution was filed. The trial court also abused its discretion when it valued another marital asset using a valuation date that preceded the date on which the petition for dissolution was filed.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 1989. During the marriage, both parties worked for a furniture business in Jasper that was owned and operated by Wife's parents. In 2015, Wife's family gifted Wife 26 shares in the furniture store, which gift was valued at $120,640 for gift tax purposes at the time of the transfer. Husband filed a petition for dissolution of marriage in August, 2017.

After a final hearing, the trial court concluded that Wife's stock in the furniture business should not be included in the value of the marital estate because it had been gifted to her and had remained in Wife's name alone. Prior to doing so, the trial court also noted that the value of the shares was $120,640, which was the value used for gift tax purposes when the shares were gifted in 2015. Husband appealed.

The Court of Appeals agreed with Husband that the trial court's decree erroneously excluded Wife's interest in the stock of the furniture business from the marital estate. Husband also contested the trial court's valuation of the stock in the furniture business. The trial court adopted the 2015 gift tax valuation of $120,640. However, Indiana law requires that, for marital dissolution purposes, the valuation date for all marital assets must be between the date the petition for dissolution was filed and the date of the final hearing. Here, the Court of Appeals concluded that the trial court abused its discretion when it valued the shares as of 2015, approximately two years before the petition for dissolution was filed.

The Court of Appeals remanded the matter back to the trial court to include the excluded furniture business shares from the marital estate, and to value the shares during the timeframe required by Indiana law, rather than as of 2015.

***Smith v. Smith*, 136 N.E.3d 656 (Ind. Ct. App. December 18, 2019)**

HELD: The trial court abused its discretion when it denied Husband's motion to continue the final hearing.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 1986 and separated in 2018, when Wife filed her petition for dissolution of marriage. The matter was set for final hearing on March 5, 2019, at 9:00 a.m.

One day before the final hearing, Husband's attorney filed a motion to withdraw, indicating a breakdown of the attorney-client relationship. No motion to continue the final hearing was filed along with the motion to withdraw. The same day that it was filed, the motion to withdraw was granted. The following day, Husband showed up for the final hearing pro se. Wife also appeared, with her counsel. During the hearing, Husband stated that he had recently had surgery and that he requested a continuance in order to get an attorney. The trial court denied Husband's request and stated that, "we're going to finish this today…"

Several weeks later, the trial court entered its decree, which divided the marital estate roughly 50/50 between Husband and Wife; however, the trial court adopted all marital asset valuations

that Wife had offered at the final hearing. Husband appealed the Decree based upon the denial of his motion for a continuance.

The Court of Appeals noted that the granting or denial of a continuance is a highly discretionary function of the trial court. The Court of Appeals concluded that Husband had demonstrated good cause as to why the motion to continue should have been granted, citing his recent surgery and wish to acquire counsel. There was also no evidence that Husband was engaged in any type of dilatory tactics. Indeed, the final hearing was set only four months after the petition for dissolution was filed. The Court of Appeals expressed it's opinion that the trial court had been Husband was not provided 10-day notice of his attorney's withdrawal, as is required by local rule.

Based on the facts and circumstances of the case, the Court of Appeals concluded it was an abuse of discretion for the trial court to deny Husband's requested continuance. The matter was reversed and remanded to the trial court for further proceedings.

***Penley v. Penley*, 145 N.E.3d 874 (Ind. Ct. App. April 29, 2020)**

HELD: The trial court abused its discretion when it denied Husband's motion for leave to file a belated motion to correct error as to the final dissolution Decree, when it was uncontroverted that issuance of the Decree had been noted in the CCS, but inadvertently never distributed to counsel of record and there was no CCS entry indicating distribution had been made.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 1988, and Wife initiated dissolution proceedings in 2017. In September, 2018, the trial court held its final hearing on property division issues. On November 8, 2018, the trial court issued its Decree resolving those issues. The CCS included a notation that the Decree was signed on November 8, 2018, and also that the Decree was entered into the RJO on November 9. The CCS, however, did not indicate any distribution of notice to the parties' counsel.

Several months after the Decree was signed and noted in the CCS, Husband's counsel learned of the previous Decree entry and a filed a motion for leave to reconsider, citing that a copy of the Decree was never received. The trial court held a hearing on Husband's motion. During it, Wife's counsel also acknowledged receiving no copy of the Decree; however, Wife argued that Husband had an obligation to monitor the CCS and, since it contained entries related to issuance of the Decree and its entry into the RJO, Husband had constructive notice of the Decree's issuance, whether the Clerk distributed copies or not. The trial court apparently agreed with Wife's argument, and denied Husband's motion for leave. Husband appealed.
The Court of Appeals observed that this issue is controlled by Trial Rule 72(E), which generally bars extensions based upon a lack of notice by the Clerk, except when there is also no record of the Clerk distributing the order entered into the CCS.

Here, it was uncontroverted that Husband did not receive the Decree. It was also uncontroverted that the CCS contained no evidence that the Decree has been distributed. (The trial court typically made entries stating "Automated ENotice," but not for this Decree.) Therefore, the trial

court abused its discretion by not allowing Husband to file a belated motion to correct errors. The trial court's order was reversed.

***Crawford v. Crawford*, 2020 Ind. App. Unpub. LEXIS 598 (Ind. Ct. App. May 14, 2020)**

UNPUBLISHED MEMORANDUM DECISION

HELD: Husband and Wife amended their premarital agreement when, twelve years into their marriage, they executed a joint revocable living trust into which they transferred all of their respective property interests.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 2002. Prior to their marriage, the parties entered into their Premarital Agreement, which generally provided that neither party would acquire any interest in the property of the other. Attached to the Premarital Agreement were the parties' respective asset schedules.

In 2014, the parties executed a Joint Revocable Living Trust. The Trust identified Husband and Wife as grantors, co-trustees, and lifetime beneficiaries. The Trust was funded with all of the parties' property.

In 2017, the parties separated and a dispute arose over the applicability of the Premarital Agreement. Wife argued that the Trust amended or revoked the Premarital Agreement. The trial court concluded that the Trust trumped the Premarital Agreement, by effectively commingling all of the parties' assets. "[A]ll of the assets included in the [Trust] . . . hereby are, included in the marital estate . . . ." Husband appealed.

The Court of Appeals agreed with Wife that, even though the Trust did not reference the Premarital Agreement, "the Trust, as executed, was contrary to the philosophy and intent of the Premarital Agreement, which was to preserve the parties' premarital assets during their marriage, divorce, or death. . . [the Trust] pulled the parties' separate premarital estates into the Trust, and it provided the parties with joint and equal control over all assets transferred into the Trust." The trial court's order was affirmed.

***In re: Marriage of Story & Story*, 2020 Ind. App. LEXIS 217 (Ind. Ct. App. May 19, 2020)**

HELD: Trial court did not err when it interpreted the parties' mediated final settlement agreement to require Husband to provide Wife with a survivor's benefit on his Military Reserve pension for both his pre-retirement period, and then later while in pay status, despite the agreement only specifically referencing the pre-retirement period.

HELD: Where the final settlement agreement did not specify who would pay for Wife's survivor benefit, the trial court acted with the consent of the parties to resolve that question when it ordered the cost divided equally between them.

FACTS AND PROCEDURAL HISTORY:

Husband and Wife married in 1992. During the marriage, Husband accrued more than 30 years of service in the U.S. Army reserve, including multiple deployments. He filed a petition for dissolution of marriage in 2017.

The parties settled their case in mediation, which settlement included an award to Wife of 50% of Husband's accrued vested monthly benefit for his Military Reserve Annuity Retirement through the date of filing. Importantly, that pension allocation was followed by this language: "Wife shall be treated as Husband's surviving spouse for the purpose of any pre-retirement survivor's benefit and shall be entitled to receive her Military Reserve Survivor Pension . . . ." The complication arising from this additional language is that the Plan did not permit only a "pre-retirement survivor's benefit": Either there is an election for a survivor's benefit for the entire pre- and post-retirement period, or neither. The agreement also did not specify how the survivor's benefit premium would be paid.

These issues were submitted to the trial court, which determined that (1) Wife was entitled to both the pre-retirement and the post-retirement survivor's benefit; (2) the cost of same should be shared equally by the parties. Husband appealed.

The Court of Appeals' opinion took a deep dive into the applicable Plan in question, in an effort to determine how best to harmonize the expressed intention of the parties' settlement agreement with the actual options available under the Plan. Husband's position was that, since the Decree only specified a pre-retirement survivor's benefit, the trial court erred when it also ordered Wife to receive a post-retirement survivor's benefit.

The Court of Appeals concluded that, under the Plan, there was no option for Husband to provide only a pre-retirement survivor's benefit. The Plan permits: (a) a complete waiver of survivor's benefit; (b) a survivor's benefit that exists only from retirement and after; and (c) a survivor's benefit that covers both the pre- and post-retirement period. "Husband elected survivor coverage for Wife during the effective period during his pre-retirement period. By its terms, that coverage continues until Husband's death and provides survivor benefit coverage for Wife, whether Husband dies before or after his retirement age."

As to the payment of the premium, the Court of Appeals concluded that Husband had consented to the trial court resolving the payment obligation dispute and, in so doing, the trial court acted properly in modifying the Decree to provide that the cost of survivor coverage for Wife should be divided equally by the parties.

The trial court's order was affirmed.

***Bringle v. Bringle*, 2020 Ind. App. LEXIS 274 (Ind. Ct. App. June 30, 2020)**

HELD: Trial court did not abuse its discretion when it adopted a valuation of Husband's business that included, as an asset of the Company, a shareholder loan due to the Company from Husband, yet it did not include that same loan as a personal liability of Husband's on the marital balance sheet.

FACTS AND PROCEDURAL HISTORY:

During the marriage, Husband was the sole owner of Company. In 2017, Company transferred certain real estate to another entity owned by Husband. For accounting purposes, Company took back a shareholder loan of $480,000 due from Husband. Separately, Company kept on its books approximately $179,707 of Husband's personal expenses that had been paid the by Company.

Together, Company kept on its balance sheet a receivable, "due from shareholder," of $659,707. In the course of subsequent marriage dissolution proceedings, the parties' joint business valuation expert prepared a valuation report that concluded Company was worth $1,050,000. A footnote in the valuation report stated that the loan due from Husband was included as an asset of Company for purposes of this valuation: "Since the receivable is included in the value of [Company], a liability of $659,707 to [Company] should be included in the marital balance sheet."

The trial court's final division of assets adopted the value of $1,050,000 for Company, and awarded it to Husband. However, the trial court's division did not include any shareholder liability of Husband due back to Company as a marital liability. Husband appealed.

The Court of Appeals' analysis was essentially that the valuation of the Company, and the decision whether to include the shareholder loan as a personal liability of the marriage, were two distinct and independent functions of the trial court. And that, even if the trial court adopted the conclusion of value reached by the valuation expert, the trial court was not derivatively bound to follow the expert's footnote on marital balance sheet items.

Here, there was evidence presented that, because the shareholder loan was essentially a loan between Husband and himself, its repayment obligation was speculative. Therefore, viewing the shareholder loan as a prospective marital liability, it was not improper for the trial court to disregard the loan.

The trial court's decree was affirmed.

B. Custody / Parenting Time

***T.R. v. E.R.*, 134 N.E.3d 409 (Ind. Ct. App. September 20, 2019)**

HELD: Father must pay for supervised parenting time at an agency. Father must comply with domestic violence classes ordered by the CHINS Court. A dissolution court may condition parenting time on Father undergoing a psychological evaluation if it is in support of the best interest of the child(ren). Father will be imputed income for employment, of which he is capable, but for which he voluntarily chooses to be underemployed. Finally, when daycare is necessary, the court may include such expenses when calculating child support.

FACTS AND PROCEDURAL HISTORY:

Mother and Father were married in 2015. There were two children born of the marriage. The first child, C.R., was born in June of 2015. The second child, B.R., was born in June of 2016. In July of 2016, the Department of Child Services (DCS) filed a petition alleging that the children were children in need of services (CHINS). The petition was filed because of Father's behavior at the hospital after the birth of the parties' second child. Mother testified during the dissolution hearing that Father became enraged when he was told that he had to install a car seat which resulted in the police being called. Mother testified that she had previously told her doctor that she just wanted to concentrate on her new baby after the birth and that Father previously displayed erratic behavior and became easily enraged. She testified that she told her doctor this information because she was worried something bad would happen.

In January of 2017, mother filed for dissolution. In February of 2017, the dissolution court refused to enter into any order on custody or parenting time before the CHINS case closed, or they received authorization to proceed. In April of 2017, through the Marion County Family Court Project, the cases were bundled which allowed both cases to proceed. In July of 2017, the juvenile court entered into a custody and parenting time order under the dissolution cause. The court found Mother complied with the DCS case plan but that Father did not comply. Mother was to have sole legal and physical custody of the children. Father was ordered to exercise supervised parenting time at the Seeds of Life Agency at his expense. Finally, Father was to complete a 26-week domestic violence course through Family First.

In May of 2018, the dissolution court approved a partially mediated agreement concerning marital debts and assets but reserved all issues regarding the children for the final hearing. In December of 2018, an evidentiary hearing was held and the dissolution court issued the decree. The order addressed numerous issues. Of these, Father appealed the following: (1) Father must pay for supervised visitation at a specific agency; (2) Father must compete the domestic violence classes and undergo a psychological evaluation; (3) Father's income was imputed in the amount of $692.00 per week based on his last employment and daycare expenses were included in the child support calculation.

Regarding the issue of paying for supervised parenting time, Father argued that his mother and brother could supervise his parenting time at his home. The Court held that Father's behavior, his failure to exercise parenting time for eighteen months, his ability to pay, as well as the fact that his mother and brother would only be able to make the three-hour drive once a week, all supported the dissolution court's order for supervised parenting time at the agency. Additionally, Father argued that once the CHINS case closed, he was no longer required to complete domestic violence classes. The Court acknowledged that the statute's wording is somewhat unclear. Specifically, the part of Indiana Code § 31-30-1-13(c) which states, "until a court having concurrent jurisdiction assumes or reassumes primary jurisdiction of the case to address all other issues." The Court acknowledged that one could interpret the statute to mean that the juvenile court's order survives only "until" the other court assumes jurisdiction. However, the statute also states that the court will "address all other issues" which lends itself to the fact that the juvenile courts orders stand and the dissolution court will address all remaining issues. Therefore, Father must complete the domestic violence classes.

Next, Father challenged the dissolution court's order for a psychological evaluation. Father argues that the dissolution court did not have the statutory authorization necessary to order him to undergo one. The Court looked to Indiana Code § 31-17-4-1(a) for guidance on the issue. This Court interpreted the statute as giving courts wide discretion when it comes to ensuring the best interest of children. However, in this case, the court did not condition Father's parenting time on him undergoing the psychological evaluation. Therefore, the Court remanded this issue to the dissolution court to clarify this issue.

Father also argued that the trial court should not have imputed his income but rather should have used his current actual income, which is much lower. The Court of Appeals disagreed. In making its decision, the Court looked at Father's employment history. Father had quit or been fired from the last several positions he held. Father also has an associate's degree that he did not utilize. For these reasons, the Court held that it was proper to impute Father's income, as he was willfully underemployed.

Finally, Father argued that daycare expenses should not have been included in the child support calculation. His argument was based on him being available to care for the children. However, this argument failed because his visitation with the children had to be supervised. Therefore, daycare was necessary and it was appropriate to include the cost in the child support calculation.

The trial court's order was affirmed and remanded with instructions.

***Arriaga v. State ex rel. De Landa (In the Paternity of M.S.)*, 146 N.E.3d 951 (Ind. Ct. App. April 6, 2020)**

HELD: Trial court erred when it concluded a third party was not a "de facto custodian" of a child and, further, that determination was consequential because the trial court then followed the incorrect statutes and case law in making its custody modification determination.

FACTS AND PROCEDURAL HISTORY:

Mother had three children during her long-term relationship with Father. Father and Mother never married, but paternity of Father was established as to all three children by paternity affidavit.

In 2011, the State brought a Title IV-D proceeding with regard to the middle child ("Child"), born in 2010. Those proceedings resulted in an order confirming Father's paternity of Child, granting Mother custody, and ordering Father to pay child support.

However, there was apparently some possibility that another man was the biological father of Child. Shortly after the Title IV-D proceedings concluded, Mother left Child with that man's mother ("Arriaga"). Child remained in Arriaga's care for years thereafter.

In 2018, Father filed a petition to modify custody. Father recited that he had been in custody of the two other children for the previous year, due largely to Mother's drug and criminal problems. Arriaga, still caring for Child, filed a motion to intervene as a de facto custodian.

Following a hearing, the trial court denied Arriaga's motion to intervene, concluding she did not meet the statutory definition of a de facto custodian, and awarded Father custody of all three children. Arriaga appealed.

The appeal hinged on the interpretation of Indiana's de facto custodian statute, found at Ind. Code § 31-9-2-35.5. It defines a de facto custodian as a person who is the primary caregiver and financial supporter for at least 6 months for a child under age 3, or for at least a year for a child over age 3. Importantly, the statute adds that "[a]ny period after a child custody proceeding has been commenced may not be included in determining whether the child has resided with" the purported de facto custodian. Because of that exception, the trial court concluded that, since Child was born in December 2010, and the Title IV-D proceedings were commenced in April 2011, Arriaga could not have been Child's caregiver for 6 months prior to April 2011.

The Court of Appeals offered a different interpretation: "the time period relevant to establishing a de facto custodianship excludes any period of time after a child custody proceeding has commenced and while it is pending. After a child custody proceeding has been commenced and has concluded, however, the calculation of the time relevant to a de facto custodian determination is not tolled." Since Child lived with Arriaga from age 6 months until she was eight years old, Arriaga had de facto custodian status.

Further, the trial court's determination was not harmless, because the custody modification statute requires the trial court to consider, in part, "[e]vidence that the child has been cared for by a de facto custodian . . . ." In addition, there is substantial case law addressing de facto custodians to be considered as part of a custody determination.
The Court of Appeals reversed the trial court's denial of Arriaga's motion to intervene and its underlying determination that Arriaga was not a de facto custodian. However, in a footnote, the Court added that it was not expressing any opinion on the outcome the custody modification action. The matter was remanded for further proceedings.

Judge Vaidik dissented, arguing that the majority's reversal was based upon arguments created by the majority, and found nowhere in Arriaga's brief.

***Rasheed v. Rasheed*, 142 N.E.3d 1017 (Ind. Ct. App. February 28, 2020)**

HELD: Trial court erred when it awarded the parents joint legal custody of their two children, when their co-parenting relationship was so dysfunctional that it created a constant battleground.

FACTS AND PROCEDURAL HISTORY:

Mother and Father married in 2011, had two children together, and Mother initiated dissolution proceedings in 2017. Mother also sought and received an order of protection against Father. Preliminarily, the parties shared joint legal custody of the children, with Mother providing the primary residence, subject to Father's Indiana Parenting Time Guidelines schedule.

As the divorce remained pending, the parties had a very contentious co-parenting relationship. A GAL was appointed, who issued a recommendation that Mother have sole legal custody. The GAL detailed many of the problems in the relationship between Mother and Father, including

Mother's fear for her safety from Father. In a subsequent report, the GAL stated that "[i]n my nearly 9 years of being a GAL volunteer, I have never been more concerned about the welfare of a child than I am [in this case.]" The GAL also outlined the anxiety that the child felt towards Father.

Following a final hearing, the trial court issued a Decree that provided for shared joint legal custody, with Mother being the primary physical custodial parent, subject to Father's parenting time that was slightly expanded from the IPTG. Mother appealed the joint legal custody award.

The Court of Appeals acknowledged that a determination of legal custody is very discretionary function of the trial court. However, "[w]here the parties have made child-rearing a battleground, joint custody is not appropriate." Concluding that this joint legal custody award imposed an intolerable situation upon the family, the trial court's award of joint legal custody was reversed, and the matter remanded for a decree providing Mother with sole legal custody.

The trial court's Decree was reversed and remanded.

[On August 7, 2020, the Indiana Supreme Court denied transfer on this case. However, Justice David, joined by Chief Justice Rush, dissented from the Court's denial of transfer, asserting that the Court of Appeals reweighed the evidence presented to the trial court, and that the trial court's order granting joint legal custody should have been affirmed.]

***Hecht v. Hecht*, 142 N.E.3d 1022 (Ind. Ct. App. March 5, 2020)**

HELD: Trial court acted within its discretion when it left the parties' parenting time schedule the same, but modified legal custody from joint legal custody to sole legal custody to Mother. The change in legal custody was warranted by the parties' inability to agree on medical and educational decisions related to their special needs child.

FACTS AND PROCEDURAL HISTORY:

The parties divorced in 2017, with two children. In their original Decree, the parties agreed to share legal custody. The parties also agreed upon an unusual parenting time schedule in which, during the school year, Mother would have the children every week and one weekend per month, while Father would have the children the other weekends of the month.

One of the parties' two children has special needs, and disagreement about her medical treatment and education became an issue. Mother filed a petition to modify legal custody and parenting time, after which Father filed a similar cross-petition for modification of his own. At a subsequent evidentiary hearing, it was uncontroverted that the parties suffered from frequent disagreements over legal custody decisions concerning their daughter.

The trial court determined that Mother "is better positioned to serve as [Child's] quarterback and Mother shall have sole legal custody of [Child]." The trial court did not modify legal custody as to the parties' other child. Father appealed.

The Court of Appeals noted the broad discretion afforded to a trial court judge in making a legal custody determination. The Court added that ample evidence was in the Record supporting the contention that the parties were unable to communicate effectively to make joint legal custody decisions. "There are times when a breakdown of communication between parents renders joint custody no longer in the best interests of the child."

The trial court's modification of legal custody was affirmed.

***Jent. v. Cave (In re: Paternity of A.J.)*, 146 N.E.3d 1075 (Ind. Ct. April 27, 2020)**

HELD: Trial court did not err when it awarded custody of Child to the former wife of the biological father, even though that former wife was not the biological or legal parent of Child.

FACTS AND PROCEDURAL HISTORY:

Father and "Mother" were married, during which they used a surrogate to become parents of Child. After their dissolution proceedings, a paternity matter was initiated to establish their respective rights and obligations with respect to Child. Following the divorce, Mother had exclusive care of Child for an extended period, both informally and, later, by temporary guardianship orders.

At a hearing in 2017, Father presented the paternity affidavit that was executed following Child's birth. That hearing resulted in an order transferring Child to Paternal Grandmother pending another hearing. That subsequent hearing granted temporary custody to Father.

Following a final hearing, the trial court issued a lengthy and detailed set of findings and conclusions, much of which is reprinted in the appellate opinion. The order detailed the problematic relationship between Father and Mother, Mother's longtime role as Child's primary parent, and Father's often distant relationship with Child. At the conclusion, the trial court decided that Mother had overcome her burden, by clear and convincing evidence, that Child's best interests would be served by custody being with the non-parent Mother over the biological parent Father. Father appealed.

The Court of Appeals framed Father's appeal as follows: "Father does not suggest that the trial court applied an incorrect legal standard when it evaluated the appropriate custody arrangement here; he merely asserts that we should assess the evidence on appeal differently than how the trial court assessed it. We cannot do so." The Court also referenced the 1994 *Levin* case as precluding a parent from asserting that a child born via artificial insemination was "not a child of the marriage."

The trial court's award of custody to Mother was affirmed.

***Souders v. Powell (In re: I.P.)*, 2020 Ind. App. LEXIS 205 (Ind. Ct. App. May 13, 2020)**

HELD: In a paternity matter, the trial court abused its discretion when it modified custody of Child to Father, where Father failed to demonstrate a substantial change in circumstances in support of modification, or show that modification would be in Child's best interests.

FACTS AND PROCEDURAL HISTORY:

In 2012, Child was born out of wedlock to Mother and Father. Paternity was established by affidavit. The parties lived together, with Child, until Mother and Child moved out in November, 2018. Child lived with Mother exclusively thereafter, except for a two-month period during which Mother recovered from injuries suffered in a car accident. Father exercised regular, informal parenting time.

In May, 2019, Mother applied for benefits for Child, which triggered a Title IV-D action to seek a support order against Father. Father responded with a petition to modify custody. The trial court held a hearing on the matter, at which evidence of the parties' circumstances was presented, which is detailed in the opinion. Father's primary concerns about custody were: Mother's recent OWI arrest; alleged "signs of instability"; and, an expression by Mother of her wish to relocate. Following the hearing, the trial court granted Father's petition for custody without findings or conclusions. Mother appeals.

Father did not file an appellee's brief, which the Court of Appeals acknowledged impacted its review of Mother's appeal.

The Court noted that, in seeking a modification of custody, the burden was on Father to prove both a substantial change in circumstances, and that the modification would be in the best interests of Child. The Court reviewed the evidence that Father presented at trial, and concluded that evidence failed to demonstrate a substantial change in circumstances. Further, there was no evidence that moving custody from Mother—who had raised child for years—to Father would be in Child's best interests.

The trial court's custody modification was reversed and remanded.

***McDaniel v. McDaniel*, 2020 Ind. App. LEXIS 295 (Ind. Ct. App. July 14, 2020)**

HELD: Trial court did not abuse its discretion when it modified custody in favor of Father after Mother moved away without the Court's prior consent under the relocation statute.

HELD: Trial court did not err when it modified legal custody in favor of Father, even though Father did not specifically request that modification.

FACTS AND PROCEDURAL HISTORY:

Mother and Father divorced in 2013, with Child, who was born in 2008. In early 2018, Mother filed a petition to relocate from Dearborn County to Richmond, Indiana. Father filed an objection and request for a hearing.

At the hearing, Mother testified she'd already sold her home and moved to Richmond. Father, who lived in Northern Kentucky, argued that Mother's move would make Child more than 90 minutes farther away, and compromise his parenting and parenting time opportunities. Father never filed a petition to modify custody, but his counsel presented those options orally to the trial court. The trial court took the matter under advisement, pending a GAL report.

Following the trial court's receipt of the GAL report and another hearing, the trial court denied Mother's relocation request. The trial court detailed its reasons for doing so, including the impact the move would have on Child's relationship with Father, Father's ability to be involved in decisions affecting Child, and that ultimately relocation was not in Child's best interests.

After that order, Mother filed a motion to correct error, and Father filed a petition to modify custody, parenting time, and child support. After a hearing on both motions, the trial court denied Mother's motion to correct error, and granted Father sole legal custody, and primary physical custody of Child, subject to Mother's IPTG parenting time. Mother appealed.

The Court of Appeals concluded that the trial court had properly reviewed and applied the statutory factors for its modification.

The trial court's modification order was affirmed.

***Madden v. Phelps*, 2020 Ind. App. LEXIS 312 (Ind. Ct. App. July 23, 2020)**

HELD: Trial court's modification from joint legal custody, to sole legal custody with Father, was an improper *sua sponte* modification because the issue of a general request to modify custody does not put the issue of legal custody properly before the trial court.

HELD: Attorney fee award of $1,000 against Mother, in favor of Father, arising from Father's contempt petition was an abuse of discretion where there was no evidence in the record to support the fee request (e.g., attorney fee affidavit, etc.)

FACTS AND PROCEDURAL HISTORY:

In 2012, Mother and Father entered into a paternity agreement concerning Child, providing for joint legal custody and primary physical custody to Mother. What followed was a very contentious and litigious relationship between Mother and Father, which is detailed in the appellate opinion.

In May 2019, amid of a flurry of other pleadings filed by the parties, Father filed a verified motion "to address issues regarding custody and parenting time" of Child. A subsequent hearing on all pending matters began with a review of what was being heard by the trial court, and legal custody was not mentioned.

However, following the hearing, the trial court issued an order that not only granted Father primary physical custody of Child, but sole legal custody, as well. The trial court also found

Mother in contempt based upon other issues, and ordered her to pay $1,000 towards Father's attorney's fees. Mother appealed.

The Court of Appeals reversed the legal custody modification, concluding that the issue of legal custody was never placed before the trial court, and well-settled law precludes a *sua sponte* modification of custody. The trial court's modification of legal custody in favor of Father was reversed.

The trial court's $1,000 fee award in Father's favor was vacated. Though it arose from Mother being appropriate found in contempt, there was no evidence submitted to the trial court in support of Father's request that he be awarded $1,000 in fees.

C. Child Support / Educational Support

Scott v. Corcoran, 135 N.E.3d 931 (Ind. Ct. App. October 28, 2019)

HELD: Father's failure to pay child support and supply tax returns under the terms of the Agreed Decree were enough to grant Mother's show cause motion. Where Father made an overpayment of support, such funds should be credited to Father's future payments and no money judgment should be issued against Mother.

FACTS AND PROCEDURAL HISTORY:

In 2002, the parties were married and later had two children. Mother was primarily a homemaker and Father worked for a company. Father was paid a salary and was also a shareholder in the company. Father received distributions in years that the company was profitable.

Father filed for a dissolution of marriage. In November 2013, the trial court approved an agreed decree of dissolution ("Agreed Decree") that settled the parties' outstanding issues, including property division, custody, child support, and parenting time. Father agreed to pay $235.00 per week in child support. He also agreed to pay 12% of any income he made over $2,903.79 per week and that he would file tax returns by November 1st of each year, immediately notify Mother of such filing, and provide her with access to the information. Finally, as part of the property settlement, Mother was assigned interest on a promissory note which generated roughly $9,000.00 per month. The Agreed Decree provided that if Mother's interest payment stopped, which it did in 2015, Mother was entitled to modify child support.

In August 2015, Mother filed for a modification of child support. Additionally, Mother filed a show cause motion alleging Father's failure to timely provide tax returns and his failure to pay child support on any extra income. In April 2016, Father paid Mother a lump sum payment based upon his excess income. After this payment, Father filed a motion to modify child support requesting that the trial court take into consideration that the support was more than Mother needed to adequately care for the children. He also requested an accounting.

The trial court held a four-day hearing on the issues. There was testimony by accountants for each side regarding the tax returns and whether the amounts should be based on Father's original tax returns or the amended returns which were filed. After the final day of the hearing, Father withdrew his request for an accounting of the child support paid to Mother.

The trial court subsequently issued its order, which (a) denied both parties' cross-petitions to modify child support, (b) granted Mother's rule to show cause for Father's failure to exchange tax returns timely (and sanctioned Father $3,000 for the violation), (c) denied Mother's rule to show cause for Father's underpayment of child support (finding that Father had actually overpaid by over $23,000); and (d) entered a money judgment against Mother, in favor of Father, in the amount of Father's overpayment. Mother appealed.

Mother argued that the trial court abused its discretion in denying her petition for rule to show cause for Father's failure to timely pay child support. Reviewing the record, the Court of Appeals concluded that Father had plainly failed to follow the provisions of the Decree requiring him to make annual child support payments on his excess income, with Father doing so only after Mother filed her contempt petition. The Court of Appeals reversed as to the lack of finding of contempt, remanding the matter with instructions to enter a finding of contempt and then determine whether sanctions against Father are appropriate.

Finally, Mother argued that Father's overpayment should be treated as a voluntary overpayment contribution and no money judgment should have been entered against her. The Court of Appeals determined that, in this case, a credit in favor of Father against his future child support payments was the appropriate remedy, not a money judgment against Mother as the trial court entered.

The trial court's order was affirmed in part, reversed in part, and remanded with instructions.

***Cunningham v. Barton*, 139 N.E.3d 1081 (Ind. Ct. App. December 26, 2019)**

HELD: For college expense order purposes, Children had not repudiated their relationship with Father as a matter of law where the evidence indicated that, in fact, it was Father who repudiated his relationship with the Children.

FACTS AND PROCEDURAL HISTORY:

Mother and Father married in 1997 and had two twin boys together. The parties divorced in 2001. When the Children were five years old, Father voluntarily ceased exercising his parenting time. However, Father continued to pay child support thereafter, as ordered.

There was no contact between the Children and Father until 2013, when Father telephoned the Children seeking to reestablish contact with them. The Children, who were then 14 years old, returned Father's telephone call, but advised Father that he should not contact them any further and that the Children wished to have nothing to do with Father. No communication between Father and the Children followed. The children turned 18 in December, 2017.

Shortly after the Children's 18th birthday, Mother filed a petition for contribution to post-secondary educational expenses. Both of the Children had various legal and disciplinary problems, though both of them maintained GPAs well above 3.0.

After a hearing, the trial court issued an order granting Mother's request for a contribution to post-secondary educational expenses from Father. The trial court made a finding that Father had abandoned the Children voluntarily when the Children were five years old. The trial court found that it is Father who repudiated the relationship with the children, not the other way around. Father appealed.

The Court of Appeals noted that the trial court correctly focused on the children's actions after they reached adulthood. And the evidence supported the trial court's conclusion that the Children did not repudiate Father. As such, the trial court's rejection of Father's repudiation defense was not clearly erroneous and was affirmed.

The Court of Appeals also rejected a secondary argument by Father that the Children lacked the aptitude for a post-secondary education. While the Court of Appeals acknowledged that the Children had struggles in school, and contacts with the criminal justice system, at the time of the hearing each of the Children had been accepted to and was attending a post-secondary school. In addition, both of the Children completed high school with a very sound great point average, despite their disciplinary problems. Therefore, the post-secondary educational expense order was not erroneous due to lack of aptitude.

The trial court's post-secondary educational expense order was affirmed.

***Anselm v. Anselm*, 146 N.E.3d 1042 (Ind. Ct. App. April 22, 2020)**

HELD: Trial court did not err when it relied upon an unsigned child support worksheet in reaching its child support order, where the parties had previously stipulated to their incomes appearing thereon, and Father made no objection to the unsigned worksheet in question during the final hearing.

HELD: Trial court erred when it required Father to pay both child support at the regular Guidelines level and 100% of the children's uninsured medical expenses.

HELD: Trial court erred when it calculated the equity in the former marital residence.

FACTS AND PROCEDURAL HISTORY:

Father and Mother married in 2014, had two children together, and then Mother initiated separation and dissolution proceedings in 2018. As part of their preliminary child support calculation, the parties agreed that Father earned $900/wk and Mother earned $543/wk.
For the final hearing, the parties disputed physical custody. Mother requested primary physical custody, citing her involvement with the children's day-to-day activities that would maintain that stability. At the hearing, Mother moved to introduce two unsigned child support worksheets. Both used the same income figures as previously agreed upon, but differed in that one gave Father a parenting time credit based upon a Guidelines schedule for Father, while the second

worksheet gave Father a credit for 136-140 overnights. Father had "no objection" to the admission of those worksheets.

Following the hearing, the trial court's Decree awarded Mother primary physical custody of the children and ordered Father to pay child support based upon Mother's worksheet that included a parenting time credit to Father of 136-140 overnights. The support order also required Father to pay all of the children's uninsured medical expenses.

Despite no appraisal and little other evidence being presented, the Decree also concluded the marital residence to be worth $64,000, but subject to loans of $34,987 and $18,645. However, the trial court then concluded the equity to be $33,000, and ordered Father to pay Mother one-half that amount, or $16,500. Husband appealed.

The Court of Appeals noted that it generally disapproves of the use of unsigned child support worksheets for various reasons. However, here, the unsigned worksheet used income figures to which the parties had previously stipulated. Moreover, at the final hearing, Father had no objection to the admission of the worksheet, nor did Father cross-examine Mother on the figures in the worksheet. Thus, Father was precluded from disputing the trial court's reliance on the worksheet in issues its order.

The Court agreed with Father, however, that the trial court committed error when it both ordered him to pay Guidelines child support and pay 100% of the children's uninsured medical expenses. This is because the Guidelines child support includes a "prepayment" by the payor of a significant portion of the children's anticipated uninsured medical expenses. Requiring a parent to pay both is a double-dip.

Finally, the Court of Appeals agreed with Father that the trial court committed a mathematical error in calculating the equity of the marital residence to be $33,000. Since the trial court made specific findings that the house was worth $64,000, and subject to loans of $34,987 and $18,645, then the equity was $10,368, not $33,000.

The case was affirmed in part, but reversed as to the uninsured medical expense order and the marital residence equity calculation.

***Eldredge v. Ruch*, 2020 Ind. App. LEXIS 238 (Ind. Ct. App. June 4, 2020)**

HELD: Trial court's issuance of an income withholding order to satisfy Father's obligation to contribute to the payment of Daughter's college expenses was authorized by Indiana law.

FACTS AND PROCEDURAL HISTORY:

Mother and Father had one child, Daughter, during their marriage, prior to divorcing in 2000. After graduating high school in 2016, Daughter matriculated at the University of Findlay in Ohio. Several months later, Mother filed a petition for college expenses. After a hearing, the trial court determined that Mother and Father should divide college expenses 46%/54%, respectively, limited to a total required parental contribution of $23,000 per year.

In July 2019, Mother filed a motion for an income withholding order on the college expenses, which the trial court granted the following day. Father's efforts to have the income withholding order set aside were unsuccessful at the trial court level, from which Father appealed.

Father's argument on appeal was that, by statute, income withholding orders are applicable only to "child support ordered in any proceeding." Ind. Code § 31-16-15. Father's argument continued that, since a college expense order is not for "child support," an income withholding order cannot be used. The Court of Appeals rejected Father's argument, concluding that the applicable statute permits an income withholding order for all manner of support that benefits a child, including a college expense order.

"Because the statute defining the term 'income withholding order' does not limit such orders strictly to child support, we disagree with Father's argument that strictly construing the relevant statutes supports his position." The trial court's income withholding order was affirmed.

D. Paternity

Gonzalez v. Ortiz (In re: Support of J.O.), 141 N.E.3d 1246 (Ind. Ct. App. February 7, 2020)

HELD: Where legal Father signed a paternity affidavit despite having questions about whether he was the biological father of Child, and legal Father failed to act within 60 days of executing the paternity affidavit, he was not entitled to have paternity later set aside.

FACTS AND PROCEDURAL HISTORY:

Child was born in April, 2017. Father "had some questions in his mind," but signed a paternity affidavit, anyway. The following month, Father obtained a home DNA kit which determined Child was not biologically Father's. Mother contended the test was incorrect, and Father took no further action.

The following year, Mother sought the assistance of a local prosecutor to initiate a child support proceeding against Father. In response, Father moved to dismiss and requested that his name be removed from Child's birth certificate. The trial court ordered the parties to undergo genetic testing based upon a potential "material mistake of fact," namely, Mother's belief that Father was the biological father of Child. After genetic testing established that legal Father was not the biological Father of Child, the trial court dismissed the child support matter, from which the State appealed.

Indiana's paternity statute is clear that, when a man executes a paternity affidavit, doing so establishes paternity without any further court proceedings. Further, a man has 60 days from signing the paternity affidavit to initiate an action to undergo genetic testing to confirm biological paternity. Once the 60 days have passed, there is no way to rescind paternity unless a court finds: (1) fraud, duress, or material mistake of fact in the execution of the paternity affidavit; and (2) a genetic test excludes the man as biological father.

Since it was uncontroverted that Father failed to act within 60 days, on appeal the main issue was whether "fraud, duress, or material mistake of fact" warranted a tardy rescission of paternity.

The Court of Appeals noted that paternity should be set aside only under the most unusual and rare of circumstances. Here, Father's own questions about paternity from the outset made his delay inexcusable. The Court found no fraud or duress. And, because Father had good cause to question paternity, Mother's assertions that she believed Father to be the biological father did not constitute a "material mistake of fact." The Court also noted the public policy considerations for not leaving a child "fatherless."

The trial court's order dismissing child support proceedings against Father was reversed and remanded for further proceedings.

***Hernandez v. Cortes (In re: J.G.)*, 2020 Ind. App. LEXIS 239 (Ind. Ct. App. June 4, 2020)**

HELD: In a paternity matter, the State timely filed its paternity petition even though it was filed five years after Child's birth.

HELD: The Putative Father was not required to register with the putative father registry as a prerequisite to the State filing its petition to establish paternity.

FACTS AND PROCEDURAL HISTORY:

Mother gave birth to Child while Mother was married to Husband. Five years later, the State filed a paternity action, as Child's next friend, seeking to establish the paternity of Putative Father. The Petition claimed that, though Mother was married to Husband at the time, Child was born out of wedlock to Mother and Putative Father. Mother moved to dismiss the petition.

While Mother's motion to dismiss was pending, the trial court ordered DNA testing, which indicated a greater than 99% chance that Putative Father was Child's biological father.
The basis of Mother's motion to dismiss was that the State's petition to establish paternity was not filed timely, and because Putative Father had not registered with the putative father registry at the time the State filed its petition. Following an evidentiary hearing, the trial court denied Mother's motion to dismiss, and found by clear and convincing evidence that Child was the biological child of Putative Father. Mother appealed.

In her appeal, Mother argued that, by statute, a petition to establish paternity must be filed within two years of the child's birth, rendering the State's petition untimely. The Court of Appeals noted that, while that two-year time limitation is generally applicable, there are exceptions. One exception is where the alleged father has acknowledged in writing that he is the child's biological father, as apparently was the case here.

In response, Mother argued that this exception only applies in cases where paternity has not been established previously. Mother claimed that, because Child was born to the marriage of Mother and Husband, that fact had already established Child's paternity.

The Court of Appeals reviewed relevant case law holding that a child born to a marriage is only "presumed to be" the biological child of the father, but that this presumption is rebuttable. Therefore, the paternity of Child had never been conclusively established, thus permitting this case's exception to the two-year filing limitation to apply.

Mother next argued that her motion to dismiss was incorrectly denied because Putative Father had not registered with the putative father registry at the time the State filed its petition to establish paternity. The Court of Appeals, however, concluded that registry is required only for a man who wishes to contest an adoption of a child. Since Child was not subject to an adoption proceeding, the putative father registry requirement was not applicable here.

The trial court's denial of Mother's motion to dismiss was affirmed.

E. Adoption

J.F. v. L.K., 136 N.E.3d 624 (Ind. Ct. App. November 26, 2019)

HELD: Trial court's adoption decree was affirmed, even though Father protested that he never received notice of the adoption hearing, at which it would be determined whether Father's consent to the adoption was required, and at which it was determined that Father's consent was not necessary.

FACTS AND PROCEDURAL HISTORY:

Indiana statute imposes strict deadlines on a parent whose parental rights are terminated by adoption proceedings to challenge that termination. In this case, a Father whose parental rights were terminated by adoption proceedings was prevented from attacking those proceedings collaterally, even though Father's position was that he did not receive notice of the hearing.

Mother and Father were married in December, 2009, and Child was born the following November. Two years later, Child's Maternal Grandparents were legally appointed as Child's guardians.

In May, 2014, Maternal Grandparents initiated adoption proceedings for Child. The adoption petition asserted that Mother consented to the adoption, and that Father's consent was not required because, for a period of at least one year, Father knowingly failed to provide for the care and support of Child when able to do so, and Father made only token efforts to support or communicate with Child.

Father was served with a summons on the adoption proceedings and Father filed an objection to contest to the adoption two weeks later.

Maternal Grandparents filed a motion requesting a contested hearing on the adoption. The trial court set the matter for hearing. Days later, Father's counsel filed a motion to withdraw his appearance, to which Father's counsel attached a letter to Father that advised Father of the date,

time, and location of the upcoming contested adoption hearing. However, Father failed to appear at the hearing.

The following month, the trial court issued its adoption decree. The decree recited that Father had been aware of the date, time, and location of the adoption hearing, but failed to appear. The trial court also found the Father's consent to the adoption was not necessary.

In 2016, nearly two years after the adoption decree was issued, Father filed a motion for relief from judgment. Father claimed that he did not have notice of the adoption hearing, in part because he did not reside at the address to which his counsel had sent details for the adoption hearing. The trial court dismissed Father's motion for relief from judgment, ruling that it was time barred. Father appealed.

The Indiana Court of Appeals noted the strict deadlines that are imposed by Indiana Code §§ 31-19-14-2 and -4. These statutes generally provide that a person whose parental rights are terminated by the entry of an adoption decree cannot challenge the adoption decree once six months after the adoption decree has passed. The statute specifically states that even a significant procedural defect, including failure to provide notice of the adoption proceedings, cannot overcome the statutory deadlines for contesting an adoption. The Court of Appeals noted it was clear that, as a matter of public policy, the Indiana legislature intended the statute to place a high value upon the finality and stability related to concluding an adoption, even in the face of potential procedural defects in the process.

As such, the trial court's adoption decree was affirmed.

A.C.S. v. R.S.E. (In re: C.A.H.), 136 N.E.3d 1126 (Ind. January 10, 2020)

HELD: The Indiana Supreme Court vacated the earlier Court of Appeals decision in concluding that a parent's implied consent to the adoption of a child may not be based solely on the parent's failure to appear at a single hearing. The Supreme Court added that implied consent for adoption may be based in part upon failure to appear at a hearing, but only if it is part of a broader pattern of an overall failure to advance the party's position on the matter.

The divided Court of Appeals decision from August 2019, vacated by this Order, was summarized as such: Father's consent to the adoption of his child was irrevocably implied when he failed to appear for the final hearing.

FACTS AND PROCEDURAL HISTORY:

Grandparents were appointed the legal guardians of Child in June 2016. Subsequently, in May of 2017, the State filed a paternity action against Father. Grandparents filed a petition to adopt the Child. Mother initially consented to the adoption. Grandparents claimed that Father's consent was not necessary because he had abandoned the child for at least six months, failed to communicate with Child for a year without just cause, and did not provide for Child.

In June of 2017, Father filed a motion contesting the adoption and requested counsel. A pretrial hearing was held in August of 2017. After arriving late, counsel was appointed to Father and he

was told to stay in touch with counsel and comply with all requests. Father then failed to appear for a deposition. Grandparents filed a motion to dismiss Father's motion to contest the adoption for failure to prosecute. Father filed a response indicating he failed to appear due to his incarceration. Grandparents withdrew their motion and the adoption proceedings were stayed pending the outcome of the paternity matter. In April of 2018, Father's paternity was established. Grandparents subsequently requested a final hearing in the adoption matter and it was scheduled for July 2018.

Father appeared with counsel at the July 2018 hearing. However, Mother, who had previously consented to the adoption, withdrew her consent. This resulted in the court continuing the final hearing to October of 2018. Grandparents then obtained new counsel and the final hearing was again continued to January of 2019, for a full day. Mother appeared and consented to the adoption. Father failed to appear. Father's counsel requested a continuance based on the fact that Father had appeared at every other hearing and was in contact with counsel. Grandparents requested that the Court proceed in default, which they did. Despite repeated attempts of Father's counsel to continue the hearing, the court found that Father failed to show cause for his failure to appear which resulted in his implied consent for the adoption. Father subsequently appealed.

The Indiana Supreme Court noted that applicable statute provides that a party contesting an adoption has a responsibility to prosecute the contest of the adoption "without undue delay." The Court noted that Father appeared at a prior hearing that was continued. In addition, dispensing with the need for a parent's consent for adoption implicates fundamental liberty interests not at issue with general civil litigation and potential for a default due to a party's failure to appear.

The trial court's adoption order was reversed and remanded for a hearing on the merits of Father's motion to contest the adoption.

***J.P. v. V.B. (In re: I.B.)*, 2020 Ind. App. LEXIS 306 (Ind. Ct. App. July 20, 2020)**

HELD: Trial court erred when it issued a stepparent adoption order without Mother's consent. Stepmother failed to establish, by clear and convincing evidence, that Mother had either failed to communicate with Child significantly, or that Mother was able to pay support but did not, in the period prior to the filing of the adoption petition.

FACTS AND PROCEDURAL HISTORY:

Mother and Father were married and had Child together in 2010. They divorced in 2014, pursuant to which Mother was awarded legal and primary physical custody of Child. In 2017, Father petitioned to modify custody based upon Mother's substance abuse and instability, as a result of which the trial court granted legal and physical custody to Father, subject to Mother's supervised parenting time.

In 2019, Father's new wife ("Stepmother") filed a petition for stepparent adoption. It was alleged that Mother's consent was not needed because, per statute, Mother had abandoned Child, and failed to communicate with Child or pay support for at least one year. Mother filed a letter with the trial court contesting the adoption.

Following a hearing, the trial court concluded that Mother's consent was not required, and issued its adoption order in favor of Stepmother. Mother appealed.

On appeal, it was uncontroverted that there had been some measure of communication between Mother and Child in the period prior to the petition being filed. At issue was whether the level of communication was token or significant. The Court of Appeals underscored that the burden was on Stepmother to prove the facts that would dispense with the need for Mother's consent by clear and convincing evidence.

The trial court's order relied largely upon a review of phone records between Mother and Child. In the 6 months prior to the petition, the records showed 11 calls totaling 83 minutes. The Court of Appeals referenced Indiana Supreme Court precedent that a single significant communication within one year is sufficient to preserve the parent's right to consent. Stepmother failed to present evidence that none of the subject phone calls were significant. (The Court also noted that the phone records were offered into evidence, but never formally admitted.) Thus, Stepmother failed to carry her burden.

As to child support, it was also uncontroverted that Mother had not paid child support, despite being ordered to do so, for more than one year prior to the filing of the petition. Critically, the burden was on Stepmother to further prove that Mother had the ability to pay child support during this period. Uncovering no evidence in the record to support a finding that Mother had the ability to pay support during the relevant period, the trial court's related finding was unsupported and erroneous.

The trial court erred when it concluded that Mother's consent was not required for the adoption, and the resulting adoption order was reversed.

F. Name / Gender Change

In re: Name & Gender Change of R.E., 142 N.E.3d 1045 (Ind. Ct. App. March 12, 2020)

HELD: In a strongly-worded opinion, the Indiana Court of Appeals reversed and remanded a trial court's order denying a transgender male's application for change of name on government documents and change of gender marker on his birth certificate.

FACTS AND PROCEDURAL HISTORY:

R.E. was born female, but identifies as male. In 2019, he filed a pro se *Verified Petition for Change of Name and Gender*. He also requested waiver of publication for the name change, and Admin. Rule 9 sealing, citing "high rates of violence against transgender people." R.E. also cited the Indiana Court of Appeals' 2017 supportive decision in *In re: the Name Change of A.L.*

Following a hearing at which R.E. and the trial court discussed R.E.'s concerns about discrimination and violence, the trial court denied R.E.'s request for waiver of publication and Admin. Rule 9 sealing. "I don't believe you have shown me enough for me to grant the request

you are asking for." R.E. went ahead and complied with the publication requirement, after which a second hearing was held.

At the second hearing, R.E. attempted to introduce various medical records related to his transition, which the trial court did not permit into evidence, citing various Indiana Rules of Evidence. The trial court remained skeptical as to "whether or not you've gone through sufficient enough procedures to actually transition into a male." The trial court continued the matter for several more months.

At the next hearing, R.E. was represented by counsel. At the conclusion of proceedings, the trial court indicated that R.E. was born a female, and no evidence had been presented demonstrating that has changed. In response, counsel for R.E. referenced R.E.'s testimony about transitioning, about taking testosterone, and stated that Indiana's legal standard on this matter is simply how the petitioner identifies, which R.E. testified was male. Following the hearing, the trial court denied R.E. all relief, writing that R.E. had "failed to set forth sufficient evidence to meet even a minimal threshold of proof that her [sic] gender has actually been changed from female to male." R.E. appealed.

The Court of Appeals noted that it has previously ruled that the legal standard for a change of gender marker on a birth certificate is "whether the petition is made in good faith and not for a fraudulent or unlawful purpose." The Court concluded from the Record that R.E. had readily satisfied this minimal threshold, and that the trial court's insistence on medical evidence of R.E.'s change of gender was in inconsistent with Indiana law.

The Court also considered the denial of R.E.'s request for Admin. Rule 9 sealing. The Court of Appeals opined that the trial court held R.E. to a burden on that issue not supported by the law. "R.E.'s testimony of the risk of harm faced by our transgender population is common knowledge and was easily sufficient to meet Administrative Rule 9's requirements to waive publication and seal the court records."

Finally, the Court of Appeals admonished the trial court for its treatment of R.E. during its proceedings. "The trial court's treatment of R.E. here was disrespectful and inappropriate."

The trial court's order was reversed and remanded with instructions to grant R.E.'s petition "without further delay."

G. Attorney Fees

C.B. v. Davis, 144 N.E.3d 759 (Ind. Ct. App. March 18, 2020)

HELD: A family law attorney cannot litigate an award of attorney fees separate and apart from his or her client.

FACTS AND PROCEDURAL HISTORY:

Indiana Code § 31-14-18-2 provides that a court in a family law matter may order one party to pay attorney's fees incurred by the other party.

In the instant case, Mother was represented by Attorney in a paternity matter. Mother sought an attorney fee award against Father. However, while that was pending, Mother and Attorney had a falling out, resulting in Attorney withdrawing from the case.

Mother and Father subsequently reached an agreement on all issues, which included a provision that Father would pay a small portion ($7500) of Mother's legal fees directly to Attorney. Attorney then sought to intervene in the case, which the trial court permitted. The trial court approved all parts of the parties' agreement, except for the $7500 fee provision. Instead, the trial court ordered Father to pay substantially all of Mother's legal fees, approximately $50,000. Father appealed.

In the appeal, Attorney argued that Indiana Code § 31-14-18-2 gives counsel an independent right to pursue attorney's fees. The Court of Appeals disagreed, writing that, while the statute gives lawyers the right to *enforce* attorney fee orders, it does authorize lawyers to request fees in their own name. "Because the client is the 'true owner' of the right to recover attorney fees, the attorney cannot litigate an award of attorney fees 'separate and apart' from the client." In reversing the trial court's order, the Court of Appeals further noted: "To the extent [Attorney] is still owed attorney fees for her services in the paternity case, she may seek them from Mother, her client."

H. Statute and Rule Changes

On March 31, 2020, the Indiana Supreme Court issued an order in case 20S-MS-238. The order provided that:

1. Custody and parenting time orders that are derivative of a child's school schedule shall not be affected by Covid-19 school closures.

2. Parents are free to informally modify their parenting time schedule to reflect school closures.

3. Child support obligations remain due despite Covid-19.

4. "Parties should be flexible and cooperate for the best interests and health of the children during this time."

2020 Indiana Law Update: Family and Juvenile Law

James A. Reed

September 15, 2020

Indiana Family Law Update

CASE LAW HIGHLIGHTS

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Dissolution of Marriage / Property Division Cases

Baglan v. Baglan, 137 N.E.3d 271 (Ind. Ct. App. November 27, 2019)

- HELD—Trial Court abused discretion by excluding Wife's ownership interest in family furniture business from marital estate
- HELD—Abused discretion using valuation date that preceded the date of final separation
- Wife gifted 26 shares of family business during marriage, valued at $120,640 per gift tax return at time of gift (2015)
- Divorce filed August 2017
- Trial court excluded business interest because it was a gift and title remained in Wife's sole name and used gift tax return 2015 value
- Reversed, remanded—cannot exclude, valuation date must be date of filing or later

Crawford v. Crawford, 2020 Ind. App. Unpb. LEXIS 598 (Ind. Ct. App. May 14, 2020)

- HELD—Joint Revocable Trust executed by parties during marriage "trumped" the premarital agreement; trust assets controlled by trust
- Parties entered into premarital agreement providing neither would acquire any interest in the property of the other
- Parties executed Joint Revocable Living Trust, parties as grantors, co-trustees, lifetime beneficiaries; transferred all of parties' property
- Trial court found Trust "trumped" premarital agreement by effectively commingling all the parties' assets—all assets in trust are marital
- Court of Appeals agreed; transfer of assets to joint trust contrary to philosophy and intent of premarital agreement; trust pulled "separate" assets into joint and equal control
- UNPUBLISHED MEMORANDUM DECISION

Bringle v. Bringle, 2020 Ind. App. LEXIS 274 (Ind. Ct. App. June 30, 2020)

- HELD—No abuse of discretion to include shareholder loan due to the Company in business valuation while not including same as personal liability of husband on marital balance sheet
- Husband sole owner of Company; Company transferred real estate to another entity owned by Husband; Company took back a "shareholder loan" of $480,000 owed by Husband; additional loan of $179,707 to Husband for personal expenses paid by Company
- Trial Court used valuation that included the personal loans; rejected Husband's argument that if loans are included in business value, must also include as liability on marital balance sheet
- Court of Appeals view business valuation and what is a liability of party as two distinct and independent functions
- Whether Husband ever would pay debt is speculative

Custody / Parenting Time Cases

Rasheed v. Rasheed, 142 N.E.3d 1017 (Ind. Ct. App. February 28, 2020)

- HELD—Trial Court erred to award joint legal custody when parties' co-parenting relationship was so dysfunctional, created battleground
- Divorce filed, Mother obtains Protective Order, preliminarily parties share joint legal custody, two children primarily residing with Mother
- Very contentious co-parenting relationship, GAL appointed, report recommended sole legal custody to Mother
- Trial Court ordered joint legal custody, Mother having primary physical custody, Father expanded IPTG schedule
- Court of Appeals reversed Trial Court, even though custody decisions very discretionary; "Where the parties have made child-rearing a battleground, joint custody is not appropriate."
- Ind Sup Ct denies transfer, 2 Justices dissenting (reweighing evidence)

Child Support / Educational Support Cases

Scott v. Corcoran, 135 N.E.3d 931 (Ind. Ct. App. October 28, 2019)

- HELD—Granting of Mother's show cause motion supported by Father's failure to pay child support and supply tax returns required by agreement
- HELD—Where Father made overpayment, such funds are credit to FUTURE payments, not a money judgment against Mother
- Trial Court granted Mother's rule to show cause for Father's failure to provide timely tax returns; denied Mother's rule to show cause for Father's failure to pay child support (found Father overpaid); entered judgment against Mother for overpayment; denied both modifications
- Court of Appeals found basis in record for granting Mother's rule to show cause for lack of paying support timely; no money judgment for overpayment

Cunningham v. Barton, 139 N.E.3d 1081 (Ind. Ct. App. December 26, 2019)

- HELD—Children had not repudiated relationship with Father (for purposes of college expense order), Father repudiated relationship with children
- Divorce in 2001, when twin boys 5 years old, Father ceased exercising parenting time, continued to pay support
- No contact with boys until 2013, Father called. Boys returned call, asked Father not to contact them again (boys were 14)
- When boys were 18, Mother filed request for college contribution; Trial Court granted, finding that it was Father that had abandoned boys
- Court of Appeals noted that trial court correctly focused on the children's actions after they reached adulthood—evidence supported finding that boys had not repudiated Father

Adoption Cases

J.F. v. L.K., 136 N.E.3d 624 (Ind. Ct. App. November 26, 2019)

- HELD—Trial Court's adoption decree affirmed, against Father's statement that he did not receive notice of contested hearing
- Within year of Mother's and Father's marriage, child born; two years later Maternal Grandparents legally appointed guardians
- Maternal Grandparents initiate adoption proceedings, with Mother's consent, asserting Father's consent not required
- Father served with summons, Father filed objection
- Contested hearing set, Father's counsel withdraws and attaches letter sent to Father advising him of hearing; Father failed to appear, adoption decree entered
- Nearly two years later, Father files to overturn the adoption, alleging no actual notice of contested hearing

Name / Gender Change Case

In re: Name & Gender Change of R.E., 142 N.E.3d 1045 (Ind. Ct. App. March 12, 2020)

- HELD—Trial Court's order denying transgender male's application for change of name on government documents and change of gender marker on birth certificate REVERSED AND REMANDED
- R.E. born female, identifies as male; filed Petition for Change of Name and Gender (*pro se*); sought waiver of publication, and Adm R 9 sealing, citing "high rates of violence against transgender people"
- Trial Court denied request for waiver and sealing after discussing with R.E. at hearing; R.E. complies with publication; at second hearing trial judge refused to admit medical records, skeptical about whether R.E. has gone through sufficient procedures to transition, continues hearing
- At conclusion of 3rd hearing (R.E. appeared with counsel), trial judge denies all requested relief, stating that there was insufficient evidence

Attorney Fees Case

C.B. v. Davis, 144 N.E.3d 759 (Ind. Ct. App. March 18, 2020)

- HELD—Family law attorney cannot litigate an award of attorney fees separate and apart from his or her client
- I.C. 31-14-18-2 allows a court in family law to order one party to pay other's attorneys fees (in part or all)
- Attorney initially representing Mother in paternity case, withdrew
- Mother and Father reach agreement, including Father agreeing to pay a small portion of fees ($7,500) owed to Attorney; Attorney filed to intervene and be awarded all of Attorney's fees (@$50,000)
- Trial Court allowed intervention, approved Agreement (except $7,500 fees) and ordered all of the fees owed to Attorney
- Court of Appeals reversed, attorney can only enforce fee orders, not pursue fees in own name; client is the "true owner"

Statute and Rule Changes

Indiana Supreme Court - Case 20S-MS-238

Thank you

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Section Five

Real Estate Law Update

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Section Five

Real Estate Law Update……. Mary A. Slade

2020 Real Estate Law Update

By

Mary A. Slade

First American Title Insurance Company[1]

I. Construing Leases and Land Contract Interests

A. General Summary

In 1892, an Indiana Supreme Court's opinion related the following information on a lease:

> Among many definitions of a lease found in the books are the following: "A lease is a contract by which one person devests himself of, and another takes the possession of lands or chattels for a term, whether long or short." Wood's Landlord and Tenant (2d ed.), § 203. "A lease at the common law is a grant or assurance of a present or future interest, for life, for years, or at will, in lands or other property of a demisable nature, a reversion being left in the party from whom the grant or assurance proceeds." Platt on Leases, 9. "A lease is a species of contract for the possession and profits of lands and tenements, either for life or a certain term of years, or during the pleasure of the parties." 12 Am. & Eng. Ency. of Law, 976. "No particular form of expression or technical words are necessary to constitute a lease, but whatever expressions explain the intention of the parties to be, that one shall devest himself of the possession of his property, and the other shall take it for a certain space of time, are sufficient, and will amount to a lease for years, as effectually as if the most proper and permanent form of words had been made use of for that purpose." 12 Am. & Eng. Ency. of Law, 977. "No precise form of words is necessary to make a lease. Any written instrument expressing the agreement of the parties, signed by one and accepted and acted upon by the other, will be obligatory upon both." *Alcorn* v. *Morgan*, 77 Ind. 184…A lease may not only confer upon the lessee the right to the occupancy of the leased premises, either generally for the time limited, or for some specific purpose, or in some specific manner, or the right to occupy and cultivate and to remove the products of cultivation, but it may confer upon him the power to occupy and remove a portion of that

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> which constitutes the land itself. Familiar and common examples of such leases are those authorizing the lessee to quarry and remove stone, to open mines and remove ores, minerals, mineral coal, etc., or to sink wells for procuring and removing petroleum and natural gas. The power to execute leases for such purposes, and the fact that the instrument by which such interest in land is granted may be in all essential particulars a lease will not be questioned. *Knight* v. *Indiana Coal Co.*, 47 Ind. 105, 17 Am. Rep. 692.

Heywood v. Fulmer, 32 N.E. 574, 575, 158 Ind. 658, 659. An unrecorded written lease with a term exceeding three years is invalid and not effective against third parties who have no actual notice of the lease. Ind. Code § 32-21-3-3. Recording provides notice of the lessee's interest and priority: where a lease for more than three years is not recorded, that unrecorded lease is fraudulent and void against a subsequent purchaser's, lessee's, or mortgagee's interest that is recorded first. Ind. Code § 32-21-4-1. In contrast to a leasehold real estate interest, a land contract's purchaser has an equitable interest that over time with payments pursuant to completion of the terms of the land contract become a fee simple interest.

> Under a typical conditional land contract, the vendor retains legal title until the total contract price is paid by the vendee. Payments are generally made in periodic installments. *Legal* title does not vest in the vendee until the contract terms are satisfied, but equitable title vests in the vendee at the time the contract is consummated. When the parties enter into the contract, all incidents of ownership accrue to the vendee. *Thompson* v. *Norton* (1860), 14 Ind. 187. The vendee assumes the risk of loss and is the recipient of all appreciation in value. *Thompson, supra*. The vendee, as equitable owner, is responsible for taxes. *Stark* v. *Kreyling* (1934), 207 Ind. 128, 188 N. E. 680. The vendee has a sufficient interest in land so that upon sale of that interest, he holds a vendor's lien. *Baldwin* v. *Siddons* (1910), 46 Ind. App. 313, 90 N. E. 1055.

Skendzel v. Marshall, 261 Ind. 226, 234, 301 N.E.2d 641, 646 (1973). "[A]n enforceable contract for the sale of land must be evidenced by some writing: (1) which has been signed by the party against whom the contract is to be enforced or his authorized agent; (2) which describes with reasonable certainty each party and the land; and, (3) which states with reasonable certainty the terms and conditions of the promises and by whom and to whom the promises were made."). *Johnson v. Sprague*, 614 N.E.2d 585, 588 (Ind. Ct. App. 1993). A land contract and a lease can have certain provisions included in a memorandum as outlined in Ind. Code § 36-2-11-20 for the memorandum's recording.

B. Recent Cases

***City of New Albany v. Board of Commissioners of the County of Floyd*, 141 N.E.3d 1220 (Ind. 2020)**

In September 1992, the Floyd County Indiana Building Authority ("Building Authority") executed a fifteen year lease with Floyd County for the criminal justice center. This lease included a provision for "upon expiration of this Lease and upon full performance by [the County] of its obligations under this Lease, the [Center] shall become the absolute property of [the County], and, upon [the County's] request, [the Building Authority] shall execute proper instruments conveying to [the County] all of [the Building Authority's] title thereto." Floyd County and the City of New Albany continued to utilize the criminal justice center after the September 2008 lease expiration. After the Building Authority refused Floyd County's request to convey the center to the county, the county filed a declaratory judgment and specific performance action in April 2018 related to the lease. In June 2018, the trial court issued a declaratory judgment regarding the validity of the lease and for the Building Authority to convey the property to Floyd County. The Indiana Court of Appeals

held the full performance – conveyance terms of the lease invalid with option terms in the lease providing an avenue for the county's purchase of the center. The Indiana Supreme Court affirmed the trial court's decision concluding the Building Authority, as a governmental entity, was formed to hold, to develop the criminal justice center, and to arrange the disposition of the center consistent with Ind. Code § 36-9-13-22 and 36-1-11-8 from the same legislative session.

Vic's Antiques and Uniques v. J. Elra Holdingz, LLC, 143 N.E.3d 300 (Ind. Ct. App. 2020)

The 2018 agreement between Vic's Antiques and Uniques ("Vic's") and J. Elra Holdingz ("JEH") included an option for Vic's purchase the subject land of the agreement and another six acres. In February of 2019, JEH alleged a breach of various provisions of the agreement as a breach of a lease as part of a small claims court action with relief requests for Vic's eviction and $6,000.00 in damages. JEH changed the basis of the breach to a post-petition claim of noncompliance with zoning laws and of locking a gate to JEH's adjacent property. Vic's disputed these assertions were related to a lease and alleged that the agreement between JEH and Vic's was actually a land contract. The small claims court viewed the agreement as a lease and ordered Vic's to vacate the subject land. The Indiana Court of Appeals vacated the small claims court's order and remanded with instructions. In evaluating the agreement for the intent of the parties, the Indiana Court of Appeals concluded the agreement was a land contract because:

1. JEH maintained legal title of the subject land;
2. While Vic's compliance with 240 monthly payments totaling $303,671.63 was to result under the agreement's terms to an "option to

purchase… for a purchase price of One Dollar ($1.00)" JEH was to obtain a title insurance owner's policy for $200,000.00; and

3. The difference between the owner's policy amount and the total payments discloses an amortization of a 4.5 percent interest race of that $200,000.00 with the monthly payment amount of $1,263.50.

As a land contract, the small claims court did not have jurisdiction for JEH's eviction claim related to landlord tenant matters under Ind. Code § 33-29-2-4(b)(2).

***Rainbow Realty Group, Inc. v. Carter*, 131 N.E.3d 168 (Ind. 2019)**

Katrina Carter and Quentin Lintner entered into a 2013 agreement with Rainbow Realty Group, Inc. ("Rainbow") regarding a house in Indianapolis. The uninhabitability of the house over a two year span saw Carter and Lintner intermittently live in the house as well as a hotel. Struggles with payments, counterclaims and three eviction proceedings resulted in a small claim court ruling for Rainbow's repossession of the land and the trial court's decision that the agreement was an unenforceable lease. However, that trial court decision also recognized Rainbow's breach of warranties of habitability and making false or deceptive statements with various compensatory and punitive damages and attorney fees awarded in favor of Katrina Carter and Quentin Lintner. The Indiana Court of Appeals reversed the trial court, concluding the agreement was not a residential lease.

In terms of the nature of the parties' agreement, the Indiana Supreme Court found that the agreement was a rental agreement subject to landlord tenant law as opposed to Rainbow's allegation of the agreement as a land contract.

This agreement was subject to the Indiana residential landlord-tenant statutes because:

1. No equity in the real estate's title accrued in the couple's favor while they made payments or in the first two years of the agreement;

2. A separate agreement had to be signed as to any sale terms for the land; and
3. A default of the agreement terms subjected the couple to eviction and loss of their payments.

II. Covenants

A. General Summary

Whether negative, affirmative, or restrictive, covenants that run with the land present a whole host of rights and responsibilities that can benefit and burden not only the original parties' land involved in the covenants but also impact future owners of the land. *Columbia Club, Inc. v. American Fletcher Realty Corp.*, 720 N.E.2d 411, 418-419 (Ind. Ct. App. 1999), *trans. denied* 735 N.E.2d 229 (Ind. 2000). Covenants can appear in a variety of land records and should be carefully evaluated separate and distinct from evaluating the obligations and requirements imposed by local subdivision, zoning, and ordinance control laws (sometimes referred to as governmental covenants or restrictions) for land use and improvements. The Indiana Supreme Court of *Conduitt v. Ross* served as the basis of the Indiana Court of Appeals elaborating on the elements of a covenant affecting real property espoused in *Conduitt*:

> A covenant that runs with the land, or "real covenant," can be enforced against the original contracting parties and any remote grantees. A covenant runs with the land if: (1) the original contracting parties intended it to run with the land; (2) the covenant "touches and concerns the land;" and (3) "there is privity of estate between subsequent grantees of the covenantor and covenantee.

102 Ind. 166, 168-170, 26 N.E. 198, 198-199 (1885); *Tippecanoe Assocs. II LLC v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438, 446 (Ind. Ct. App. 2004), *affirmed in part and superseded in part* 829 N.E.2d 512 (Ind. 2005); *Moseley v. Bishop*, 470 N.E.2d 773, 776

(Ind. Ct. App. 1984); Restrictive covenants are disfavored because of the limitations placed upon the free use of land: however, unambiguous restrictive covenants have been enforced after evaluating their impact on public policy grounds, enhancement of land value, and promotion of trade and/or use as versus restraint on land use and/or competition concerns. *Tippecanoe Assocs*, 829 N.E. at 514-516.

B. Recent Cases

***Feather Trace Homeowners Ass'n v. Luster,* 132 N.E.3d 500 (Ind. Ct. App. 2019)**

The covenants of the Feather Trace Homeowners Association ("Association") require homeowners to pay an annual $200.00 assessment for the Association's maintenance and operating costs. Because Luster viewed that the Association was not maintaining common areas, subdivision roads, lighting and the neighborhood pond and was not enforcing rental and individual homeowner property maintenance, Luster refused to pay the 2018 annual assessment. The Association filed an action for the unpaid assessment and related fees: the trial court ruled in favor of Luster after a bench trial revealed the condition and maintenance of the subdivision. The Indiana Court of Appeals reversed the trial court decision and remanded with instructions for the trial court to enter an order in favor of the Association and to determine the money owed by Luster. No cases were located to support Luster's refusal to comply with the assessment covenant and Luster had other remedies. The covenants regarding the Association board and responsibilities, injunctive relief, receivership, or breach of fiduciary responsibilities options provide other avenues for Luster to address the condition of the subdivision but those options remained unexplored.

***Kosciusko Cty. Cmty. Fair, Inc. v. Clemens*, 143 N.E.3d 310 (Ind. Ct. App. 2020)**

As part of a 1990 litigation settlement, the Kosciusko County Community Fair, Inc. ("Fair") executed a restrictive covenant as to limiting the use of Fair land for motorized racing. This recorded covenant with the county recorder indicated "a covenant running with the Real Estate and shall be binding upon the Fair Association and [Original] Homeowners and all persons claiming under them. This covenant shall be enforceable by [Original] Homeowners and their successors and assigns." In May of 2018, four homeowners alleged the Fair's breach of those covenants with the Fair's activity as a nuisance creating damages and sought injunctive relief and a compliance order. An initial trial court order and appeal affirming the trial court's granting of a preliminary injunction in a 2018 Opinion indicated the covenant ran with the land and enforcement was sought by a successor to an Original Homeowner. *Kosciusko Cty. Cmty. Fair, Inc. v. Clemens*, 116 N.E.3d 1131 (Ind. Ct. App. 2018). The homeowner plaintiffs sought a permanent injunction with their motion for summary judgment. On September 3, 2019, the trial court entered a permanent injunction in response to that motion with the order referencing that the "2018 Opinion 'flatly rejected the Fair's misplaced reliance on the Statute of Frauds' and, citing the 2018 Opinion, 'the Fair's argument that the restrictive covenant fails or lack of an essential element has been rejected.'"

Among its appellate arguments, the Fair claimed that the restrictive covenant failed to comply with the statute of frauds without a description of the benefitted properties, and with the rules of perpetuities as well failure of a homeowner plaintiff to meet the enforceability requirement of the covenant for ''successors" and "assigns". The Fair also

challenged whether the covenant "was an enforceable property interest." The Indiana Court of Appeals affirmed the trial court's decision and remanded for a determination of damages. In its prior evaluation in the 2018 Opinion and in this 2020 decision, the Court of Appeals carefully outlined how the covenant ran with the land, touched and concerned the land, and how one of the homeowner plaintiffs purchased the property that an Original Homeowner owned at the time of the Fair's execution of the restrictive covenant. The Indiana Court of Appeals was not going to reweigh the evidence that vertical privity estate with one of the plaintiffs succeeding to the interest of an Original Homeowner for the restrictive covenant running with the land. The 2018 Opinion also addressed how the recorded covenant was a writing and identified the burdened land and the burdened party for an indefinite time period that fails to violate the rule of perpetuities. The doctrine of the law of the case does not permit relitigation of this area by the Fair after the 2018 Opinion. The remand by the Indiana to the Court of Appeals to the trial court focused on the purpose of determining an award of damages in favor of the homeowner plaintiffs given "that the Fair's claims on appeal are meritless."

***Centennial Park, LLC v. Highland Park Estates*, LLC, 2020 Ind. App. LEXIS 309 (Ind. Ct. App. 2020)**

This July 2020 published decision involves covenants affecting a platted lot. The 1977 recorded plat of Highland Park Phase I included a covenant "that nothing shall be done on any lot 'which may be or become an annoyance or nuisance to the neighborhood.'"

Centennial Park, LLC v. Highland Park Estates, LLC, 117 N.E.3d 565, 568 (Ind. Ct. App. 2018. Centennial Park developed 30 acres to the north of Highland Park. Although an

offering of an easement through the future Phase II of Highland Park was offered to Centennial Park to supplement that development's one and only access to the West, Centennial decided to accelerate its access options in May 2017 by purchasing Lot 15 located in and adjacent to a cul de sac in Highland Park Phase I. In June of 2017, the Town of Ellettsville annexed Lot 15 and was granted a fifty foot wide easement and right of way by Centennial Park over the west side of Lot 15 to connect Centennial Drive to the Centennial Park subdivision. Although Centennial Park intended to construct a permanent road in that easement area, a construction road was put in place across Lot 15. One of adjacent cul de sac lot owners for Lot 16 in Highland Park experienced the blocking of the Lot 16 driveway, and repeated knockdown of the mailbox during the construction traffic. Lot 16 was originally purchased for its location on the cul de sac for the safety it would provide to the owner's "children to play and ride their bikes." This opinion also indicated how the court record disclosed construction traffic damage to the cul de sac and mud buildup on the cul de sac's roadbed.

In February 2018, Highland Park received an injunction order against Centennial Park for the use of Lot 15 as a roadway: the Indiana Court of Appeals affirmed that injunction decision. *Id.* At 573. In August of 2018, the Ellettsville Plan Commission approved Centennial Park's petition for the vacation of a portion of the Phase I Highland Park plat and the plat's covenants. After a series of judicial review, interlocutory appeal, and motions to dismiss, Centennial Park sought relief from the trial court's injunction pursuant to Trial Rule 60(B)(7) and (B)(8) premised on the vacation by the planning commission: the trial court denied the relief request.

The Indiana Court of Appeals affirmed the trial court's decision. Centennial Park alleged that any barrier to road usage of Lot 15 was removed by the vacation of the covenants related to Lot 15. Highland Park argued that the access road was a nuisance that independently can serve as a rationale for the injunction regardless of the status of the lot 15 covenants. Without addressing Highland Park's claim that the vacation of the covenants violated Indiana statutes and constitutional rights, the Indiana Court of Appeals concluded that the findings of fact and conclusions of law by the trial court were not challenged by Centennial Park including the trial court's conclusion that "the construction and the future existence of the access road through Lot 15 constitutes a nuisance and would continue to do so pursuant to Covenant G." The trial court's findings of fact and conclusions also supported a private nuisance *per accidens* that affects a certain group of people (additional traffic affected the owners and families adjacent to the cul de sac) where a lawful conduct "becomes a nuisance by virtue of the circumstances surrounding the use… [A] nuisance *per accidens* is a question for the trier of fact." Centennial Park's Trial Rule 60(B)(7) and (B)(8) allegations failed to support an abuse of discretion or meritorious claim argument given the record's support of the nuisance finding regardless of the viability or existence of the original plat covenants.

III. Recent 2020 Legislation and Administration Laws

A. Lake Michigan

Last year's real estate law update discussed *Gunderson v. State* regarding the State of Indiana's rights to the bed and waters of Lake Michigan. 90 N.E.3d 1171 (Ind. 2018). HEA 1385 created a new chapter, Ind. Code § 14-26-2.1 Ownership of Lake Michigan in Public

Trust. In this chapter, Lake Michigan and the boundaries of Indiana include "the land adjoining the waters of Lake Michigan up to the ordinary high water mark" where the "ordinary high water mark" is:

> the line on the bank or shore of Lake Michigan that is:
> (1) established by the fluctuations of water; and
> (2) indicated by physical characteristics, including:
> (A) a clear and natural line impressed on the shore;
> (B) shelving;
> (C) changes in character of soils;
> (D) the destruction of terrestrial vegetation; and
> (E) the presence of litter or debris.

Ind. Code § 14-26-2.1-2. Unless a conveyance was authorized by legislation before February 14, 2018, the state of Indiana's ownership of Lake Michigan is "for the use and enjoyment of all citizens of Indiana." Ind. Code § 14-26-2.1-3(a). An adjacent owner to Lake Michigan "does not have the exclusive right to use the water or land below the ordinary high water mark of Lake Michigan." Ind. Code § 14-26-2.1-3(b). Ind. Code § 34-30-19.5-3 provides immunity to a landowner, tenant, lessee or occupant of property adjacent to Lake Michigan after June 30, 2020 where an individual traverses that property to and from the beach of Lake Michigan where the public has a vested recreational right. Ind. Code § 36-1-29 provides a framework for building, renovating, or emergency preparedness of seawalls or revetments in relation to Lake Michigan and private property.

B. Recording

SEA 340 made a change to one small word in IC 32-21-2-3 effective July 1, 2020 affecting the recording of various documents as follows:

> For a conveyance, a mortgage, or an instrument of writing to be recorded, it must be:

(1) acknowledged by the grantor; ~~**or**~~ **and**
(2) proved before a:
(A) judge;
(B) clerk of a court of record;
(C) county auditor;
(D) county recorder;
(E) notary public;
(F) mayor of a city in Indiana or any other state;
(G) commissioner appointed in a state other than Indiana by the governor of Indiana;
(H) minister, charge d'affaires, or consul of the United States in any foreign country;
(I) clerk of the city county council for a consolidated city, city clerk for a second class city, or clerk-treasurer for a third class city;
(J) clerk-treasurer for a town; or
(K) person authorized under IC 2-3-4-1.

As mentioned in the 2004 case of *Bourbon Mini-Mart, Inc. v. Comm'r, Ind. Dep't of Envtl. Mgmt*:

> The cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used. *T.W. Thom Const., Inc. v. City of Jeffersonville, 721 N.E.2d 319, 324 (Ind. Ct. App. 1999).* Accordingly, if the language of a statute is clear and unambiguous, it is not subject to judicial interpretation. *State v. Rans, 739 N.E.2d 164, 166 (Ind. Ct. App. 2000), trans. denied*… As previously mentioned, the words "or" and "and" are not interchangeable, and when performing statutory construction, we must give these terms their plain and ordinary meaning.

806 N.E.2d 14 (Ind. Ct. App. 2004). Ind. Code § 32-21-2-6 indicates a deed "may be proved according to the rules of common law before any officer who is authorized to take acknowledgments." Changing "or" to "and" in IC 32-21-2-3 appears to require two notarial acts in order to record certain instruments on or after July 1, 2020. Prior to this change, many electronic and paper instruments submitted for recording with a notarial requirement generally utilized an acknowledgment. Ind. Code 33-42-0.5-2. However, a

form of common law proof focuses on the signature, signature authentication, and identity authentication of a witness with the witness' sworn statement on the execution of the instrument memorialized in a notarial certificate. The technical deficiency provisions of Ind. Code § 32-21-4-1(c) has not been evaluated in an appellate decision as to whether the limited instrument types described in Ind. Code § 32-21-4-1 and recorded without a proof would be protected by the technical deficiency provisions. If a submitted instrument is rejected by an Indiana County Recorder, the 30 day safe harbor time under 11 USC § 547(c) provides limited time to remedy the rejection and to successfully resubmit and record the instrument among the recorder's public land records.

C. Notarization Administrative Rules

Effective March 31, 2020, , 75 IAC 7 provides the administrative framework for notary public, remote notarial public, and remote notarization vendor applications. The approval and effective dates of 75 IAC 7 were the last regulatory steps for remote notarization in Indiana pursuant to Ind. Code §§ 33-42-16-2 and 33-42-17. A remote notarial act involves the interaction of a remote notarial officer and signer via audio visual communication to authenticate the signer's signature and identity and for the remote notarial officer and signer to electronically execute an electronic record via use of technology from a remote technology vendor approved by the Indiana Secretary of State. *Id.*; Ind. Code § 33-42-0.5; 75 IAC 7-1, 3, 5, and 8. The administrative code also illustrates the importance of related application education, continuing education for a notary public, and the impact of failing to report changes in a remote notary public's use of an approved vendor.

APPENDIX

Real Estate Law Update
September 15, 2020
Mary A. Slade

City of New Albany v. Board of Comm'rs of the County of Floyd

141 N.E.3d 1220

(Ind. 2020)

- **Sept. 1992: Lease**
- **Sept. 2008: Lease Expiration**
- **April 2018: Declaratory Action**

Vic's Antiques and Uniques v. J. Elra Holdingz, LLC

143 N.E.3d 300 (Ind. Ct. App. 2020)

- **2018 Agreement**
- **Feb. 2019: Breach & Eviction Action**
- **Lease v. Land Contract**

Rainbow Realty Group, Inc. v. Carter

131 N.E.3d 168 (Ind. 2019)

- **2013 Agreement**
- **Residential Lease v. Residential Land Contract**

Feather Trace Homeowners Ass'n v. Luster

132 N.E.3d 500

(Ind. Ct. App. 2019)

- **August 2002 Purchase**
- **2018 Payment Refusal**
- **July 2018: Small Claims Action**

Kosciusko Cty. Cmty. Fair, Inc. v. Clemens

143 N.E.3d 310 (Ind. Ct. 2020)

- **1990 settlement**
- **May 2018 litigation**
- **2018 Opinion on Preliminary Injunction**
- **2020 Opinion on Permanent Junction**

Centennial Park, LLC v. Highland Park Estates, LLC

2020 Ind. App. LEXIS 309 (Ind. Ct. App. 2020)

- **1977: Plat and Covenants**
- **May 2017: Lot Purchase**
- **June 2017: Annexation and Easement**
- **February 2018: Injunction**
- **August 2018: Vacation**

Lake Michigan

Effective July 1, 2020 – HEA 1385

- **Ownership of Lake Michigan**
- **Ordinary High Water Mark**
- **Immunity**
- **Preservation and Permits**

Recording

Effective July 1, 2020·SEA 340

Ind. Code § 32-21-2-3(a)

For a conveyance, a mortgage, or an instrument of writing to be recorded, it must be:

(1) acknowledged by the grantor; ~~**or**~~ **and**

(2) proved before a:

Notary Administrative Rules

Effective March 31, 2020·75 IAC 7

- **Applications**
- **Remoted Notarization**
- **Remote Technology Vendor**
- **Education Component**

Section Six

Internet Law and Social Media

Jessica L. Ballard-Barnett
Judicial Law Clerk, The Honorable Melissa S. May, Judge
Indiana Court of Appeals
Indianapolis, Indiana

Seth R. Wilson
Adler Attorneys
Noblesville, Indiana

Section Six

Internet Law and Social Media

Seth Wilson, Adler Attorneys
Jessica Ballard-Barnett, Indiana Court of Appeals

Introduction

Suddenly, we are all internet lawyers. At the risk of making the understatement of the year, the global pandemic has forced us to rely on technology like never before. For a profession that typically does not quickly adapt to change, lawyers have had to move with light speed to prepare for and adjust to the global shutdown. The sure things are no longer sure. The only constant: change.

Most years, the material for this seminar has dealt with trends and/or new developments. Now, trends have reset. There are no experts. No one of us has experience navigating a pandemic. None of us has ever gone through this before. Even as we prepare this material, new issues come to light.

Stop for a minute and breath. Lawyers are more vital now than ever--being a stable and reliable source of advice and counsel to our clients, colleagues, and, most importantly, our families. The underlying foundation to our profession is strong. The principles and ideas on which this country was built will serve to guide us even in these changing times.

In this seminar, we will attempt to offer practical ways to think through the current technology based issues facing you and your practice. It is really incredible to think back even a few years ago when a global shutdown would not have been possible, without the technology that we have available today.

You now can access your office from your pocket. How many Zoom calls have you seen people take from their cars/kitchen/bed? You can, literally, practice law from the palm of your hand. It may not be ideal, but it is possible. And, because it is less than ideal, has caused quite a few interesting opportunities for us to learn.

Let’s start with a couple of the hot-button issues. Keep in mind, our goal is to be apolitical. We are not interested in debating who/what is right/wrong, but highlighting the impact technology can have on these matters from a constitutional perspective.

1. COVID-Related Constitutional Considerations
    a. Are you free to speak on Social Media?
        i. Is fact checking a violation of free speech?
            1. In late 2019, Facebook changed its policies regarding the dissemination of anti-vaccine information after pressure from the CDC, WHO, and members of Congress. These steps included reducing the ranking of groups and pages that spread misinformation about vaccines, rejecting ads that include misinformation about vaccines, and possibly removing fundraising tools from groups and pages that spread misinformation about vaccines. Facebook worked with the WHO and CDC to identify specific vaccine hoaxes and to provide scientifically-verifiable information to those looking for general information about vaccines.[1]
            2. In August 2020, a group called the Children's Health Defense sued Facebook, Mark Zuckerburg, and separate organizations Science Feedback, Poynter, and PolitiFact, alleging they acted "jointly or in concert with federal government agencies" to infringe the CHD's First and Fifth Amendment rights by labeling their information as "misinformation" and thus "openly censor[ing] unwanted critiques of government policies and pharmaceutical and telecom products on privately owned internet platforms."[2]
        ii. Does a social media provider have a constitutional right or duty to regulate what is posted on its platforms?
            1. In June 2017, the Knight First Amendment Institute sued President Trump, his director of social media, and press secretary for violating Twitter users' right to free speech after the President's Twitter account blocked the users for criticizing the President and his policies. In public forums, the First Amendment protects against such "viewpoint discrimination." The Knight Institute argues that not extending First Amendment rights to a forum stitch as Twitter creates an "echo chamber" which would contradict Justice Brennan's statement in New York Times v. Sullivan, that free speech is "the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."
            2. Constitutional scholars argue to the opposite - that the President's Twitter account is individual to the person, not the office, and thus

[1] https://about.fb.com/news/2019/03/combatting-vaccine-misinformation/; https://arstechnica.com/science/2019/03/as-anti-vax-movement-gets-weirder-and-dumber-facebook-announces-crackdown/
[2] https://arstechnica.com/tech-policy/2020/08/anti-vaccine-group-sues-facebook-claims-fact-checking-is-censorship/

the decisions about that account are not constrained by the First Amendment because they are not governmental decisions. Others focused on Twitter's status as a private company and contended there is not right to free speech on Twitter, and therefore the President's Twitter account cannot be a "designated public forum" because the forum itself is not public.

3. The Knight Institute maintains Twitter's status as a private company is not the issue; instead it is the use of the forum by the President.
4. This also brings into question the validity of Facebook (and now Twitter's) ban on hate speech and how it could be applied disproportionately.[3]
5. The U.S. District Court for the Southern District of New York held that the President's account constituted a "public forum" under the First Amendment. The case was argued in March 2019 before the 2nd Circuit Court of Appeals. The 2nd Circuit affirmed the District Court, and the Department of Justice has filed a petition for certiorari before the Supreme Court.[4]
6. Can local officials block dissenters on social media? (Seth has an example)

iii. Did you even read the terms of service?

1. The terms of service for social media platforms such as TikTok, Zoom, Tinder, Twitter, and Facebook take more than twenty minutes to read at 240/words per minute. Microsoft's terms of service, at this rate, takes over an hour to read. In addition, the terms of service for most social media platforms, including Facebook and Snapchat, require at least a 10-12 grade reading level based on the average words per sentence and the syllables per 100 words (the "Flesch Reading Ease test").[5]

b. And, now that you have all of that social media information, what are you going to do with it?

i. Recording considerations (Video/bystander videos/etc)

ii. Finding and using Social Media Information

1. "Friending" or "Following" a party's user account on social media through a fake account violates Indiana Professional Conduct Rule 4.2 and 4.1. Having a paralegal do so also violates the Indiana Professional Conduct Rule 5.3.
2. In a July 2020 Advisory Opinion (1-20) by the Indiana Disciplinary Commission, the Commission indicated, regarding an attorney's use of social media, "An excellent rule of thumb for social media is

[3] https://www.wired.com/story/should-facebook-and-twitter-be-regulated-under-the-first-amendment/
[4] https://thehill.com/homenews/administration/512938-trump-asks-supreme-court-to-let-him-block-critics-on-twitter
[5] https://www.visualcapitalist.com/terms-of-service-visualizing-the-length-of-internet-agreements/

if the attorney cannot do it [under the ethics rules] in person, he/she cannot do it online."

3. Indiana Rule of Professional Conduct 3.4 prohibits an attorney from unlawfully obstructing another party's access to evidence, and this could include advising a client to "clean up" their Facebook account to remove incriminating pictures.
4. Under the umbrella of Indiana Professional Conduct Rule 1.1 regarding an attorney's duty to maintain competence in technology, below are some tips to help maximize e-discovery:
    a. On Facebook you can filter a person's timeline by date and keyword search
    b. Review a user's albums for significant life events, which could include discoverable information such as a personal injury party engaging in activity that is relevant to the claim.
    c. On Instagram, posts can be searched by location. This may be helpful in searching for activity at a public place at a certain time - sometimes Instagram pictures can be clearer than surveillance video.
    d. Users may have multiple accounts, such as fake accounts or accounts not using their real name. To discover these accounts, or other relevant information not in the user's account, check for mutual friends and work backwards, reviewing pictures on others' accounts to find account tags for accounts under false names.
    e. Be mindful of view notifications
        i. On LinkedIn, unless you are viewing under certain privacy settings, the user is notified when someone looks at their platform.
        ii. On Instagram, a user is notified if you look at their "stories."
        iii. On Facebook, a user can see how many times a video has been viewed, but cannot see who viewed it.
        iv. TikTok does not generate view notifications but you must create a user name to view a video on TikTok.
    f. Look for social media accounts and relevant information therein BEFORE requesting relevant social media posts, usernames, and passwords as part of formal discovery - while it is unethical for an attorney to advise a "clean up" a social media profile, the request may prompt the user to do so on his/her own.
    g. Avoid compromising firm security and confidential information by using certain social media platforms. Some law firms have banned TikTok from attorneys' and

employees' phones based on reports that the app routinely snoops into other apps on the phone which could contain confidential information.

h. Remember that like all other evidence, social media evidence must be authenticated and a foundation must be laid for its admission.[6]

2. Due Process/Access to Justice

a. "Virtual" Courtrooms

i. Constitutional implications - due process, confrontation clause

1. Remote courtroom proceedings may affect a defendant's Sixth Amendment right to counsel if the client and the attorney have been unable to confer prior to the remote hearing, such as in a bail hearing.
2. In-person testimony may seem more reliable than virtual testimony based on technology glitches. A study in 2014 indicated that testimony via video takes away the fact-finder's ability to read non-verbal cues and some technology may filter out voice frequencies associated with human emotion.
3. Access to technology is also a problem. In 2019, nearly half of American who made less than $30,000 a year did not have home wifi or computer access. Approximately one in three do not have a smartphone. Forty two million Americans live in areas out of the reach of broadband internet.[7]
4. Before the pandemic, one in six immagration hearings were held remotely. Recent studies have shown that if those individuals had appeared in person and not on video, the court would have been more likely to grant asylum or denied deportation.
5. Conversely, remote technology has enabled legal aid organizations to meet with clients who live in remote areas of Montana, and video has increased the availability of translators in the courtroom in Nebraska.[8]
6. Some court do not allow witnesses to appear virtually because their identity cannot be authenticated.
7. Privacy could be an issue, especially when a defendant is speaking with his/her attorney from prison. For witnesses, this lack of privacy could hinder the witness' willingness to recount

[6] https://www.theindianalawyer.com/articles/van-dame-and-johnson-finding-using-social-media-evidence-in-personal-injury-cases
[7] https://www.brookings.edu/techstream/the-legal-and-technical-danger-in-moving-criminal-courts-online/
[8] https://www.brennancenter.org/our-work/analysis-opinion/promise-and-peril-courts-go-virtual-amid-covid-19

traumatic events. Additionally, it is sometimes unclear from the platform who has access to the recording of the proceeding or the chat logs.[9]

8. Other concerns include:
    a. A client's appearance on/in a video conference may disclose a confidential location.
    b. Consider witnesses/clients who live in a potentially dangerous situation with another party, such as in family law matters.[10]

ii. Rural county considerations
1. access to justice
2. access to internet services
3. Universal wifi (mifi example)

b. Software Applications
i. Does the specific application make a difference? Do the litigants have access to Zoom/Webex/Microsoft Teams?
ii. Etiquette? - Ethics?
1. Presenting evidence
    a. Agree before the hearing about the format in which evidence will be offered - .pdf, on camera, etc.
    b. Will screen sharing be permitted? Is that a good idea? Keep in mind that when you're sharing your screen, you could be sharing EVERYTHING on your screen (e.g., email notifications).
    c. Remember you are not passing a tangible object, so think about how it can be easily identified and referred to virtually.[11]
2. Ethics
    a. A brief overview of the Model Rules of Professional Conduct
    b. Duty of Competence, technologically speaking
3. Zoombombing
    a. Zoombombing occurs when someone who does not have authorized access to a Zoom session interrupting that session with inappropriate content such as pornography, racial slurs, or loud music.

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[9] https://www.cnet.com/news/why-virtual-courts-put-defendants-at-a-disadvantage/

[10] https://www.nycourts.gov/LegacyPDFS/accesstojusticecommission/PracticalConsiderationsforAttorneys-in-the-VirtualCourtroom.pdf

[11] https://www.nycourts.gov/LegacyPDFS/accesstojusticecommission/PracticalConsiderationsforAttorneys-in-the-VirtualCourtroom.pdf

b. When using any teleconferencing platform, it is important to have
    i. Password for access
    ii. Host or co-host who can moderate in the event of zoombomber or other inappropriate behavior[12]

iii. What about Recording Issues?
1. Rule 2.17 of the Indiana Rules of Judicial Conduct prohibits courtroom broadcasting and photography.
2. On August 14, 2020, Indiana Supreme Court issued an order authorizing judges to record videos showcasing safety procedures in place in the courtroom. This does not overrule any other prohibitions put in place for recording court proceedings.[13]

3. Tracking Through Mobile Phones

a. Unintentionally allowed tracking on the web
    i. The terms and conditions of many social media sites allow those sites to track data about you or to reveal information to others you may not intend. You can follow a few simple steps to address this possible privacy breach
        1. "Lock down" your account
            a. Facebook
                i. Turn off "Location" - this will prevent Facebook and other users from know the location from where you are posting.
                ii. Select "Friends" for "Who can see your future posts?" and "Who can look you up using the email address/phone number your provided?" - this will prevent any Facebook user from seeing your posts.
                iii. Select "No" for "Do you want search engines outside of Facebook to link to your profile?"
            b. Instagram
                i. Make your account private
            c. Twitter
                i. Under "Tweet Privacy" check on the box next to "Protect my Tweets."
                ii. Make your account private and only accessible by those who follow you.
            d. LinkedIn

[12] https://arstechnica.com/tech-policy/2020/08/zoombomber-crashes-court-hearing-on-twitter-hack-with-pornhub-video/?comments=1
[13] https://www.theindianalawyer.com/articles/supreme-court-allows-cameras-in-courtrooms-for-covid-19-psas

i. You have the option to change the mode you would like others to view your profile via the Settings and Privacy.
    1. You can choose:
        a. Your name and headline
        b. Private profile characteristics
        c. Private mode
    2. Note recent advisory opinions from the Discipline Commission[14]
2. Generally, avoid using your real name on social media. One exception may be LinkedIn.
3. Audit your posts
    a. Check for old pictures or pictures you're tagged in that may not reflect well on your reputation.
4. Log in to the internet without using a social media site
    a. Many third party vendors and games ask you to log in via Facebook or another social media platform. This allows the third party website to have access to some of the information on your social media platform.
    b. Allowing this access could also spread viruses onto your social media accounts.
5. Stop social tracking
    a. Some web browsers like Firefox have extensions that allow the user to open the social media site without allowing the site to "follow" you to other sites, which is how social media sites get data so that you receive ads relevant to your interests.[15]

b. Through your smart phone's Location Data
    i. To prevent unintended privacy invasions that share your location with these apps and possibly third parties from your phone, the National Security Agency suggests:
        1. Disable location settings on the device.
        2. Disable bluetooth and turn off wifi if those capabilities are not needed. Use Airplane Mode when your device is not in use. Ensure bluetooth and wifi are disable in Airplane Mode.
        3. Apps should be given as few permissions as possible
            a. Set privacy settings to ensure apps are not using or sharing location data.
            b. Avoid using apps related to location; if you choose to, turn off the location feature.
        4. Disable advertising permissions to the greatest extent possible

[14] https://www.in.gov/judiciary/discipline/2413.htm
[15] https://blog.mozilla.org/firefox/data-detox-social-media/

a. Set privacy settings to limit ad tracking
b. Reset the advertising ID[16] for the device on a regular basis.

5. Turn off settings that allow a lost, stolen, or misplaced device to be tracked.
6. Minimize web browsing on the device as much as possible
7. Use an anonymizing VPN to obscure location
8. Minimize the amount of data with location information that is stored on the cloud, if possible.[17]

c. Contact Tracing
   i. New OS updates on Android and Apple phones have added apps with Contact Tracing abilities to assist in the fight against COVID-19.
      1. While these apps may be useful, they make make many users vulnerable
         a. Data could be used for other purposes
         b. The apps could be hacked and the information used for other purposes
      2. Current optional contact tracing apps could lead to mandatory tracking under certain circumstances.[18]

4. Opportunities

a. Though this is a challenging time, it also helps reframe perspective and provide potential for improvement. There's no doubt that some of the changes we have experienced recently have come to stay. What are some of the positive things that have happened?
   i. Artificial Intelligence (AI) sites/form creation (Unauthorized Practice of Law?)
      1. Community.lawyer assists practitioners with adding client portals and AI capabilities to their websites to assist with certain legal tasks.
      2. In August 2020, Keesal Propulsion Labs released the GPT-3 program, which draws upon 175 billion parameters to craft many written works, including court filings
         a. The software is advertised as a complement, not a replacement to traditional lawyer duties.
            i. Simple filings
            ii. Standards of review

[16] https://www.wired.com/story/ad-id-ios-android-tracking/
[17] https://arstechnica.com/tech-policy/2020/08/beware-of-find-my-phone-wi-fi-and-bluetooth-nsa-tells-mobile-users/
[18] https://www.forbes.com/sites/zakdoffman/2020/05/22/contact-tracing-apple-google-coronavirus-security-update-android-iphone/#5f8f5ff61d59

3. Other similar programs include:
    a. Grammarly
    b. BriefCatch
    c. Hemingway Editor
    d. PerfectIt + American Legal Style
    e. WordRake
4. While helpful in some respects, using AI to draft legal writing could limit creativity and new legal ideas because the AI draws from information it already has.[19]

b. Working from Home
    i. Protection of client information/confidential matters
        1. "Work from Home" may create new data sources for preservation and collection
            a. Users may have to save a document locally instead of on the firm's cloud service due to connection issues
            b. Online communication may include confidential information and may also be discoverable
        2. Collection and data transfers may be interrupted because of stress on the system.
        3. Hosting vendors may be delayed in ingesting, processing, and producing data.
        4. Large system outages may be more than an inconvenience.
        5. More of a possibility of interception of data when sending information remotely from one machine to another in an uncontrolled at home environment.
            a. Are employees required to use work issued computers to access documents?
            b. How do you know your client's computer is secure?[20]
        6. Podcast on the topic[21]
    ii. E-Notary/Recording
        1. The Indiana Secretary of State provides an application for someone to become a "Remote Notary."[22]
    iii. Remote Proceedings
        1. Mediation/Depositions/Hearings/Trials
        2. Setting up a Mediation using Microsoft Teams
            a. Set up three meetings
                i. Client + Attorney
                ii. Other Party + Attorney
                iii. Attorney + Client + Other Party

[19] https://www.theindianalawyer.com/articles/a-brave-new-chapter-ai-tackles-legal-writing
[20] https://www.law360.com/articles/1256759/10-e-discovery-challenges-caused-by-covid-19
[21] https://abovethelaw.com/2020/08/protecting-your-data-and-discovery-in-the-era-of-covid/
[22] https://www.in.gov/sos/business/4789.htm

    b. Participants can switch between meetings as needed or permitted and this set up provides a good replication of in-person mediation.[23]
3. Think about how your office functions as a virtual Courtroom
    a. Audio
    b. Lighting
    c. Positioning Devices and cameras (iPad/web cam/laptop)
    d. Internet Access

[23] https://www.theindianalawyer.com/articles/start-page-using-microsoft-teams-for-mediation

Internet Law / Social Media

Jessica L. Ballard-Barnett & Seth R. Wilson

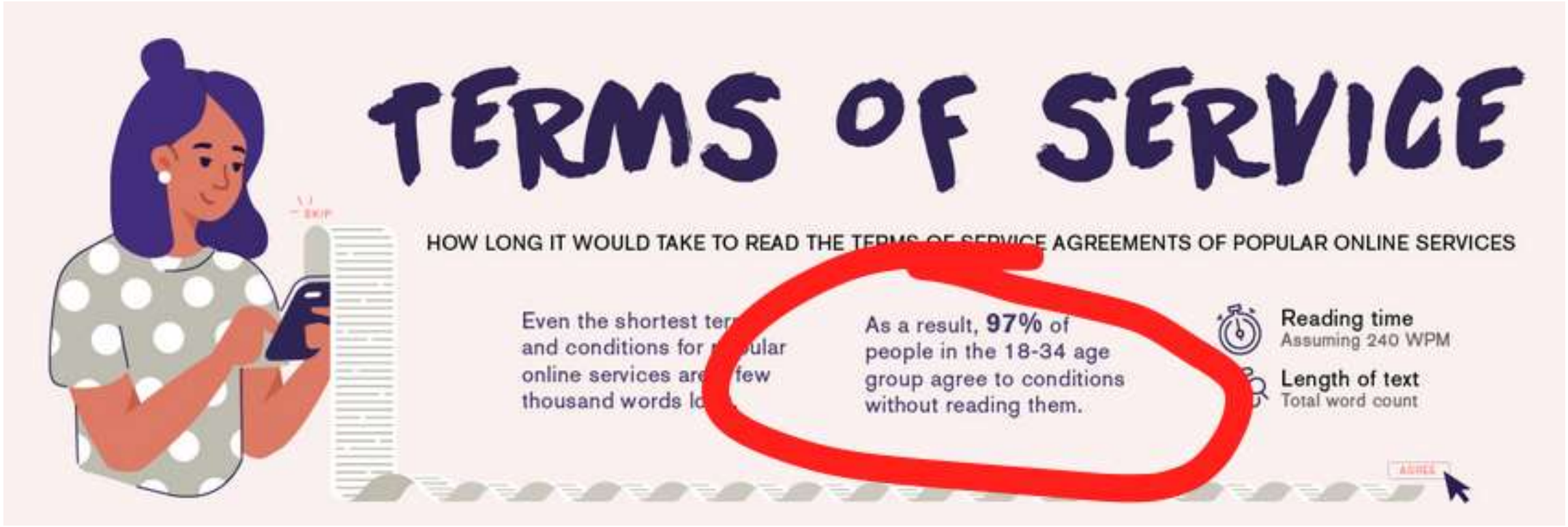

REVENGE OF THE
NERDS
Their time has come!

Introduction & Overview

- Did you ever think you would be an internet-based lawyer?
- Practice law from the palm of your hand?
- New possibilities

COVID-Related Constitutional Considerations

- Social Media Free Speech
  - Fact Checking
  - Regulation by Providers
  - Terms of Service


TERMS OF SERVICE
HOW LONG IT WOULD TAKE TO READ THE TERMS OF SERVICE AGREEMENTS OF POPULAR ONLINE SERVICES
Even the shortest ter
and conditions for p ular
online services are few
thousand words lo
As a result, 97% of
people in the 18-34 age
group agree to conditions
without reading them.
Reading time
Assuming 240 WPM
Length of text
Total word count


TERMS OF SERVICE

TERMS OF SERVICE

HOW LONG IT WOULD TAKE TO READ THE TERMS OF SERVICE AGREEMENTS OF POPULAR ONLINE SERVICES

Even the shortest terms and conditions for popular online services are a few thousand words long.

As a result, **97%** of people in the 18-34 age group agree to conditions without reading them.

Reading time
Assuming 240 WPM

Length of text
Total word count

FACEBOOK INSTAGRAM SPOTIFY TWITTER LINKEDIN TINDER YOUTUBE APPLE AMAZON ZOOM TIKTOK NETFLIX MICROSOFT UBER

U.S. BILL OF RIGHTS

31:36

7591

SPOTIFY

35:48

8600

TikTok's terms of service includes lengthy details on what users are forbidden to post:

Content that showcases drug use and weapons, "instructions on how to conduct criminal activities", and "pranks like swatting".

Misinformation, including hoaxes, false political information and "misleading information about medical treatments".

Symbols related to hate and terrorist groups, as well as content that glorifies, praises or supports dangerous individuals or organizations.

TIKTOK

31:24

7459

The average American would need to set aside almost 250 hours to properly read all the digital contracts they accept while using online services.

Why are some sections of terms of service agreements in ALL CAPS?

To call attention to certain parts of a legal document so they're harder to miss. This practice is a throwback to when contracts where written up by typewriters (which didn't have a wealth of formatting options).

Microsoft's massive terms of service agreement would take well over an hour to read, but it does cover the company's entire suite of products.

ART OF WAR

S. Tzu

50:06

12035

COVID-Related Constitutional Considerations

- What to do with all this information?
  - Recording
  - Find and Use in Court Proceedings (MRPC 4.2 and 4.1)
  - July 2020 Advisory Opinion 1-20
  - MRPC 3.4

COVID-Related Constitutional Considerations

- E-Discovery Ideas
  - Facebook
  - Instagram
  - LinkedIn
  - TikTok (not a clock)

Due Process/Access to Justice

- Virtual Courtrooms
  - Right to Counsel
  - Confrontation Clause
  - Access to Technology

Due Process/Access to Justice

- Virtual Courtrooms
  - Technology Impact on Credibility
  - Privacy/Confidentiality
  - Positives
  - Rural Area Considerations

Due Process/Access to Justice

- Software Applications
  - Access
  - Presenting Evidence
  - Ethics
  - Issues (Zoombombing/recording)

Tracking

- Unintentional Tracking
  - Websites (shop on Amazon, see ads everywhere)
  - Social Media Services (Facebook, Instagram, Twitter, LinkedIn)

Tracking

- Mobile Phones/Devices
  - Location Data
  - Contact Tracing (Google/Apple)

Opportunities

- Change can be good or bad
  - Artificial Intelligence (AI)
  - Community.lawyer
  - GPT-3
  - Services (Grammarly, BriefCatch, etc.)
  - Will robots really replace lawyers?

Opportunities

- Work from Home (WFH)
  - Protect Client Information
  - Internet Access Issues
  - Security Considerations
  - Signing documents with clients
  - Court/Mediation/Client Meetings

Section Seven

Judge Robert H. Staton
Indiana Law Update

2020 Insurance Law Update

Anna Mallon
Paganelli Law Group LLC
Indianapolis, Indiana

Section Seven

2020 Insurance Law Update.....Anna Mallon

2020 INSURANCE LAW UPDATE

I. CASE LAW UPDATE

A. HOMEOWNER'S AND CONDOMINIUM POLICIES

1. Appraisal

A sample appraisal provision in a homeowner's policy states:

APPRAISAL

If "**you**" and "**we**" fail to agree on the amount of loss, on the written demand of either, each party will choose a competent, disinterested and impartial appraiser and notify the other of the appraiser's identity within 20 days after the demand is received. The appraisers will select a competent, disinterested and impartial umpire. If the appraisers are unable to agree upon an umpire within 15 days after both appraisers have been identified, "**you**" or "**we**" can ask a judge of a court of record in the state where "**your**" "**residence premises**" is located to select an umpire.

The appraisers will then set the amount of loss. If the appraisers submit a written report of an agreement to "**us**," the amount agreed upon will be the amount of loss. If they cannot agree, they will submit their differences to the umpire. A written award by two will determine the amount of loss.

Each party will pay the appraiser it chooses, and equally bear expenses for the umpire and all other expenses of the appraisal. However, if the written demand for appraisal is made by "**us**," "**we**" will pay for the reasonable cost of "**your**" appraiser and "**your**" share of the cost of the umpire.

"**We**" will not be held to have waived any rights by any act relating to the appraisal.

This is not an agreement to arbitrate. The appraisers and umpire are only authorized to determine actual cash value or the cost to repair or replace damaged property. The appraisers and umpire are not authorized to determine if a loss is covered or excluded under the policy.

Either party can invoke appraisal under the policy. Appraisal is appropriate when there is a dispute about the amount of the loss. Coverage issues are not appropriate for appraisal. Insurers sometimes refuse to go to appraisal when issues of scope, causation or coverage are involved.

Recently, the Northern District addressed whether an insurer committed bad faith by refusing to proceed to appraisal when the claim involved differences about the scope of work to be performed. *Grizzle v. State Farm Fire and Casualty Co.*, 2020 WL 736085 (N.D. Ind. February 12, 2020). In *Grizzle,* a storm blew down a tree damaging the insured's home. State Farm paid portions of the insured's claim, but rejected payment for damages to the home's electrical wiring and kitchen floors. The insured filed a lawsuit against State Farm for breach of contract and bad faith. In opposing summary judgment on the bad faith claim, the insured argued that State Farm acted in bad faith by denying the request to participate in appraisal.

The District Court held that State Farm did not act in bad faith by refusing to proceed to appraisal because State Farm explained the reasons it was refusing to proceed to appraisal, namely coverage issues, questions about whether the insured's appraiser was disinterested and a question about whether the insured waived appraisal. 2020 WL 736085 at * 4. The District Court explained that "by refusing to proceed with the appraisal, State Farm was disputing the applicability of that provision (an issue to be decided under…. the contract claim), and it did so for reasons that don't support a reasonable jury's finding of bad faith." *Id.* While this case supports that an insurer may not be found liable for bad faith for refusing to proceed to appraisal, it does not answer the question directly about whether appraisal is appropriate when there are coverage/scope issues involved.

2. Duty of Prompt Notice

Most homeowner's policies have a "Your Duties After The Loss" provision, detailing the duties of the insured in the event of a loss. The duties of the insured contained in a homeowner's policy have also been described as conditions precedent to coverage, meaning these conditions must be met before coverage is found. One of the duties required of an insured is the duty to provide "prompt notice" after a loss occurs. This duty of "prompt notice" was examined by the

Southern District in *Mapleton Countryside Condominium Assoc. Inc. v. Travelers Indem. Co*., 2020 WL 4448458 (S.D. Ind. August 3, 2020).

In *Mapleton*, Travelers Insurance issued Condominium Policies to Mapleton Place, a condominium complex in Westfield, Indiana. Mapleton claimed a hail and windstorm occurred on June 22, 2016 during the Traveler's policy period. Allegedly, at the time of the storm, Mapleton looked into filing a claim, but was allegedly told by a Traveler's agent that it would be a waste of time. Mapleton ultimately submitted a claim on January 10, 2017 (nearly 7 months after the loss). As part of its investigation, Traveler's inspected the storm event and was unable to confirm a single hail or wind event on June 22, 2016. Thus, Traveler's informed Mapleton that it was not entitled to any proceeds under the policy.

Mapleton also involved a second claim involving a hail and windstorm on April 26, 2017. Mapleton did not file a claim for the April 2017 storm until March 22, 2018 (nearly 11 months after the loss). Traveler's could not find damage to the condominiums from this storm and denied the claim. Mapleton filed a lawsuit against Traveler's in state court for breach of contract and bad faith for its denial of the two claims. Traveler's removed the lawsuit to federal court and moved for summary judgment.

Traveler's advanced several arguments in its summary judgment motion and one of those arguments was that Mapleton failed to provide "prompt notice" of the claims. This argument is more commonly known as the late notice defense to coverage. The District Court examined the law in Indiana related to the late notice defense- "Indiana Courts view notice as a crucial component of an insurance claim, and consequently have created a rebuttable presumption that an insurer is prejudiced by failure to comply with the notice requirement." 2020 WL 4448458 at * 4.

The District Court explained that "prompt notice" had been interpreted to mean reasonable notice. *Id.*

In examining the late notice defense, the District Court found that Traveler's did not waive the late notice defense in failing to advise Mapleton that it considered its notice late until two months after the notice was given. *Id.* at * 5. The Court explained that Traveler's did not mislead Mapleton into thinking it did not need to comply with the policy's notice provision. *Id.* There was no evidence that Mapleton delayed reporting due to any actions of Traveler's. *Id.* The District Court also found the evidence insufficient that Mapleton had advised its insurance agent of its intent to file the first claim. *Id.*

As to the timeliness of the notice for the June 2016 storm, the District Court found that the notice was "neither reasonable nor prompt." *Id.* at *8. The District court relied on *Askren Hub States Pest Control Servs., Inc. v. Zurich Ins. Co.,* 721 N.E.2d 270 (Ind, Ct. App. 1999) as support for finding that a six-month delay in notifying an insurer of a loss does not satisfy the notice requirement in the Policy. *Id.* After finding the notice unreasonable, Mapleton had the opportunity to rebut the presumption of prejudice. Mapleton argued that there was no prejudice because Traveler's was able to investigate and deny the claim. The Court found, however, that the nearly 7-month delay in giving notice made it hard for Traveler's to determine what damage, if any, was caused from the June 2016 storm. *Id.* at ** 8-9. The Court also relied on the fact that within that time period, Mapleton's contractor completed repairs on the property. *Id.* The Court granted Traveler's motion for summary judgment on the breach of contract and bad faith claims for both losses due to failure to give "prompt notice" as required by the Policy. *Id.*

B. AUTOMOBILE POLICIES

Indiana has financial responsibility requirements set forth in Ind. Code § 27-7-5-2 et seq. The purpose of the Financial Responsibility Act is to ensure that every insured is entitled to recover uninsured motorist benefits for the damage they would have recovered from the offending motorist if that person would have maintained a policy of liability insurance or maintained adequate liability insurance. Every year, there are cases interpreting what constitutes an underinsured motor vehicle ("UIM") or an uninsured motor vehicle ("UM"), who is entitled to UIM/UM coverage, and what amounts are available under these coverages. This year is no exception.

1. What Constitutes An Underinsured Motorist

In *Catanzarite v. Safeco Ins. Co. of Indiana*, 144 N.E.3d 778 (Ind. Ct. App. March 26, 2020), the Court of Appeals examined whether a tortfeasor with liability coverage qualified as an underinsured motorist. Catanzarite was in a vehicular accident with Smith. Smith was at fault for this accident. Smith was insured with liability limits of $100,000 per person. Catanzarite had UIM coverage with Safeco with policy limits of $100,000 per person. Smith's insurer offered its $100,000 liability policy limits. Catanzarite sought UIM coverage from Safeco and Safeco denied this claim since the liability limits of Smith's policy were equal to the UIM limits. Catanzarite filed a Complaint for Declaratory Judgment seeking a declaration that she was entitled to UIM coverage. The trial court granted summary judgment to Safeco and found that there was no UIM coverage available to Catanzarite. Catanzarite appealed.

At issue on appeal was whether the payment of a hospital lien by a tortfeasor's liability insurer reduces the limit of liability coverage under the tortfeasor's policy for purposes of determining whether the tortfeasor is underinsured. The Court of Appeals explained that, here,

Smith's carrier offered Catanzarite its full liability limits. 144 N.E.3d at 785. Catanzarite argued that she had a $25,000 hospital lien that she would be required to pay from the $100,000 settlement with Smith's insurer, and that she should be able to collect $25,000, the difference between her UIM limit and the funds she will receive from Smith's carrier after the medical expenses were paid off.

The Court of Appeals looked at the Supreme Court case of *Corr v. American Fam. Ins.*767 N.E.2d 535 (Ind. 2002), for the proposition that it is not right to compare the tortfeasor's liability limit to the underinsured limits for the purpose of determining whether the tortfeasor's vehicle is underinsured. *Id.* at 785-786. Instead, the comparison is between the amount of liability proceeds paid and the underinsured motorist limits. *Id.* In *Lakes v. Grange Mut. Cas. Co.*, 964 N.E.2d 796 (Ind. 2012), the Indiana Supreme Court held that a limits to limits comparison is not the proper approach to determine if a vehicle is underinsured. *Id.* at 786. Using this guidance from the Supreme Court, the Indiana Court of Appeals noted that, here, Smith's insurer offered to pay the full $100,000 limits, but the question is whether the medical lien reduces the amount payable to Catanzarite. *Id.*

The Indiana Court of Appeals looked to the meaning of both the UIM statute and the hospital lien statute and concluded that the hospital lien statute applies to the amount obtained or recovered through settlement. *Id.* at 786-787. Thus, the $100,000 received by Catanzarite would be subject to a hospital lien. *Id.* The Court explained that "while it is true that any payment of the lien directly to [the hospital] does diminish the amount of funds actually passing through Catanzarite's hands, it does not diminish the $100,000 settlement proceeds she is receiving from Hanover, to which Catanzarite is entitled under the operative insurance policy, i.e. Smith's bodily injury liability limits." *Id.* at 787. The Court of Appeals affirmed the decision of the trial court

and held that Smith had an adequate bodily injury liability policy at the time of the accident and did not qualify as an underinsured motorist. *Id.* The Court of Appeals determined that Catanzarite was not entitled to UIM benefits from Safeco. *Id.*

2. Meaning of "Resident Relative" for UM/UIM Coverage

Who is entitled to UM/UIM coverage is another question that often arises in the UIM context. In *Grimes v. State Farm Mutual Automobile Ins. Co.*, 2019 WL 6491889 (S.D. Ind. December 3, 2019), the Southern District examined whether a daughter was entitled to underinsured motorist coverage under her parents' policy.

Grimes was a passenger in a vehicle owned and driven by her boyfriend. The vehicle was struck by another vehicle at fault for the accident and without insurance. Grimes' parents had an automobile policy issued by State Farm providing uninsured motorist coverage up to $250,000. The State Farm policy defined "insured" to include "resident relatives." "Resident relatives" is defined as a person other than the named insured "who resides primarily with the first person shown as a named insured on the Declarations Page and who is (1) related to that named insured or his spouse by blood, marriage, or adoption, including an unemancipated child of either who is away at school and otherwise maintains his or her primary residence with that named insured; or (2) a ward or foster child of that named insured, his or her spouse, or a person described in 1. above."

Grimes sought uninsured motorist coverage as an insured under her parents' policy. The issue presented was whether Grimes met the definition of "resident relative" of her parents. The Court of Appeals determined that Grimes was not a "resident relative" of her parents and relied on the word "primarily" in the definition of "resident relative" and framed the question as whether

Grimes primarily resided with her mother at the time of the accident. 2019 WL 6491889 at **4-5. In finding that she did not, the District Court explained that Indiana courts consider the following factors in determining residency under automobile policies: (1) whether a claimant maintained a physical presence in the policy holder's home; (2) whether the claimant had a subjective intent to reside there; and (3) the nature of the claimant's access to the policy holder's home and contents. *Id.* at * 4. Applying the factors to the facts, the District Court explained that while Grimes may have stayed with her parents occasionally, the policy requires Grime to primarily reside there. *Id.*

Since there are no Indiana cases interpreting primary resident, the District Court predicted how the Indiana Supreme Court would decide the issue. The District Court determined that "primary resident" was unambiguous as primary is commonly defined as "first, principal, chief and leading." *Id.* at * 5. The District Court gave "primary residence" it ordinary and plain meaning to find that Grimes was not a primary resident of her parents' house:

> Grimes' own testimony reveals that at the time of the accident she was living at the 5301 English Ave rental home… And although Grimes, like many adult children who do not primarily reside with their parents, kept some personal belongings and maintained her childhood bedroom at her parents' house, with easy access thereto, she testified that in March of 2014, two years before the accident, she "transitioned from [her] parents' house to their rental. One cannot maintain a primary residence at a house out of which she has already "transitioned"…. While her parents' home remained a place for Grimes to visit and even spend the night, her ties to the house "do not overcome the stronger evidence supporting a finding that the [rental home] was her primary residence.

Id. (citations omitted). The District Court found that there were no disputed material facts that could alter the determination of her primary residence under the policy and therefore Grimes was not an insured entitled to uninsured motorist coverage. *Id.* at * 6.

3. Meaning of "Occupying" an Auto For UM/UIM Coverage

Cases arise wherein the person or persons seeking UM/UIM coverage are not in the car when the accident occurs. The question then becomes whether the person(s) seeking coverage was "occupying" the insured vehicle while outside of it. In *Geico Cas. Co. v. Mangai*, 2020 WL 4482214 (N.D. Ind. August 4, 2020), a group of college students were driving back from a dance in a van when they blew a tire. While trying to change the tire on the side of the road, some of the students who were standing outside of the van were struck by another vehicle and were either killed or sustained serious injuries. The decedents, by their parents, filed a lawsuit against the at fault driver and GEICO, the carrier for the owner of the van, seeking uninsured motorist coverage.

The GEICO policy provides uninsured motorist coverage for an "insured" and the definition of "insured" includes "any other person while occupying an owned auto." GEICO filed a declaratory judgment seeking a determination that the students were not "occupying" an insured auto on the date of the accident and did not qualify as insureds entitled to UM coverage.

The District Court denied GEICO's motion for summary judgment and interpreted what it meant to "occupy" a vehicle. 2020 WL 4482214 at ** 5-7. The Court explained that the analysis is whether the students were "in, upon, entering into or alighting from the vehicle." *Id.* at * 5. The Court easily ruled out that the students were not "in" the vehicle at the time of the accident and next turned to an assessment of whether the students were "upon" the vehicle. *Id.* GEICO argued that "upon" the vehicle required a physical connection to the vehicle and cited cases for that proposition under Indiana law. *Id.* The decedents, by their parents, argued that the case law supports that it is the relationship with the insured auto that determines whether the claimant was "upon" the vehicle. *Id.* at * 6. The District Court agreed with the students that they were "upon" the vehicle as they "clearly had a continuous relationship with the vehicle throughout the ordeal."

Id. at *7. Thus, the students were "occupying" the vehicle at the time of the accident and entitled to UM coverage. *Id.*

C. COMMERCIAL POLICIES

1. Known Loss Doctrine/Known Injury Provision

The "known loss" doctrine is a common law concept deriving from the fundamental requirement in insurance law that the loss be fortuitous. *General Housewares Corp. v. National Surety Corp*., 741 N.E.2d 408 (Ind. Ct. App. 2000). One may not obtain insurance for a loss that has already taken place. *Id.* The known loss doctrine will bar coverage if the insured has actual knowledge that a loss "has occurred, is occurring, or is substantially certain to occur on or before the effective date of the policy." *Id.* Many Commercial General Liability Policies also contain policy language that states that "prior to the policy period, no insured listed under Who is An Insured and no 'employee' authorized by you to give or receive notice of an 'occurrence' or claim, knew that the 'bodily injury' or 'property damage' had occurred, in whole or in part." This provision is referred to as the known injury provision and also may operate to bar coverage.

Recently, this known injury provision was interpreted by the Northern District in *Greene v. Westfield Ins. Co.*, 394 F.Supp.3d 849 (N.D. Ind. June 3, 2019) and affirmed by the Seventh Circuit, 963 F.3d 619 (7th Cir. June 25, 2020). In *Greene*, a class of homeowners in Elkhart, Indiana obtained a $50 million judgment against a waste recylcing facility for environmental violations, nuisance, and negligence based on the impact of the waste facility on their homes and property. After judgment was entered, the class sought coverage for the judgment from the facility's insurer, Westfield, in a proceeding supplemental. Since a judgment was already issued, the coverage issue involved only indemnity. Westfiled moved for summary judgment on a number of grounds, including (1) late notice; (2) no accident; (3) professional errors or omissions; (4)

expected or intended injury; (5) known claim; and (6) pollution exclusion. The District Court granted summary judgment to Westfield on the late notice, known claim, and expected or intended exclusion. 349 F.Supp.3d at 864.

As to the known injury provsion, the Court explained that the "known claim exclusion applies to property damage that began prior to the policy period if the insured was aware of it" and "requires consideration of what the [insured] knew, and when, about the harms the Class complained of in this action." *Id.* at 858. The Court found the evidence overwhelming that the insured was aware of property damage prior to 2004 when the policies were first issued. *Id.* at 860-862. The Court relied on the fact that in 2000, IDEM inspected after complaints of fugitive dust from outdoor grinding operations visible in the air and the insured agreed to a Fugitive Dust Control Plan. *Id.* Again in 2003, a neighbor complained of fine dust that had accumulated on the neighbor's pond and cars prompting IDEM to inspect again and violations were communicated to the insured. *Id.* There was also evidence that the insured admitted that they were working to control the dust problems and that the insured's owner had met with neighbors to discuss the dust concerns. *Id.*

The insured in *Greene* argued that at no time prior to the policy inception was he aware that "bodily injury" or "property damage" within the meaning of the Westfield policies had occurred in whole or in part as a result of its operations. *Id.* The Court rejected the insured's argument and held:

> But it is [the insured's] awareness of a condition that ultimately supports a claim for property damage that matters, not their knowledge or belief that the condition actually constitutes "property damage" as defined in the policies. Given that the question is [the insured's] knowledge prior to obtaining the insurance, the policies' definition cannot reasonably be the applicable standard for determining [the insured's] awareness of property damage.

Id. at 862. The District Court concluded that the insured's owner had become aware, prior to 2004, that property damage resulting from fugitive dust had occurred or begun to occur and found no coverage based on the known injury provision. *Id.*

The insured appealed the District Court's decision to the Seventh Circuit. The Seventh Circuit affirmed and explained that the "known claim" and "expected or intended injury" exclusions work together "as the language of both focuses on when [the insured] first learned about the property damage and bodily injuries that gave rise to the neighbors' lawsuit." 963 F.3d 619 at 627. The Seventh Circuit explained that "the extent of Westfield's obligations can be easily resolved (as nonexistent) if [the insured]- specifically [the insured's] owner… knew about the neighbor's injuries before the first policy went into effect…". *Id.* The Seventh Circuit concluded that there was overwhelming evidence that the insured knew about the fugitive dust and resulting property damage before the first policy went into effect, so any damages for those injuries were both known claims and expected injuries. *Id.*

2. No Coverage For Ransomware Attacks

In *G&C Oil Co. of Indiana v. Continental Western Ins. Co.*, 145 N.E.3d 842 (Ind. Ct. App. June 4, 2020), the Court of Appeals held that a ransomware attack was not covered under the fraud provision of multi-peril commercial insurance policy. The employees of G&C discovered that the company was the victim of a ransomware attack and were unable to access the company's servers and workstations. The hijacker demanded a ransom in exchange for the passwords to restore control over the servers which G&C paid.

G&C submitted a claim to Continental Western Insurance Company under its Commercial Policy. The Policy included a Commercial Crime and Fidelity Coverage Part providing coverage for computer fraud. The computer fraud provision stated:

> Computer Fraud
>
> We will pay for loss or of damages to "money", "securities" and "other property" resulting directly from the use of any computer to fraudulently cause a transfer of that property from inside the "premises" or "banking premises":
>
> a. To a person (other than a "messenger") outside those "premises"; or
> b. To a place outside those "premises".

Continental denied coverage because G&C had not purchased the optional Computer Virus and Hacking Coverage. G&C filed a Complaint for Declaratory Judgment seeking a declaration of coverage. The trial court granted summary judgment for Continental and found that G&C's losses did not result from computer fraud.

The Court of Appeals examined the word "fraud" and explained that the term is commonly understood to mean "the intentional perversion of truth in order to induce another to part with something of value or to surrender a legal right." 145 N.E.3d at 846. The Court explained that the Court of Appeals for the Ninth Circuit has considered language similar to language at hand and concluded that the phrase "fraudulently cause a transfer" requires the unauthorized transfer of funds. *Id.* In finding that the ransomware attack was not covered under the policy's computer fraud provision, the Court explained:

> Here, the hijacker did not use a computer to fraudulently cause G&C to purchase Bitcoin to pay as ransom. The hijacker did not pervert the truth or engage in deception in order to induce G&C to purchase the Bitcoin. Although the hijacker's actions were illegal, there was no deception involved in the hijacker's demands for ransom in exchange for restoring G&C's access to its computers.

Id. at 847. The Court of Appeals affirmed the trial court's grant of summary judgment for Continental. *Id.*

D. BAD FAITH AND EXTRACONTRACTUAL CLAIMS

1. Third Party Bad Faith

The tort of breach of an insurer's duty of good faith and fair dealing was first recognized in Indiana in *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993). Although the *Erie* court did not establish the exact parameters of the duty owed by an insurer to an insured, it did state that the obligation of good faith and fair dealing with respect to the discharge of an insurer's contractual obligation includes the obligation to refrain from: (1) making an unfounded refusal to pay policy proceeds; (2) causing an unfounded delay in making payment; (3) deceiving the insured; and (4) exercising any unfair advantage to pressure an insured into a settlement of the claim. *Erie*, 622 N.E.2d at 519.

The Indiana Court of Appeals decided *Schmidt v. Allstate Property and Cas. Ins. Co.*, 141 N.E.3d 1251 (Ind. Ct. App. February 12, 2020) dealing with third-party bad faith in the underinsured/uninsured motorist context. In *Schmidt*, a passenger was injured in a motor vehicle accident and submitted an underinsured motorist claim under the driver's policy with Allstate. The passenger filed suit against Allstate for UIM coverage and also included a claim for bad faith. The trial court granted Allstate's motion for summary judgment on the bad faith claim and held that an insurer does not owe the duty of good faith and fair dealing to a non-policyholder. The Court of Appeals reversed and held that because the passenger qualified as an "insured person" under the policy, she was entitled to bring a bad faith claim against Allstate. 141 N.E.3d at 1256.

This decision by the Court of Appeals calls into question the line of cases holding that there must be privity of contract to support a bad faith claim. The Court of Appeals explained that "no published Indiana Supreme Court or Court of Appeals case has squarely held that an insurer does

not owe a duty of good faith and fair dealing to an insured, named or unnamed, who is not the policyholder. To the extent that the cases mentioned in the trial court's order may suggest that no such duty exists, we believe the such proposition is untenable and unjust." *Id.* at 1255. This case may be used to support the argument that an insurer owes a duty of good faith and fair dealing to an insured who is not a policyholder. It remains to be seen whether this case will be applied outside of the UM/UIM context and how it will be applied when the person seeking coverage is identified in a policy as a covered person and/or when the issue is whether someone qualifies as an insured.

2. Bad Faith Failure to Settle

When an excess judgment is rendered against an insured it is not uncommon that the insured assigns any cause of action it may have against the insurer to the tortfeasor in exchange for the tortfeasor not executing any judgment against the insured. The tortfeasor then steps into the shoes of the insured and brings a cause of action against the insurer for its failure to settle the claim within policy limits. In making this claim for failure to settle, the tortfeasor is seeking extra-contractual damages or more than the policy limits The insurer will argue that the proper claim is a claim for bad faith failure to settle with its heightened burden of proof. The tortfeasor, on the other hand, often argues that the claim is negligent failure to settle with a lower burden of proof. The case law in Indiana has been mixed on whether the cause of action is a negligent failure to settle or bad faith failure to settle.

In *Travelers Indemnity Co. v. Johnson,* 440 F. Supp.3d 980 (N.D. Ind. February 18, 2020), the Northern District addressed whether a cause of action exists for negligent failure to settle. In this case, Johnson was injured in a collision with a semi-truck. Johnson brought suit against the operator of the truck, Horn, and Horn's employer, Sandberg Trucking. Horn and Sandberg Trucking were both represented by Travelers Indemnity Company. Travelers retained defense

counsel to defend Horn and Sandberg Trucking in the suit brought by Johnson. Johnson repeatedly requested policy limits of $1,000,000.00 and Traveler's rejected the demands offering $75,000.00 to $150,000.00. At trial, the jury awarded Johnson $7,100,000.00. Horn was responsible for $2,130,000.00. Horn then assigned to Johnson any claims he had against Travelers. Travelers paid its $1,000,000.00 policy limits.

Travelers filed a Complaint for Declaratory Judgment seeking a declaration that it was relieved of any obligations since it paid its policy limits. Johnson counterclaimed alleging negligent failure to settle, bad faith failure to settle and breach of contract. Travelers moved to dismiss the claim for negligent failure to settle. In holding that the negligent failure to settle claim should be dismissed, the Court reviewed the history of claims for extracontractual damages against an insurer and concluded as a matter of law that an insurer does not breach the obligation of good faith and fair dealing when it negligently fails to settle a claim within policy limits. 440 F.Supp.3d at 990. The District Court noted that as early as 1990, the Seventh Circuit, relying on Indiana law, alluded to a negligent failure to settle. *See A&B v. Gen. Accident Ins. Co. of Am.*, 909 F.2d 228, 231 (7th Cir. 1990), but that the seminal case of *Erie Ins. Co. v. Hickman*, 622 N.E.2d 515 (Ind. 1993), undercut this argument that negligence is sufficient. *Id.* at 989-990. Based on *Erie* and cases post *Erie*, the District Court held that there is no cause of action in tort for negligently failing to settle a claim within the policy limits and the cases decided on this issue pre-*Erie* are no longer authoritative. *Id.*

II. STATUTORY UPDATE

House Bill 1372 addresses "Various Insurance Matters." None of the matters are particularly notable. As it relates to insurance law, this past legislative session was not as eventful as past years.

2020 Indiana Law Update

Insurance Law Update

Anna Mallon

Paganelli Law Group

Insurance Case Law Update

- Homeowner’s Policies
- Automobile Policies
- Commercial Policies
- Bad Faith/Extra-Contractual


Homeowner’s
Policies

Appraisal

- *Grizzle v. State Farm Fire and Cas. Co.*, 2020 WL 736085 (N.D. Ind. 2020).

Background:

- Appraisal to set the amount of loss.
- Coverage issues not appropriate.

Facts:

- Damage to home from storm.
- State Farm paid for some damage, but denied coverage for other damage.

Facts:

- Insured demanded appraisal.
- State Farm refused to go to appraisal.
- Insured filed suit- breach of contract and bad faith.

Holding:

- No bad faith for refusing to go to appraisal.
- State Farm had reasons for refusing.
- Coverage issues and appraiser not disinterested.

Practice Pointer:

- Need a reasonable basis if refusing to participate in appraisal to avoid bad faith.
- This case did not discuss whether coverage issues are appropriate for appraisal.

Duty of Prompt Notice

- *Mapleton Countryside Condominium Assoc. Inc. v. Travelers Indem. Co.*, 2020 WL 4448458 (S.D. Ind. 2020)

Background:

- Duty of the insured to provide prompt notice of a loss is contained in most policies.

Facts:

- Travelers insured a condominium complex (Mapleton).
- Mapleton submitted a claim on January 10, 2017 for a June 22, 2016 hail and windstorm.

Facts:

- Travelers was unable to confirm a storm on June 22, 2016 and denied the claim.

- Second claim submitted by Mapleton on March 22, 2018 for an April 26, 2017 storm.

Facts:

- Travelers did not find damage to the condominiums and denied the claim.
- Mapleton filed suit against Travelers for breach of contract and bad faith.
- Travelers removed the case to federal court and moved for summary judgment.

Holding:

- District Court reviewed case law in Indiana on late notice defense.
- Rebuttable presumption of prejudice by failure to comply with notice requirement.
- Prompt notice means reasonable notice.

Holding:

- Notice provided by Mapleton was "neither reasonable nor prompt."
- Travelers was prejudiced by the delay- the nearly 7-month delay in giving notice made it hard to determine what damage, if any, was caused from the storm.

Holding:

- Mapleton's contractor completed the repairs making it hard for Travelers to inspect.
- Summary judgment for Travelers.

Practice Pointer:

- The late notice cases hinge on the ability to show or not show prejudice. Line up facts on the issue of prejudice.

Automobile Policies

Uninsured and Underinsured Motorist Coverage (UM/UIM)

Background:

- Insurer required to offer UM/UIM coverage in auto policy (Ind. Code §27-7-5-2).
- Protect insured from paying for damage caused by uninsured/ underinsured motorist driver.

What Constitutes an Underinsured Motorist Vehicle

- *Catanzarite v. Safeco Ins. Co. of Indiana*, 144 N.E.3d 778 (Ind. Ct. App. 2020).

Facts:

- Catanzarite was in an accident with Smith.
- Smith was at fault.
- Smith's insurer offered the $100,000 liability limits.

Facts:

- Catanzarite sought UIM coverage from Safeco.
- Safeco denied coverage because the UIM limits were equal to Smith's liability limits.
- Catanzarite filed a declaratory lawsuit.

Facts:

- Trial court granted summary judgment for Safeco.
- The issue on appeal was whether the payment of a hospital lien by Smith's liability insurer reduces the limit of liability coverage for purposes of determining whether Smith was underinsured.

Holding:

- The law in Indiana- it is not right to compare the tortfeasor's liability limits to the UIM limits to determine if the tortfeasor is underinsured.
- A comparison between the amount of liability proceeds paid and the UIM limits is appropriate.

Holding:

- Acknowledged that the lien would diminish the amount of funds passing through Catanzarite's hands.
- The lien does not diminish the $100,000 settlement proceeds Catanzarite is entitled to under Smith's policy.

Holding:

- Affirmed the trial court's grant of summary judgment for Safeco.
- Smith did not qualify as an underinsured motorist.

Meaning of "Resident Relative" for UIM Coverage

- *Grimes v. State Farm Mutual Automobile Ins. Co.*, 2019 WL 6491889 (S.D. Ind. 2019).

Facts:

- Grimes was a passenger in her boyfriend's car when it was struck by another vehicle without insurance.
- Grimes sought UM coverage under her parents' policy as an insured.

Facts:

- "Insured" includes a person "who resides primarily" with the named insured and is related to the named insured by blood…

Holding:

- Indiana courts consider the following factors to determine residency under auto policies:
  - Physical presence in the policyholder's home.
  - Subjective intent to reside there.
  - Nature of access to the home and contents.

Holding:

- District Court determined that Grimes did not meet the definition of insured and relied on the word “primarily.”

Holding:

- No Indiana cases have interpreted “primary resident.”
- District Court gave primary its ordinary meaning- first, principal, chief and leading.

Holding:

- Grimes transitioned from her parents' house several years prior and even though she visited and kept some of her belongings there, it was not her primary residence.

Meaning of "Occupying" An Auto

- *Geico Cas. Co. v. Mangai*, 2020 WL 4482214 (N.D. Ind. 2020).

Facts:

- Group of college students were driving back from a dance when they blew a tire in the van.
- Some of the students were struck and killed while trying to change the tire on the side of the road.

Facts:

- Decedents, by their parents, filed a lawsuit against the at fault driver and the carrier for the owner of the van (Geico).
- Geico policy provides UM coverage for insureds.

Facts:

- “Insureds “includes” any other person while occupying an owned auto.”
- Geico filed a declaratory action seeking a determination that the students were not “occupying” the auto at the time of the accident.

Holding:

- Determination of whether students were occupying a vehicle depends on whether they were in, upon, entering into or alighting from the vehicle.

Holding:

- Facts of the case required an assessment of whether students were upon the vehicle.
- Geico argued that being upon the vehicle requires a physical connection to the vehicle.

Holding:

- The parents argued that being upon the vehicle requires an analysis of the students' relationship with the vehicle.

Holding:

- District Court agreed with the parents- “the students clearly had a continual relationship with the vehicle.”

- Students were ”occupying” the vehicle and entitled to UM coverage.

Practice Pointer:

- UM/UIM cases can present all different factual scenarios.
- Case law developing more and more- do research to see if your facts have been addressed.

Commercial Policies

Known Loss Doctrine

- *Greene v. Westfield Ins. Co.*, 394 F.Supp.3d 849 (N.D. Ind. 2019) *aff'd* 963 F.3d 619 (7th Cir. 2020).

Background:

- Known loss doctrine bars coverage if the insured has actual knowledge that a loss has occurred, is occurring, or is substantially certain to occur on or before the effective date of the policy.

Background:

- Many CGL policies contain a known injury/claim provision barring coverage if the insured knew that the “bodily injury” or “property damage” had occurred.

Facts:

- Class action lawsuit where homeowners in Elkhart obtained a $50 million dollar judgment against a waste recycling facility for environmental violations.

Facts:

- Class sought coverage for the judgment from the facility's insurer, Westfield Insurance, through a proceeding supplemental.

Facts:

- Westfield moved for summary judgment on the known claim provision and argued that the facility was aware of the property damage before the policy was procured.

Holding:

- District Court granted summary judgment to Westfield on the known claim provision.
- Evidence established that the insured was aware of the property damage prior to 2004 when the policies were first issued.

Holding:

- IDEM inspected after complaints about dust and the insured agreed to a Fugitive Dust Control Plan before the policy was issued.
- Insured addressed complaints from neighbors about dust before the policy was issued.

Holding:

- District Court- “Awareness of a condition that ultimately supports a claim for property damage that matters…”
- 7th Circuit affirmed.

Practice Pointer:

- Look to see if the known injury/claim provision is in the policy. If so, in addition to the known loss doctrine, an insurer can use actual policy language to support no coverage for known injuries.
- Bodily injury cases harder to apply the defense.

Coverage For Ransomware Attacks

- *G&C Oil Co. of Indiana v. Continental Western Ins. Co.*, 145 N.E.3d 842 (Ind. Ct. App. 2020).

Background:

- Ransomware is one of the largest cybercrimes in the world.
- Cyber insurance market has grown rapidly.

Facts:

- Employees of a company discovered the company was the victim of a ransomware attack.
- The hijacker demanded a ransom in exchange for the passwords to restore the system.

Facts:

- Company submitted a claim under its commercial policy- Commercial Crime and Fidelity Coverage Part providing coverage for computer fraud.

Facts:

- The claim was denied and the company filed a declaratory lawsuit.
- Trial court granted summary judgment for the insurer- no coverage.

Holding:

- The Court of Appeals held that the phrase “fraudulently cause a transfer” requires the unauthorized transfer of funds.

Holding:

- Although the hijacker's actions were illegal, there was no deception involved in the hijacker's demands for ransom.
- Affirmed trial court.

Practice Pointer:

- Computer fraud provision is not necessarily the same as a cyber policy.

Bad Faith/Extra-Contractual Claims

Third-Party Bad Faith

- *Schmidt v. Allstate Property and Cas. Ins. Co.*, 141 N.E.3d 1251 (Ind. Ct. App. 2020).

Background:

- Duty for Insurer to act in good faith to Insured.

- Duty arises by virtue of contract between Insurer and Insured.

Facts:

- Schmidt was a passenger injured in a motor vehicle accident and sought coverage under the driver's policy for UIM coverage.

Facts:

- Allstate denied the claim and Schmidt filed a lawsuit- breach of contract and bad faith.
- Trial court-no duty of good faith and fair dealing owed to non-policyholder.

Holding:

- Court of Appeals reversed.
- Schmidt qualified as an insured person under the UIM coverage.
- Schmidt entitled to bring bad faith claim.

Practice Pointer:

- Named Insured is in privity.
- “Insured”-case law in Indiana that they can sue for bad faith.
- “Covered Person” questionable if they can sue for bad faith.
- Need to assess status of person seeking coverage.

Bad Faith Failure to Settle

- *Travelers Indemnity Co. v. Johnson,* 440 F.Supp.3d 980 (N.D. Ind. 2020).

Background:

- Arises when an excess judgment is rendered against the insured.
- Failure to settle within policy limits.

Facts:

- Johnson was injured in collision with semi truck.
- Johnson brought suit against the truck's driver and his employer.

Facts:

- Travelers defended the truck driver and employer.
- Travelers refused to settle for policy limits ($1 million).
- Jury returned a verdict for $7.1 million.

Facts:

- Truck driver and employer assigned claims to Johnson.
- Travelers paid the limits and sought a declaration that it was relived of any further obligations.

Facts:

- Johnson counterclaimed for breach of contract, negligent failure to settle and bad faith failure to settle.
- Travelers moved to dismiss the claim for negligent failure to settle.

Holding:

- District Court determined that there is no cause of action for negligent failure to settle.

Practice Pointer:

- For the excess judgment cases there must be clear and convincing evidence that the insurer acted in bad faith by refusing to settle.

Predictions for 2021

- Indiana may decide whether there is coverage for business interruption claims resulting from Covid-19.
- Indiana may decide the legality of setting off payments made under Medical Payments coverage for UM/UIM coverage.

Section Eight

INDIANA LAW UPDATE

SEPTEMBER 15-16, 2020

TORT CASES

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Section Eight

Tort Cases……Kevin P. Farrell
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TORT UPDATE

A. BREACH OF WARRANTY

Kenworth of Indpls., Inc. v. Seventy-Seven Ltd., 134 N.E.3d 370 (Ind. 2019).
Goff, Rush, David, & Massa; Slaughter concurs in part (without opinion)

Holdings:

1. **Language of warranty contract created an express future performance warranty, such that breach of warranty accrued with discovery of breach;**
2. **Genuine issues of material fact about when Buyers should have discovered breach precluded summary judgment based Sellers' assertion that claim was filed outside limitations period.**

Seven trucking companies ("Buyers") purchased 40 dump trucks from Kenworth, et al ("Sellers") via contract that contained a one-year limitations period from "accrual of the cause of action." Delivery of the first truck took place in November 2005, and that same day Buyer noticed excessive vibration while driving, reported the problem to Sellers, and informed Sellers the problem needed to be eliminated before additional trucks were delivered. Sellers assured Buyers the vibration problem fell under the warranty and would be fixed. Because of the assurances, Buyers accepted the remaining trucks, and all the trucks vibrated excessively. Sellers attempted to fix the problem by modifying the engine mounts and changing the engine mounts, but the vibration continued to return. In March 2008, Sellers extended the vehicle base warranty to four years/250,000 miles and agreed to replace engine mounts for as long as Buyers owned the trucks. By the end of 2008, several Buyers had returned the trucks and stopped making payments.

In September 2010, Kenworth sued two buyers for loan default, and in October 2010, Buyers filed suit for breach of contract, constructive fraud, rescission of contract and UCC claims of breach of express and implied warranty, estoppel, and non-conforming goods. Sellers moved for summary judgment based on the Warranty Agreement's one-year limitations period. Buyers argued their cause of action accrued when the four-year warranty ended and equitable estoppel tolled the limitations period. The trial court denied summary judgment for Sellers because the Sellers' promise to work on a permanent fix to the excessive vibration throughout the modified warranty period was an implied promise of future performance under the UCC, such that the statute of limitations for the claims accrued one year from the date the extended warranty expired.

The Supreme Court first noted that everyone agrees the parties contracted for a one-year limitations period, and the question is when the period began to run. Breach of warranty generally runs from the date of delivery, but if the express warranty guarantees future performance, then breach of warranty occurs at the time the breach is discovered.

For a warranty to be a future-performance warranty, a warranty must contain three items: (1) it must be an explicit promise or guarantee; (2) it must concern the characteristics of the goods themselves; and (3) it must identify a specific future time period during which the goods will conform to that guarantee. The Warranty Agreement between Buyers and Sellers contains all three of those – (1) "Kenworth Truck Company warrants directly to you"; (2) the truck "will be free from defects"; (3) "during the time and mileage periods set forth" (i.e., one year). Thus, courts must apply the discovery rule to determine whether the breach of warranty action accrued. When the Buyers should have discovered the breach of warranty is a genuine issue of material fact. Sellers were unable to identify what was causing the vibration and were still testing the trucks in 2008, but the record suggests Buyers did not know that Sellers could not identify the problem. Accordingly the trial court properly denied summary judgment to Sellers.

Even if Buyers failed to discover the breach and filed their claim within the limitations period, Sellers actions may have tolled the limitations period. Under Indiana Law, a limitations period may be tolled by contractual agreement or by equity. The parties here did not include tolling in the contract. However, "a party's efforts at repairing or replacing goods might toll a limitations period under the equitable estoppel doctrine, but whether a limitations period is tolled will depend on the circumstances of the case, not a bright-line rule." In so deciding, the Supreme Court determined that *Ludwig v. Ford Motor Company*, 510 N.E.2d 691 (Ind. Ct. App. 1987), is still good law, but its holding is limited to the facts of that case and it does not control the outcome herein. Thus, genuine issues of material fact exist about whether Sellers' conduct tolled the limitations period for the warranty claims.

B. COVENANT NOT TO COMPETE

American Consulting, Inc. v. Hannum Wagle & Cline Engineering, Ind., 136 N.E.3d 208 (Ind. 2019). David, Rush, & Goff Slaughter & Massa concur & dissent

Holdings:

1. **Liquidated damages clauses in employment contracts were unenforceable penalty provisions because they were designed to punish former employees rather than compensate the company; and**
2. **Genuine issues of material fact precluded summary judgment as to tortious interference with contractual relationship claims.**

Knowles, Day, and Lancet were employed by American Structurepoint Inc. (ASI), and all three of them had contracts that included restrictions on soliciting customers and employees of ASI if they left employment with ASI. Knowles contract contained liquidated damages clauses that required: (1) if he took a client from ASI, he would pay to ASI 45% of all amounts ASI had billed the client in the past 12 months; and (2) if he took an employee, he would pay to ASI 50% of the employee's salary from ASI in the prior year. Day and Lancet signed agreements that required they repay to ASI 100% of the salary from ASI in the prior year, if they hired an ASI employee.

Knowles, Day and Lancet all left ASI and went to Hannum Wagle & Cline (HWC). At HWC, Knowles solicited contracts from ASI customers and the three men recruited seven ASI employees to work for HWC. ASI sued HWC, Knowles, Day, and Lancet for breach of contract and tortious interference with ASI's contracts and business. The trial court granted summary judgment to Knowles, Day and Lancet as to the liquidated damages after finding the clauses unenforceable as a matter of law. As for tortious interference claims, the trial court granted summary judgment to Day but found issues of fact with regard to Knowles and Lancet. The Court of Appeals reversed the trial court regarding the liquidated damages, believing them to be enforceable.

The Supreme Court held the liquidated damages clauses were unenforceable penalties because they are "facially unreasonable." The Court noted it is not clear: (1) how an employee's salary was correlated to ASI's damages from loss of that employee; (2) why Knowles, who had more seniority and higher pay, was required to pay 50% of the employees' salaries, while Day and Lancet had to pay 100% of the employees' salaries; and (3) why ASI would be justified to collect 250% of the salary of each lost employee, in light of the three defendants being alleged responsible for each of the seven recruited employees. In addition, some of the contracts with clients for which ASI was seeking liquidated damages payments were contracts in which clients had hired HWC to do work that ASI would not do – such that the liquidated damages could not be proportional to any loss by ASI. ASI failed to demonstrate how the liquidated damages clauses were correlated to ASI's actual damages, and thus the Supreme Court determined that all of the liquidated damages provisions were unenforceable penalties. Nevertheless, ASI may recover any actual damages they can prove based on breach of contract.

Supreme Court also held trial court properly denied summary judgment as to whether Defendants tortuously interfered with ASI's contractual relationships, as there are questions of fact about "whether defendant acted maliciously and without a legitimate business purpose and whether defendant acted fairly and reasonably under the circumstances."

C. DEFAMATION

Abbott, Barnes & Gray v. Individual Support Home Health Agency, Inc.,148 N.E.3d 1091 (Ind. Ct. App. 2020). Mathias, Riley, Tavitas

Holdings:

1. **Reports by Employees about Employer to ISDH, which began quasi-judicial proceedings by ISDH against Employer, were protected by absolute privilege given to statements made in judicial proceedings.**
2. **Where Employer's tortious interference claims were also based on the alleged false statements given to initiate quasi-judicial proceedings, the claims had to be dismissed because the statements were protected by absolute privilege.**

Home Health provides services to homebound patients, and it is regulated by ISDH (Indiana State Dept. of Health). Abbott, Barnes, and Gray, all of whom are licensed nurses, were employed by Home Health as cases managers for patients. In 2017, Appellants reported to ISDH that Home Health employees were forging Appellants' signatures on health care documents. Home Health denied the allegation, claiming instead the Appellants were upset about poor performance reviews. ISDH investigated and could not substantiate the forgery reports. Appellants left employment with Home Health and encouraged others Home Health employees to quit. Home Health sued Appellants for defamation, tortious interference with a contract, and tortious interference with a business relationship. Appellants filed a motion to dismiss based on their assertion that their statements to ISDH were absolutely privileged. The trial court denied the motion to dismiss and an interlocutory appeal ensued.

Indiana recognizes an absolute privilege protecting statements made in the court of judicial proceedings, "regardless of the truth or motive behind the statements." In 2008, the Indiana Supreme Court extended this absolute privilege to statements in quasi-judicial proceedings. For the same reasons cited by the court in *Hartman v. Keri*, 883 N.E.2d 774 (Ind. 2008) – chilling of reports could be disastrous, deterrents to false reporting exist – Court held that statements by Appellants, which initiated quasi-judicial proceedings against Home Health, should be protected by absolute immunity.

D. FAILURE TO PROSECUTE [T.R. 41(E)]

Sharif v. Cooper, City of Indianapolis & IMPD, 141 N.E.3d 1258 (Ind. Ct. App. 2020). Riley & Baker Brown dissents with opinion

Holding:

1. Trial court abused its discretion by granting Trial Rule 41(E) dismissal of claim for failure to prosecute.

On April 7, 2016, Cooper, who was an employee of IMPD, drove his vehicle into Sharif's vehicle, causing injuries to Sharif that required medical attention. Sharif filed a tort claim notice and then, on March 22, 2018, filed a complaint against the City. On March 20, 2019, Sharif perfected service on the City. On April 17, 2019, the City filed an Answer and a motion to dismiss based on TR 41(E). After a hearing, the trial court dismissed Sharif's claim, and Sharif appealed.

Sharif failed for a year to perfect service on the City, and that appears sufficient to justify a dismissal under TR 41(E) as a plaintiff may not leave service of process unperfected for an unreasonable length of time without just cause. While a TR 41(E) motion to dismiss for failure to prosecute should not be granted if the plaintiff has resumed diligent prosecution prior to the defendant's filing of the motion to dismiss, here the City could not file the motion prior to receiving the summons as it had no notice the complaint had been filed. Thus the Court of Appeals turned to a nine factor test for whether to dismiss for failure to prosecute – including such factors as length of delay, reason for delay, plaintiff's personal responsibility, prejudice to

defendant, and other possible sanctions. Applying those factors to Sharif's case, the Court noted the error was by Sharif's counsel, who corrected the error and began diligently prosecuting again when it was realized, such that the extreme remedy of TR 41(E) dismissal was inappropriate.

E. FALSE ARREST

Stone v. Wright & City of Clinton, 33 N.E.3d 210 (Ind. Ct. App. 2019). Brown, Altice & Tavitas

Holdings:

1. **Two year statute of limitation for false arrest began to run on day court issued arrest warrant;**
2. **Notice of Tort Claim needed to be filed within 180 days of arrest warrant issuance;**
3. **Deputy Chief of Police has statutory immunity from malicious prosecution claim when plaintiff fails to allege the Defendant's actions were outside the scope of his employment; and**
4. **Trial court did not abuse its discretion in denial of request to file third amended complaint when new allegations in complaint were available at time of original complaint and when trial court had already dismissed the cause of action.**

On May 6, 2014, Deputy Chief of Police Doyle Wright filed an affidavit for probable cause stating that Heather Stone touched A.M., a two-year-old child who lived with Stone and her Husband, in a rude, insolent or angry manner resulting in bodily injury. On May 9, 2014, the trial court found probable cause and issued an arrest warrant. Stone was arrested and held in jail. Stone filed a notice of tort claim on May 23, 2016. On October 11, 2016, Stone filed a complaint against Deputy Chief Wright and the City of Clinton for false arrest and malicious prosecution. On December 5, 2016, Defendants moved for dismissal of Stone's claim because Defendants have immunity to malicious prosecution claim and Stone failed to timely file her notice of tort claim.

On January 19, 2017, Stone filed a first amended complaint that was similar to the first. On February 1, 2017, Stone filed a second amended complaint that suggested her causes of action for false arrest and malicious prosecution could find remedy under the Fourteenth Amendment and 42 USC § 1983. In February 2017, Defendants removed the case to federal court. The federal court held that Stone failed to state facts to support a malicious prosecution claim under § 1983 and that her false arrest claim was time barred because it accrued on May 9, 2014, and she did not file her claim until October 11, 2016. Accordingly, the federal court remanded Stone's remaining State Law claims for false arrest and malicious prosecution to the Vermillion Circuit Court.

On September 15, 2017, Defendants again filed a motion to dismiss in State court because Stone failed to timely file notice of the tort claim as to false arrest and because Defendants have immunity to her malicious prosecution claim. On June 11, 2018, the trial court dismissed

Stone's claims. Stone filed a motion to correct error and then, on August 27, 2018, Stone moved to file a third amended complaint to add an allegation of intentional infliction of emotional distress and to indicate that she filed her notice of tort claim within 180 days of the dismissal of the charges against her, such that her claim should be deemed timely. On November 28, 2018, the trial court denied Stone's motion to correct error and her motion for leave to file a third amended complaint.

On appeal, Stone first alleges the trial court erred by dismissing her second amended complaint. The Court of Appeals held that, because the arrest warrant was issued on or about May 9, 2014, and her complaint was filed in October 2016, Stone's claims for false arrest and false imprisonment were barred by the two year statute of limitations. In addition, those claims were barred by Indiana's Tort Claims Act because Stone needed to file her notice of tort claim within 180 days of the issuance of the arrest warrant and she did not file it until two years later. As for Stone's malicious prosecution claim, the Court of Appeals held the claim was properly dismissed as Stone had not alleged that Wright acted outside the scope of his employment and, as Stone acknowledged, both the Town and Deputy Chief have immunity from malicious prosecution.

The Court of Appeals also held the trial court did not abuse its discretion in denying Stone's motion for leave to file a third amended complaint because Stone did not file the motion until after her other claims had all been dismissed and because the new claim Stone wished to assert could have been asserted in her original complaint. Judgment of the trial court affirmed.

F. HIPPA CONFIDENTIALITY

Henry v. Community Healthcare Sys. Community Hosp., 134 N.E.3d 435 (Ind. Ct. App. 2019). Baker, Kirsch, & Crone

Holding:

1. **Henry's complaint survived judgment on the pleadings where she alleged the facts necessary to support breach of a healthcare provider's common-law duty to maintain the confidentiality of medical records.**

Amanda Henry received medical treatment, including x-rays, at Community Hospital in Munster. Three days later, Henry's employer had digital images of Henry's x-rays on the employer's cell phone, and the employer showed them to Henry. Henry later learned the x-ray tech was the spouse of her employer. Henry filed a complaint against Community that alleged a Community employee shared Henry's protected health information with the employee's spouse, which caused damages to Henry. Community filed a motion to dismiss. The trial court granted judgment on the pleadings for Community after determining no private right of action exists under HIPPA and the tort of Disclosure is not recognized in Indiana.

The Court of Appeals first noted Community's argument –that neither the Health Insurance Portability and Accountability Act (HIPPA) nor the Indiana Access to Health Care Records

Statute (IAHRS) can support a private right of action—is a red herring because Henry is not asserting a private right of action under those statutes. Instead, Henry is asserting those statutes establish a standard of care that exists for a negligence action that was available under common law. Specifically, the Court holds that medical providers' duty of confidentiality to their patients existed at common law and continues to exist, such that Henry can assert a claim for the breach thereof and use HIPPA to help determine the standard of care under the common-law duty. Because Henry's pleadings alleged the facts necessary to support a claim, the trial court erred when it granted Community's motion. The Court reversed and remanded for further proceedings on Henry's complaint.

**Court of Appeals declined to address the viability of Henry's other negligence claims, which included public disclosure of private facts.

**Court also noted that if Henry could not prove damages, she could always file a complaint with "the medical licensing board or professional organization."

Hayden v. Franciscan Alliance, Inc., 131 N.E.3d 685 (2019). Mathias, May, Brown

Holdings:

1. **Trial court properly granted summary judgment to Franciscan on theory of respondeat superior because Collins accessed Hayden's records for non-employment reasons, in direct violation of the confidentiality agreement she signed with Franciscan.**
2. **Trial court properly granted summary judgment to Franciscan on theories of negligent hiring and retaining, training, and monitoring and supervision because Hayden failed to designate evidence that created a genuine issue of material fact.**

On November 18, 2013, Leslie Hayden had x-rays taken at St. Francis Hospital for a broken arm. In 2015, a high school rival, Jessica Hensley, texted a picture of Hayden's confidential medical records to Hayden's boyfriend and posted them on Facebook. Hensley was best friends with Brooke Collins, who worked as a registrar at St. Francis Hospital. Hayden complained to Franciscan about the leak of her records in July 2015, and St. Francis' investigation revealed Collins' password had been used to access Hayden's records on November 29, 2013, which was eleven days after Hayden's arm was assessed and treated. Hayden was not a patient on the 29th, so Franciscan concluded Collins' access was improper. Collins also admitted accessing Hayden's confidential information. Hayden filed suit against Hensley, Collins, and Franciscan. Against Franciscan Hayden asserted (1) respondeat superior for the acts of Collins and (2) negligence for failing to have systems in place to protect confidential records (for negligently hiring, retaining, training, supervising, and monitoring Collins). Franciscan moved for summary judgment, which the trial court granted.

The Court of Appeal affirmed the grant of summary judgment to Franciscan. Hayden failed to designate evidence to demonstrate issues of fact about Collins act being well outside her

employment or about Franciscan acting negligently when it hired, retained, trained, monitored, or supervised Collins. Franciscan's designated evidence demonstrated it had not been negligent.

G. INSURANCE COVERAGE

Schmidt v. Allstate Property & Casualty Insurance Co., 141 N.E.3d 1251 (Ind. Ct. App. 2020). Crone, Bradford, Pyle

Holding:

1. Insurer owes duty of good faith and fair dealing to injured passenger who was not the policyholder.

Monika Schmidt was a passenger in a car driven by her friend, Deborah Fisher, when Robert Bromley collided with Fisher's car. Schmidt was injured by the collision. Bromley had Progressive Insurance with limits of $50,000 per person and $100,000 per accident. Fisher had an Allstate policy with limits of $100,000 per person and $300,000 per accident. Schmidt filed a complaint against Bromley and Fisher for negligence. Schmidt, as a passenger in Fisher's car, qualified as an "insured" under Fisher's policy with Allstate, and Schmidt demanded Allstate make available to her, as a policy insured, the underinsured motorist coverage available under Fisher's policy. When Schmidt was unable to negotiate a settlement with Allstate, she added a claim against Allstate for breach of its duty of good faith and fair dealing with an insured. Schmidt alleged Allstate failed to promptly inform her of the underinsured motorist coverage, failed to respond to her claim, failed to make a reasonable settlement offer, failed to promptly assign an adjuster to her claim, and requiring her to sue Allstate and dismiss Fisher before it would consider her claim. Allstate moved for summary judgment, asserting it did not act in bad faith, and the trial court denied summary judgment due to issues of fact about Allstate acting in bad faith. Allstate then moved for summary judgment based on a theory that it did not owe Schmidt a duty, as a matter of law, because she was not the policyholder. The trial court reviewed the caselaw and granted summary judgment for Allstate based on Schmidt being an insured, but not the policyholder.

The Court of Appeals first noted that "no published Indiana Supreme Court or Court of Appeals case has squarely held that an insurer does not owe a duty of good faith and fair dealing to an insured, named or unnamed, who is not the policyholder." The Court then reiterated that to determine whether a duty exists between two parties we must consider: (1) the relationship between the parties; (2) the reasonable foreseeability of the harm to the person injured; and (3) public policy concerns. As to the parties' relationship, Schmidt was in the same contractual position with Allstate as the named policyholder, in that she had both a fiduciary relationship with Allstate (because she had to be honest and give any information to Allstate that Allstate requested) and an adversarial relationship with Allstate (because she was trying to get full coverage for her claims). The Court agreed with Schmidt that harm to the injured passenger who needs the insurance coverage is reasonably foreseeable if an insurer fails to deal in good faith with that passenger. Finally, the Court noted that legislative acts, such as the unfair claims

practices act and the uninsured and underinsured motorist provisions, have not distinguished between policyholders and additional insureds, which suggests that public policy leans toward Allstate having a duty to Schmidt under these facts. Therefore the Court held an insurer owes a duty of good faith and fair dealing to an insured who is not the policyholder, and the Court reversed and remanded for further proceedings.

Progressive Southeastern Ins. Co. v. Smith, 140 N.E.3d 292 (Ind. Ct. App. 2020), *as corrected on reh'g.* Baker, Bailey, Tavitas

Holdings:

1. **Insured is not entitled to bodily injury liability coverage pursuant to his policy's language, his own admission, and Supreme Court precedent.**
2. **When an insurer has no duty to defend insured for bodily injury to himself, the insurer also has no duty to defend the friend whose driving caused the insured's bodily injury.**
3. **Party not entitled to declaratory judgment based on lack of proper service of process when party had participated in proceedings without raising lack of service.**

Nolan Clayton was driving Smith's vehicle with Smith's permission, and Smith was the passenger in the car. Smith had insurance with Progressive Southeastern. An accident occurred that seriously injured Smith. Progressive paid Smith nearly $11,000 for vehicle damage and paid Smith his medical payment coverage limit of $5,000. Progressive then sought declaratory judgments that Smith was not entitled to coverage under his policy's uninsured motorist or bodily injury liability provisions and that Progressive had no duty to defend or indemnify Clayton. In a first appeal, the Court of Appeals determined Smith was not entitled to uninsured motorist coverage. After the first appeal, Smith moved to dismiss Progressive's complaint, and the trial court agreed after concluding Progressive waived its other arguments by bringing the first appeal.

Progressive appealed and argued that Smith is not entitled to bodily injury liability coverage, that Progressive has no duty to defend or indemnify Clayton, and that Clayton is not entitled to dismissal of the complaint for an alleged failure to prosecute. The Court of Appeals first held Smith was not entitled to bodily injury coverage under his policy or under Indiana law because, by pursuing uninsured motorist coverage, Smith forfeited any right to seek coverage under the bodily injury liability provisions of the policy. As to duty to defend, Smith's policy declares Progressive has no duty to defend if the bodily injury is to Smith or a family member, and if Progressive would not have to defend Smith in that situation, it also had no duty to defend Clayton; therefore, Progressive was entitled to a declaratory judgment as to this issue.

Also at issue in the trial court had been Clayton's request for declaratory judgment regarding an alleged lack of proper service and failure to prosecute. The appellate court found these arguments "wholly unpersuasive" because Clayton had participated in some of the proceedings

without arguing a lack of personal jurisdiction. The Court also noted Clayton was not prejudiced, as he was not entitled to coverage under Smith's policy anyway.

Court of Appeals reversed and remanded for entry of declarations in favor of Progressive.

Catanzarite v. Safeco Ins. Co. of Ind., 144 N.E.3d 778 (Ind. Ct. App. 2020). Riley, Baker, Brown

Holdings:

1. **Amounts that tortfeasor's insurer (Hanover) pays toward hospital medical liens of injured party (Catanzarite) are amounts "available for payment to the insured" for purposes of determining whether a tortfeasor (Smith) was underinsured.**
2. **Trial court properly granted summary judgment to Insurer (Safeco) whose Insured (Catanzarite) wished to collect under her Under-Insured Motorist (UIM) provision, because Insured was not entitled to UIM funds when the amount of bodily-injury coverage available to her from the tort-feasor's insurance was identical to her under-insured coverage.**

Christine Catanzarite and Timothy Smith were driving opposite directions on the same street, when Smith turned left and his vehicle struct Catanzarite's vehicle. Both of Catanzarite's legs were broken, and she spent three weeks in the hospital, during which she accumulated $269,841.32 in medical expenses. The hospital perfected a hospital lien. Smith was insured by Hanover, and he had a liability insurance policy limit of $100,000 per person. Catanzarite was insured by Safeco and had underinsured motorist coverage with a policy limit of $100,000 per person. Hanover informed Catanzarite that if she signed a release, Hanover would pay her the $100,000 policy limit. Because Hanover's payment would be less than the medical lien, Catanzarite notified Safeco that she wished to assert a claim against her own underinsured motorist provision. Safeco refused to pay because Hanover's payment had been the equivalent of Catanzarite's UIM coverage. Catanzarite filed a declaratory judgment complaint against Safeco, asking the court to determine whether she was entitled to her policy's UIM funds. The trial court granted summary judgment for Safeco.

The Court of Appeals reviewed *Corr v. Am. Family Ins.*, 767 N.E.2d 535 (Ind. 2002), which held a simple comparison of a tortfeasor's liability limit and an injured insured's UIM policy limit is not the appropriate way to determine whether a tortfeasor was underinsured in a particular case. Rather, *Corr* held, the injured insured's UIM policy limit must be compared to the amount of the tortfeasor's liability limit that is, in fact, "available for payment to the insured." *Corr* also held "available for payment to the insured" meant "money present and ready for immediate use by the insured" (not potentially accessible funds).

Catanzarite argued that, although the amount of Smith's liability policy was equivalent to her UIM policy, she would not be receiving $100,000 from Smith's policy because that money would instead be paid to the hospital lien. The Court of Appeals held that, contrary to

Catanzarite's assertion, the funds being paid toward the Hospital lien were being paid on Catanzarite's behalf – even though not going directly to her for payment of the lien by her – such that she could not claim those moneys were unavailable to her. As Hanover made $100,000 available to Catanzarite, which was the amount of her UIM policy limit, Safeco properly denied Catanzarite's request for UIM policy funds. Summary judgment for Safeco affirmed.

H. INTERPLEADER

First Chicago Insurance Co. v. Collins, 141 N.E.3d 54 (Ind. Ct. App. 2020). Bailey, Kirsch, Mathias

Holdings:

1. **Insurer waived merits of arguments on appeal by failing to assert the issues before the trial court.**
2. **Trial court did not abuse its discretion when it granted TR 60(B) motion for relief from default judgment as defaulted party demonstrated exceptional circumstances led to default and a different result would have been reached if merits had been heard; and**
3. **While Insurer may be liable to defaulted party who had not been served notice of interpleader action, trial court erred in ordering Insurer to make $25,000 available, as there was no evidence in the record as to the amount of the defaulted party's claims.**

On June 17, 2017, Candice Collins' car was being driven by Timothy Lewis, who crashed Collins' car into several vehicles, including the car of Robin Dunn. Dunn and her son were injured. Collins was insured by First Chicago Insurance ("FCIC"). On June 27, 2017, attorney Darron Stewart sent a letter to FCIC indicating that he was counsel for Dunn and her son and that, henceforth, FCIC should contact counsel rather than Dunn. FCIC made the limits of its liability known to Stewart and had discussions regarding the claim.

Then, on December 27, 2017, FCIC filed an interpleader complaint against several defendants, including Dunn, indicating Collins' policy limit was $50,000 and asking the court to accept the $50,000 and divide it amongst the defendants without FCIC taking part in the litigation. FCIC did not serve Dunn's counsel, as Dunn's counsel had instruction. Instead FCIC purported to have served Dunn at an address that was not Dunn's address and, without the knowledge of Dunn or her counsel, FCIC obtained a default judgment against Dunn in the interpleader action. The trial court then divided the $50,000 between the three defendants who had not been defaulted.

When Dunn and her counsel learned about the default judgment, they moved under TR 60(B) to have it set aside. FCIC responded with an answer that asserted only that the trial court did not have personal jurisdiction over FCIC because the cause of action had reached final adjudication with the default judgment. The court granted Dunn's motion for relief from judgment.

The Court of Appeals held FCIC's arguments on appeal as to the merits of the TR 60(B) decision were waived because FCIC did not assert arguments on the merits at the trial court. Moreover, FCIC's failure to serve Dunn's counsel was an exceptional circumstance that could justify setting aside a default judgment, and Dunn had a meritorious defense because she had been entitled to a portion of the $50,000 that had been divided between the other three defendants. However, the trial court erred in ordering FCIC to deposit $25,000 with the trial court to cover Dunn's expenses, as no evidence had yet been submitted as to the extent of the damages incurred by Dunn and her son in the accident.

I. LEGAL MALPRACTICE

Saylor v. Reid, 132 N.E.3d 470 (Ind. Ct. App. 2019), *reh'g denied, trans. denied*. Brown, Riley, & Tavitas

Holdings:

1. **Because plaintiff's various allegations all constituted part of his legal malpractice claim, the two-year statute of limitations for attorney malpractice applied to all.**
2. **Although TR 12(B)(6) permits a claim to be amended once as of right to avoid dismissal, trial court's dismissal with prejudice was harmless when plaintiff failed to explain on appeal how he could have amended his complaint to avoid dismissal.**

Saylor was convicted of molesting his stepdaughter, pled to being a habitual offender, and sentenced to 138 years. "At some point, Saylor paid Attorney Reid $5,000." On April 15, 2014, a petition for post-conviction relief was filed in Saylor's name by Reid, who signed Saylor's name on the signature line of the petition. The post-conviction court denied Saylor's petition, and on May 23, 2016, the Court of Appeals remanded for a new trial as to the habitual offender finding. On June 19, 2018, Saylor sued Reid for "fraud, forgery, fraudulent misrepresentation, negligence, *res ipsa loquitor*, legal malpractice and claim for compensatory, actual and punitive damages." Reid filed a motion to dismiss based on the statute of limitations. The trial court dismissed Saylor's complaint with prejudice.

Claims of legal malpractice are subject to a two-year statute of limitations, but are also subject to the discovery rule, such that a plaintiff's limitations period does not begin until the plaintiff knew or should have known that he was injured by another's tort. Saylor's allegations against Reid all arise from Reid's filing of the petition for post-conviction relief, which occurred on April 15, 2014. However, Saylor did not file his complaint until June 19, 2018, which is well outside the two-year statute of limitations. Saylor's complaint was also filed more than two years after the Court of Appeals issued its opinion on that petition. Accordingly, the trial court did not err in dismissing his complaint against Reid.

Saylor also alleges error under Trial Rule 12(B)(6) because it permits a plaintiff to amend a complaint once as of right, but the trial court dismissed his first complaint with prejudice. As Saylor did not allege on appeal how he could amend his complaint to avoid the two-year statute of limitations, the court held any error in the dismissal with prejudice was harmless.

Jacob v. Vigh, 147 N.E.3d 358 (Ind. Ct. App. 2020). Najam, Kirsch, Brown

Holding:

1. **While Indiana Supreme Court has exclusive jurisdiction over attorney discipline for violation of the rules of professional conduct, trial courts retain jurisdiction over claims of fraud, breach of contract, breach of fiduciary duty, and legal malpractice that may also be based upon violation of the rules of professional conduct.**

Jacob hired Vigh as counsel for post-conviction proceedings and paid Vigh a $10,000 retainer. Over four years, the only action Vigh took in the case was filing repeated motions to continue the final hearing on Jacob's petition. Then, after four years, Vigh moved to withdraw as counsel, the court granted Vigh's request, and Vigh did not return any of the retainer to Jacob. Jacob filed a complaint that included detailed factual allegations and alleged fraud, breach of contract, breach of fiduciary duty, and violation of the rules of professional conduct. Vigh moved to dismiss Jacob's complaint because the trial court had no jurisdiction to adjudicate claims based on the professional conduct rules, and the trial court granted his motion to dismiss.

Jacob appealed and the Court of Appeals reversed the grant of the motion to dismiss:

> "Vigh may be subject to sanctions under the Indiana Rules for Admission to the Bar and Discipline of Attorneys. That is not for us to decide. But we can say that our Supreme Court's exclusive jurisdiction over such matters does not preempt to preclude a tort or contract claim arising from the same facts."

J. MEDICAL MALPRACTICE

Riley v. St. Mary's Medical Center of Evansville, Inc., 135 N.E.3d 946 (2019). Crone, Baker, Kirsch

Holdings:

1. **radiologic technologist had sufficient experience to testify as an expert; and**
2. **genuine issues of material fact about the proximate cause of Riley's injuries precluded summary judgment for Hospital.**

At 3:00 pm on June 8, 2015, Nataomi Riley arrived at the Hospital for a CT scan with contrast dye to rule out a pulmonary embolism. Riley had had the procedure multiple times previously

without any problems. Hospital employee, radiologic technologist Osborne, came into the CT room to insert an IV into Riley's right forearm, and then Osborne went behind the protective wall and pushed a button to inject a 30 mL test dose of dye into Riley's arm at 4 mL per second. As the dye was going into her arm, Riley repeatedly told Osborne that it hurt and that it was going into her tissue rather than her vein. Osborne put Riley into the Xray machine for the scan, and then Riley began screaming for Osborne to get her out of the machine because the pain was moving up to Riley's shoulder. Osborne admitted something was wrong because she could not visualize the contrast in the Xray. A second technician then came in, put a new line in Riley's left arm, and performed the required Xrays without incident. However, by the time Riley was removed from the machine, there was a swelling the size of a small egg on Riley's right forearm. Osborne wrapped Riley's arm and sent her home. Riley arrived home around 7:00 pm. Soon thereafter, her right arm was so swollen that her flesh split open on her right hand and fluid was running out. She called the Xray department and told a technician what was happening. The technician told her to alternate hot and cold compresses, and to go to the hospital if it got too bad. By 10:00 pm, the pain was unbearable and Riley went to the Hospital ER, where she was put on morphine for the pain and taken to surgery to repair "right arm IV contrast extravasation." Riley was in the hospital four days and then had weeks of home health care for the wound. She has ongoing neurological and muscular problems with the arm.

Riley filed a proposed medical malpractice complaint against the Hospital, and the review panel determined the evidence did not demonstrate the Hospital failed to meet the standard of care. Riley filed a complaint against the Hospital in the trial court, and Hospital moved for summary judgment based on the review panel's determination. Riley designated her medical records, Osborne's deposition, her own deposition, and an affidavit from radiologist technician Barry Southers, who opined that Osborne did not follow the standard of care required in the situation. Hospital admitted Southers' affidavit created a genuine issue of material fact about the standard of care, but Hospital argued Southers was unqualified to render a medical opinion on causation because he is not a doctor. The trial court sided with Hospital and granted summary judgment, dismissing Riley's claim.

The Court of Appeals noted the general rule is that non-physician healthcare workers are not qualified under Evidence Rule 702 to provide an opinion about medical causation. However, a non-physician may qualify as an expert if the issue of causation is not complex. The real question is whether the non-physician has sufficient expertise with the circumstances at issue. Herein, Southers' affidavit indicated he was an Associate Professor at a university and Senior Researcher in a medical lab who had performed numerous scans like the one Riley had. Southers pointed to the portions of Hospital's policies that required Osborne to contact the supervising physician, which Osborne did not do. Southers opined Osborne's failure to contact the physician was a cause of Riley's injuries. The Court of Appeals held Southers was qualified as an expert because of his experience and the lack of complexity of causation. Accordingly, the court reversed summary judgment for Hospital and remanded.

Strickholm v. Anonymous Nurse Practitioner, et al., 136 N.E.3d 264 (2019). Bradford, Vaidik & Altice

Holding:

1. **Summary judgment based on Patient's failure to file claim within the two-year statute of limitations was precluded by genuine issue of material fact about whether Nurse Practitioner's review and approval of patient's record constituted provision of health care.**

On December 1, 2015, Peter Strickholm was seen by Anonymous Nurse Practitioner ("NP") at an Anonymous Practice Group in Bloomington. NP prescribed Lisinopril-HCTZ to control Strickholm's high blood pressure and told him to return in a week to be checked. On December 8, 2015, Strickholm returned for a blood pressure check, and an LPN checked his pressure and noted it in the electronic report that the LPN forwarded to a physician who indicated Strickholm should return for a check in 7-14 days, when the Lisinoprol might be increased if further improvement was not seen. On December 11, 2015, at the latest, NP reviewed the LPN's report and approved it without ordering a change of medicine or additional tests. On December 15, 2015, Strickholm entered the hospital with low sodium levels. The next day Strickholm experienced cardiopulmonary arrest, which resulted in permanent cognitive impairment. On December 4, 2017, Strickholm's family filed a proposed medical malpractice complaint. NP moved for summary judgment, asserting the last day she provided medical care to Strickholm was December 1, 2015, and Strickholm's claim was filed three days after the expiration of the limitations period. The trial court granted NP's motion for summary judgment after determining December 1, 2015, was the last day NP provided medical care.

The Court of Appeals held a genuine issue of material fact existed about whether the NP's December 11, 2015, review and approval of the record from Strickholm's December 8, 2015, visit constituted the provision of health care. Court has "little hesitation in concluding" as it does because the Medical Malpractice Act "concerns health care that was provided or '*that should have been provided*, by a health care provider, to a patient.'" In a footnote, the Court suggests it would have reached the same conclusion under the continuing-wrong doctrine, as the allegations are "essentially the same." Case reversed and remanded for proceedings.

Rogers v. Dr. D & Clinic C, 2020 WL 3478605, ---N.E.3d --- (Ind. Ct. App. 2020). Riley, Matias, Tavitas

Holding:

1. **Claims barred as a matter of law by the two-year statute of limitations for medical malpractice actions.**

On April 17, 2015, Deborah Williams consulted Dr. D about hip pain because Dr. D had performed a total hip replacement surgery for Williams in 2007. After consultation, surgery was

scheduled for May 18, 2015. During surgery, Dr. D found the stem of the prosthetic was firmly fixed. He attempted to cut and remove the prosthesis, but in the process shattered Williams' femur. When Williams was in recovery, it was discovered that her hip was partially dislocated, so she was returned to the operating room for reduction. Williams remained in the hospital, and on May 27, 2015, Dr. D wrote discharge papers for Williams, but a nurse requested a consultation because Williams had hypertension, clumsiness, and cold limbs. Williams remained in the hospital with Dr. D as her attending physician until her death on June 20, 2015. Williams' mother, Rogers, filed a proposed medical malpractice complaint with the IDOI on behalf of Williams' Estate on June 16, 2017. Before the medical review panel issued its decision, Dr. D filed a petition for preliminary determination with the trial court in which he asserted the complaint was barred by the statute of limitations. The trial court granted summary judgment to Dr. D.

On appeal, the Court held the occurrence date of the malpractice was May 18, 2015, the date of surgery. However, Williams knew for sure that something was wrong on May 27, 2015, when she could not be discharged as planned. Thus, the complaint filed June 16, 2017, was past the two-year deadline. Furthermore, the complaint cannot be saved by the continuing wrong doctrine because the complaint designated no evidence that suggested the treatment decisions made by Dr. D after the surgery aggravated the injury. Trial court's grant of summary judgment affirmed.

K. NEGLIGENCE

Gacsy v. Reinhart, 142 N.E.3d 518 (Ind. Ct. App. 2020). Baker, Riley & Brown

Holdings:

1. **Gacsy's counsel did not violate motion in limine; and**
2. **Evidence of prior escapes of Reinhart's horses was directly relevant to Gacsy's claim of negligent confinement, such that trial court's order in limine was improper.**

In June 2014, Gacsy was knocked down by Reinert's horse and sustained injuries. Gacsy filed a complaint against Reinert alleging Reinert negligently maintained his horse confinement, which allowed the horses to roam at large and injure Gacsy. One of Gacsy's main theories of negligence was that Reinert knew the fence was inadequate prior to Gacsy getting injured. Two weeks before trial, Reinert filed a motion in limine to exclude all reference to or testimony about 'any incidents previous or subsequent to the incident giving rise to this lawsuit in which one or more of Reinert's horses is alleged to have escaped its confinement." The trial court granted that motion in limine. At a first trial, Gacsy's counsel made four comments during opening arguments that were alleged to violation that order in limine, and the trial court granted a mistrial.

Before a second trial, Gacsy asked the court to reconsider the motion in limine, but the trial court denied that request and informed Gacsy that violation of the order would result in dismissal of his complaint. During opening statements, Gacsy's counsel said the evidence would show Reinert's fence "wasn't built well and that about two months before Gacsy was injured it found a failure. That's the words Reinert will tell you. The fence found a failure." Reinert objected. In support of that statement, Gacsy's counsel pointed to Reinert's deposition testimony that said the fence was "good for a lot of years, then it apparently found a failure." The trial court determined the statement violated the motion in limine and it dismissed Gacsy's complaint with prejudice.

On appeal, the Court of Appeals first held the statement by Gacsy's counsel regarding the fence finding a failure did not violated the order in limine, because the order prohibited mentioning horses escaping the confinement on prior occasions, but counsel stated only that the fence "found a failure," not that the horses escaped. Second, the Court of Appeals held the trial court had abused its discretion by granting the motion in limine because the prior and subsequent escapes of Reinert's horses are relevant to determining whether he was negligent in the manner in which he confined the horses – which is an element Gacsy had to prove to succeed in his claim. Accordingly, the Court of Appeals reversed the trial court's order and remanded for a new trial.

Indianapolis Power & Light Co. v. Gammon, 148 N.E.3d 1042 (Ind. Ct. App. 2020). Vaidik, May, Robb

Holding:

1. **Electric Utility owed no duty to protect construction worker from power lines**

Gammon was employed by Window Man, and Window Man was hired to install aluminum trim around the roof of a commercial building. Uninsulated IPL lines were a few feet from the roof of the building, but Gammon did not call IPL to have the lines de-energized. While on an aluminum ladder with aluminum trim, Gammon was electrocuted, fell forty feet, and sustained serious injuries. Gammon sued IPL for negligently failing to insulate the wires or comply with building clearance requirements. IPL moved for summary judgment claiming it had no duty to protect Gammon, and the trial court denied IPL's motion.

On interlocutory appeal, the Court of Appeals held IPL had no duty to Gammon. First, IPL has a duty under Indiana law to insulate only those power lines that the general public might contact; wires that are high in the air need not be insulated because they would be encountered only by workers who know to take proper precautions. Second, the NESC building requirements are in administrative code (170 IAC 4-1-26) cannot create a duty because Indiana courts have declined to find duty from administrative regulations. Finally, no duty arises under the *Goodwin v. Yeakle* analysis, 62 N.E.3d 384, because it cannot be "foreseeable" that a person who is expected to take all necessary precautions to protect himself would be injured. Accordingly, the trial court erred when it denied IPL's motion for summary judgment.

KMC, LLC v. Eastern Heights Utilities, Inc., 144 N.E.3d 773 (Ind. Ct. App. 2020). Baker, Bradford, Pyle

Holding:

1. **Water Utility had no duty to turn off water to fire suppression sprinkler system in building when it was prohibited by law from turning off the water to that system without proper authorization and when building owner did not request water to fire suppression system be turned off.**

KMC owns a building in Bloomfield and installed a fire suppression system in the building in 2006. In 2017, when the building was vacant, KMC decided to winterize the building and turn off the heat. KMC called the Eastern Heights, the water utility company, and requested the water supply to the building be shut off. Utility turned off the water main valve in the basement. That winter, the supply lines for the water suppression system froze, and when they thawed, they flooded the building, resulting in $300,000 in damages. KMC sued Utility for negligence, based on Utility's failure to turn of the water to the fire suppression system, which proximately caused the damages to the building. The trial court granted summary judgment to Utility.

The Court of Appeals affirmed the grant of summary judgment to Utility because Utility had no duty to turn off the water supply to the fire suppression system. First, KMC did not specifically request that Utility turn off the supply valves outside the building that controlled the fire suppression system. Second, strict statutory language controls when and why a fire suppression system may be shut off, and without proper authorization from other authorities, Utility was prohibited from turning off the water to the fire suppression system. Utility could not have a duty to break the law.

Golden Corral Corp v. Lenart, 127 N.E.3d 1205 (Ind. Ct. App. 2019). Altice, Najam, Pyle

Holdings:

1. **Trial court properly determined plaintiff's action for severe food poisoning was not governed by the Indiana Product Liability Act, as restaurant was not a "manufacturer" of chicken wings;**
2. **Trial court did not abuse its discretion when it allowed Lenart's doctor to opine that differential diagnosis led her to conclude Golden Corral's food caused Lenart's vomiting, which caused an umbilical hernia;**
3. **Trial court did not err when it denied Golden Corral's motion for judgment on the evidence, as the expert testimony from Lenart's doctor suggested the food was the proximate cause of Lenart's injuries;**
4. **Trial court did not abuse its discretion when it gave a jury instruction on spoliation, as Golden Corral knew of Lenart's injuries within the week they occurred, such that Golden Corral knew or should have known that it needed to keep the buffet's temperature charts well within the 90 window at which the charts were regularly discarded;**

5. **Trial court's instruction as to spoliation was incorrect as to the undercooked chicken wing itself, as Golden Corral had no duty to keep the undercooked chicken that was served on the night in question; and**
6. **Trial court did not abuse its discretion when it gave the jury an instruction on res ipsa loquitur, as the instruction was supported by the evidence that Lenart had no stomach issues in the six-months prior to the incident, but within two hours of eating two plates of chicken wings prepared by Golden Corral she repeatedly vomited so forcefully that he herniated her stomach.**

On Sunday, April 28, 2013, Kristina Lenart went to eat at Golden Corral's buffet with her family. Lenart had two plates of chicken wings, some mashed potatoes, and a slice of pizza. Toward the end of the meal, Lenart's husband noticed the chicken wing his daughter had started to eat was undercooked, and he took it to the manager and complained. The manager refunded the money the Lenarts had paid to eat at the buffet. One to two hours later, Lenart had diarrhea and began vomiting intensely. Later that evening, Lenart went to the emergency room, where she remained overnight. Lenart continued to experience abdominal pain, nausea, and vomiting, and a few weeks later she was diagnosed with an umbilical hernia that required surgery. Lenart has since had two additional stomach surgeries, and she may require additional surgeries in the future. Prior to April 28, 2013, Lenart had not had gastrointestinal problems.

Lenart sued Golden Corral for its failure "to prepare and serve its barbeque chicken wings in a manner safe for human consumption." A jury returned a verdict for Lenart and awarded her $240,000.

L. PREMISES LIABILITY

Cavanaugh's Sports Bar v. Porterfield, 140 N.E.3d 837 (Ind. 2020). Massa, Rush, & Slaughter Goff dissents & David joins

Holding:

1. **"Cavanaugh's owed no duty to protect its patron from the sudden parking lot brawl when no evidence shows that Cavanaugh's knew the fight was impending."**

Porterfield and a friend were at Cavanaugh's until the 3 am closing time. The two men talked to the bartenders and had no disputes with anyone in the bar. When all people in the bar exited at 3 am, Porterfield and his friend got in a fight with other people leaving the bar. Porterfield sustained injuries that left him blind.

Porterfield sued Cavanaugh's for negligence and claimed Cavanaugh's had a duty to protect him because the bar was in an area known for criminal activity. Cavanaugh's responded that it had no duty to protect patrons from the unforeseeable acts of third parties. Porterfield argued the five occasions on which police were called within thirty minutes of closing time in the prior year rendered the fight foreseeable. The trial court denied summary judgment to Cavanaugh's on the

theory that a genuine issue of material fact existed about whether Cavanaugh's owed a duty to Porterfield.

The Indiana Supreme Court noted the critical inquiry was whether the criminal attack was foreseeable, but that "foreseeability in this context –as a component of duty—is evaluated differently than foreseeability in proximate cause determinations…." A "key factor is whether the landowners knew or had reason to know about any present and specific circumstances that would cause a reasonable person to recognize the probability or likelihood of imminent harm." Landowners have duty only when they have such contemporaneous knowledge. Historical evidence of crime is relevant to foreseeability in the context of proximate cause, but "should play no role when we evaluate foreseeability as a component of duty." Cavanaugh's had no duty to Porterfield on the night in question from the unforeseeable sudden attack.

Al-Sinan v. Blackbird Farms Apts., LLC & WH Long Rentals, Inc., 139 N.E.3d 224 (Ind. Ct. App. 2019). Bradford, Vaidik & Riley

Holding:

1. **Summary judgment to apartment complex precluded by genuine issue of material fact about whether apartment complex breached duty to keep walkways free of hazardous condition created by ice.**

Rehem Al-Sinan leased an apartment at Blackbird Apartments. Around 7:20 a.m. on March 3, 2015, Al-Sinan slipped and fell on a service ramp connected to the entry of her apartment. She called 911 and was taken to the hospital for injuries. Al-Sinan filed suit against Blackbird, arguing she was injured because Blackbird breached its duty to keep its sidewalks and walkways clear of ice and snow. Blackbird filed a motion for summary judgment. Al-Sinan filed a response to Blackbird's motion and attached a designated report from an expert. Blackbird filed a motion to strike the expert report. The trial court held a hearing and granted Blackbird's motions to strike and for summary judgment.

On appeal, Blackbird does not dispute that it owed Al-Sinan a duty. Instead, Blackbird claims it did not breach its duty. In support of its claim, Blackbird focuses on Al-Sinan's statement that she did not see ice on the ramp and claims the suggestion that she fell on ice is mere speculation. The Court of Appeals found Al-Sinan's designated evidence created more than a speculative inference, as Al-Sinan's designated deposition indicated that it was cold on the morning she slipped, that she did not walk on the steps because she could see that the steps were icy, and that although she did not see any ice visible on the ramp, she slipped and fell as soon as she stepped on the ramp. Accordingly, the trial court had erred in granting summary judgment for Blackbird.

Buckingham Mgmt. LLC v. Tri-Esco, INC., 137 N.E.3d 285 (Ind. Ct. App. 2019). Altice, Robb & Bradford

Holding:

1. **Trial court properly granted summary judgment to snow removal contractor in slip-and-fall action because contract between contractor and apartment complex did not require action by contractor in two days prior to accident and because contractor had no control over the parking lot at the time of the accident.**

Buckingham Management was doing business as Bradford Place Apartments. Bradford had a contract with Tri-Esco that required Tri-Esco to remove snow and ice from the streets and parking lot at Bradford whenever at least two inches of snow fell. The contract did not require Tri-Esco to inspect the streets and lot at any other time. The contract contained inconsistent language about whether was Tri-Esco to salt the driveways and parking lots without a specific request by Bradford, but Tri-Esco had never applied salt to Bradford's property without a specific request from Bradford. Bradford purchased tons of bagged salt each year for snow and ice removal, and Bradford maintained its own sidewalks.

On February 21, 2015, Tri-Esco removed snow from Bradford's streets and parking lot with trucks and plows, and Bradford employees spread nine bags of ice melt on the property. Neither Tri-Esco nor Bradford removed snow or applied salt to be property in the subsequent 48 hours, nor did Bradford ask Tri-Esco to spread salt. At 7:00 am on February 23, 2015, Deborah Perez arrived at Bradford, where her daughter lived. As she exited her car, she noticed the lot was covered in ice, so she balanced herself against her vehicle as she walked toward her daughter's apartment. Despite her caution, Perez slipped and fell onto her left arm and shoulder, causing injuries that required surgeries and have produced continuing pain. Perez sued Bradford and Tri-Esco for negligence based on a failure to inspect and maintain the property, put down salt, remove snow and ice, or warn of the dangerous condition. Bradford and Tri-Esco asserted affirmative defenses. Tri-Esco also filed a motion for summary judgment, claiming it had no duty to maintain the parking lot in the two days prior to Perez falling and it had no control over the premises. After a hearing, the trial court granted summary judgment to Tri-Esco.

On appeal, Bradford asserted error in the grant of summary judgment because genuine issues of fact existed about whether the contract required Tri-Esco to salt the property without a request from Bradford and whether Tri-Esco exercised reasonable care when it removed snow on February 21. The Court of Appeals declined to find a genuine issue of material fact in the inconsistent contractual provisions about salting because two of three provisions required Tri-Esco to receive specific authority from Bradford before salting and because Tri-Esco had not ever salted without being given specific authority by Bradford. The Court also held Tri-Esco could not have had a duty to Perez when Tri-Esco had no control over the premises in the 48 hours prior to Perez's fall and neither the contract terms nor a specific request from Bradford created any obligation for Tri-Esco to return to the property during that time.

Cooper's Hawk Indianapolis, LLC v. Ray, 2020 WL 3495308, --- N.E.3d --- (Ind. Ct. App. 2020). Brown, Najam, Kirsch dissents with opinion

Holding:

1. **Trial court erred in denying Cooper's Hawk's motion for summary judgment as there was no designated evidence suggesting there was liquid on the floor before Ray fell or that Cooper's Hawk unreasonably failed to know about liquid on the floor.**

Ray and her boyfriend went to Cooper's Hawk to taste wines on a rainy day. After one sample, Ray went to the restroom. When she exited the bathroom, she fell in the hallway outside the restroom. Cooper's Hawk staff informed Ray's boyfriend of the fall and contacted EMTs. Ray had not seen any water on the floor as she entered the restroom, nor did she see any on the floor or feel her clothes become wet when she fell. After EMTs arrived, Ray's boyfriend noticed a "mist" on the floor in the hallway and heard one of the EMTs mention that his knee was damp. The manager from Cooper's Hawk submitted an affidavit in which she indicated there had been no reports of water in the hallway, that staff checks the hallway at least twice an hour, and that she found no water on the floor after Ray fell. Ray sued Cooper's Hawk for negligently maintaining the hallway, which caused her injury. Cooper's Hawk moved for summary judgment based on its not actually or constructively knowing what caused Ray's fall. The trial court denied Cooper's Hawk's motion, and an interlocutory appeal ensued.

The Court of Appeals held the trial court erred in denying Cooper's Hawk's motion for summary judgment because the record contained no evidence to suggest there was liquid on the floor before the EMTs arrived or that Cooper's Hawk knew or should have known about a dangerous condition in the hallway. Judge Kirsch dissented, believing a genuine issue of material fact existed.

Cruz v. New Centaur, LLC, et al., 2020 WL 3478691, --- N.E.2d --- (Ind. Ct. App. 2020). Riley, Mathias, Tavitas

Holdings:

1. **Indiana Grand entitled to summary judgment against Jockey injured by collision of horses when Jockey failed to allege or designate evidence to show that (1) Indiana Grand's alleged negligence increase the risk of harm to Jockey or (2) that Jockey relied on Indiana Grand's safety measures.**
2. **Owners of horse that ran wild and injured another Jockey cannot be liable under a theory of respondeat superior because Owners' jockey cannot be liable pursuant to Indiana Supreme Court precedent such as Magenity v. Dunn, 68 N.E.3d 1080 (Ind. 2017).**

New Centaur does business as Indiana Grand Racing & Casino and owns the Indiana Downs horse racing track in Shelby County. When horses are not being raced, the track is used to exercise and train horses. It is not uncommon for riders to be thrown from a horse or for horses to become loose during training, so Indiana Grand hires Outriders – employees who are mounted on horses, monitor safety on the track, and assist if a horse gets loose. If a horse gets loose, Outriders alert a clocker, who activates a siren to warn others that a horse is loose. Marcelle Martins is a licensed jockey who, in 2018, exercised horses for Michael E. Lauer Racing at Indiana Downs. On May 7, 2018, Martins was exercising a horse called Accessorizing, who was owned by Lauer's wife Penny. After one turn around the track, Accessorizing began to run out of control. Martins called for assistance from an Outrider, who unsuccessfully attempted to grab Accessorizing's reins. Martins was thrown from the horse, which sped toward a group of horses. Accessorizing collided with a horse called Glitter Cat, which was being ridden by Civilo Cruz. Cruz was thrown to the ground and injured. After the collision, the warning siren was activated.

Cruz filed a complaint that alleged premises liability and negligence claims against Indiana Grand and that alleged respondeat superior and negligent hiring claims against the Lauers. Indiana Grand filed a motion for summary judgment that asserted it owed no duty to Cruz because he assumed the risks of participating in an inherently dangerous sport. The Lauers moved for summary judgment because Martins was an independent contractor, not their employee, for respondeat superior purposes, and because (like Indiana Grand) they owed no duty to Cruz when he assumed the risk of participating in a dangerous sport. Cruz filed a brief in opposition to summary judgment that asserted Indiana Grand assumed a duty of care toward him by employing Outriders and using a warning siren. The trial court granted summary judgment to Indiana Grand and the Lauers because they had no duty to him when Cruz chose to take part in horse racing. The trial court denied summary judgment to the Lauers as to Cruz's claim of respondeat superior because there was a genuine issue of material fact about whether Martins was an employee or independent contractor.

The Court of Appeals first reviewed the development of Indiana's jurisprudence regarding sports injuries. The Court then turned to Cruz's allegations against Indiana Grand – Cruz alleged on appeal that Indiana Grand assumed a duty to protect him by employing Outriders and having a siren; however, to survive summary judgment, Cruz needed to demonstrate Indiana Grand's negligence increased his risk of harm or that he relied on Indiana Grand to exercise care with the safety measures, and he designated no such evidence, which made the summary judgment for Indiana Grand appropriate.

As for Cruz's allegations against the Lauers, the Court first noted Cruz abandoned his general negligence theory against the Lauers and asserted only his respondeat superior claim should avoid summary judgment. The Court held, however, that because Martins is shielded from liability pursuant to Indiana's sports jurisprudence, "there is no negligence to impute to the Lauers on a theory of respondeat superior. Therefore, the Court reversed the trial court's partial denial of the Lauer's motion for summary judgment.

M. PRODUCT LIABILITY

Bayer Corp., et al., v. Rene Leach, et al., 147 N.E.3d 313 (2020). Per Curiam

Holding:

1. **On interlocutory appeal from denial of motion for judgment on the pleadings, Court of Appeals erred when it failed to address the legal viability of each and every one of plaintiffs' claims.**

Thirty-six women filed a complaint against Bayer based on a medical device manufactured by Bayer. The plaintiffs asserted multiple claims, such as defective manufacturing, false marketing, improper training of physicians, and cover-up of information. Bayer filed a motion for judgment on the pleadings, which the trial court denied. The trial court certified the order for interlocutory appeal. The COA accepted jurisdiction and addressed only whether the plaintiffs' stated a claim for manufacturing defect that was not preempted by federal law. COA declined to address other claims in plaintiffs' pleadings.

Supreme Court granted transfer and remanded for COA to address denial of judgment on pleadings as to all other claims. "In a complaint with multiple claims, the viability of a single claim does not immunize a separate, deficient claim from judgment on the pleadings. When analyzing pleadings for Rule 12(C) purposes, Indiana courts are required to address the viability of each claim presented, disposing of only unviable ones."

Estabrook v. Mazak Corporation, 140 N.E.3d 830 (Ind. 2020). Slaughter, Rush, David, Massa, & Goff

Holding:

1. **Ten-year statute of repose provided by Indiana Products Liability Act cannot be extended for a manufacturer's post-sale repair, refurbishment, or reconstruction of a product.**

In 2014, Estabrook was injured while working on a machine purchased from Mazak Corporation in 2003. In 2016, Estabrook filed a product-liability suit against Mazak alleging the machine had an unsafe design defect. Estabrook's injury did not arise within ten years of the delivery of the product in 2003, such that the ten-year statute of repose in the Products Liability Act, IC 34-20-3-1, precluded his action under the Indiana Products Liability Act.

However, over the past 40 years, in dicta, courts have suggested that an exception to the ten-year statute of repose may exist when the manufacturer has repaired, refurbished, or reconstructed a product to such an extent that a "new product" exists, which would restart the ten-year limitations period. Supreme Court held plain language of PLA statute does not permit the creation of an exception for repair or refurbishment to provide a new period of repose.

Hackney v. Pendu Mfg., Inc., 146 N.E.3d 1016 (Ind. Ct. App. 2020). Kirsch, Vaidik, Mathias

Holding:

1. **Trial court properly granted Manufacturer's motion for summary judgment – in injured worker's action against machine manufacturer under Indiana's Product Liability Act, Ind. Code 34-20-2, for an alleged unreasonably dangerous and defective product – because worker's multiple failures to follow machine's warnings caused injuries and could not have been reasonably expected by manufacturer.**

Hackney worked at American Fibertech, which uses a machine custom built by Pendu to trim the edges off wooden boards. Pendu shipped the machine to Fibertech, which hired contractors to modify and attach the machine to Fibertech's production line. Pendu sent a safety manual for the machine, Fibertech kept the manual, and Hackney had never read the manual. On November 17, 2015, Hackney was working at the infeed end of the machine, feeding boards into the machine, when he noticed a piece of scrap wood near the outfeed end of the machine that could cause the machine to jam. Hackney walked to the other end of the machine, which required him to pass two buttons that would stop the machine, but he did not stop the machine. Instead he leaned over a railing on one foot to reach into the moving machine. His baggy sweatshirt got caught in the moving machine and was ripped off his body, damaging his arm and shoulder. "Fibertech investigated and determined the accident was caused by Hackney's behavior, violation of safety rules, and failure to first turn off the machine." Hackney sued Pendu, alleging it created a dangerous and defective machine in violation of the IPLA. Pendu filed for summary judgment because hackney's injuries were caused by his misuse of the machine. The trial court granted summary judgment for Pendu.

A claim under the IPLA requires a plaintiff to show: (1) the product is defective and unreasonably dangerous, (2) the defect existed when the machine left Pendu, and (3) the defect was the proximate cause of the plaintiff's injuries. The IPLA provides three non-exclusive defenses: incurred risk, misuse of the product, and alteration of the product. If a defendant proves one of these defenses, it is a complete defense to a claim. Pendu alleged Hackney's misuse was a complete defense, because Hackney (1) did not turn off the machine, (2) overreached on one foot, (3) leaned over the outfeed, which should not have been accessible, (4) wore improper apparel, (5) ignored his twice-weekly training about turning off the machine, and (6) had not read the safety manual.

Misuse is typically a question of fact for a jury, but it can be decided as a matter of law if the evidence is undisputed that "the plaintiff misused the product in an unforeseeable manner." To prove misuse, a defendant must demonstrate plaintiff's misuse (1) was the cause of the harm and (2) was not reasonably expected by the seller. Herein, the Court of Appeals determined that Hackney's misuse caused his injuries and that, while a seller might expect users to ignore some warnings, Pendu could not have expected that Hackney would disregard this many safety warnings at one time. Accordingly, summary judgment for Pendu was affirmed.

N. PROPERTY DAMAGE

Shield Global Partners-G1, LLC v. Forster, 141 N.E.3d 1269 (Ind. Ct. App. 2020). Mathias, Kirsch, & Bailey

Holdings:

1. **Indiana recognizes damages for "inherent diminished value;" and**
2. **Shield presented sufficient evidence to support a claim of diminished value damages.**

Lindsay Forster rear-ended a truck being driven by Lance Ingersoll. Ingersoll had leased the truck from a Chevy dealership, and GM Financial had a security interest in the truck. GM Financial assigned its security interest to Shield. After the accident, the truck was repaired, but Shield presented evidence the truck's value had been diminished by $4,000-$7,000 dollars. Shield sued Forster for the diminished value of the truck. The trial court denied Shield's claim after concluding Indiana did not recognize diminished value damages.

Pursuant to *Wiese-GMC v. Wells*, 626 N.E.2d 595 (Ind. Ct. App. 1993), damages to fair market value (FMV) can be proven in three ways: (1) FMV before minus FMV after, (2) cost of repair, or (3) cost of repair plus loss to FMV. Trial court misread *Wells* when it concluded Shield could not recover loss damages on top of repair costs. Trial court also erred when it determined Shield had not proven actual loss on top of repair costs, as appraisals indicated truck had diminished value after repairs.

O. SET OFF

Batchelder v. IU Health Care Assoc., Inc., 148 N.E.3d 1116 (Ind. Ct. App. 2020). Tavitas, Najam, Vaidik

Holding:

1. **When joint tortfeasors cause a single loss, amount of settlement from one of those tortfeasors must be set off against the total loss sustained by plaintiff (not against the statutory limit for recovery) because the one-satisfaction doctrine is not meant to reduce a plaintiff's recovery to less than one full recovery.**

John Batchelder was a practicing cardiologist. On September 25, 2015, Batchelder's vehicle was struck by a vehicle driven by Emma Mourouzis. Batchelder was transported to IU Health North Hospital, where a radiologist with IUHP misread an x-ray, failed to diagnose a cervical spine fracture, and released Batchelder. Two days later, Batchelder sought a second opinion, which uncovered the fracture, and Batchelder was taken to surgery. On April 19, 2016, Batchelder sued Mourouzis, and two days later Batchelder died. On June 17, 2016, Batchelder's Estate filed an amended complaint that alleged the total damages was between six and ten million dollars.

On March 13, 2017, Mourouzis settled with the Estate for $1.25 million. On June 14, 2017, the Estate filed a proposed complaint with the IDOI, and a medical review panel found the IU radiologist violated the standard of care. On August 8, 2018, the Estate filed a wrongful death complaint against IUHP and alleged the negligent medical care caused Batchelder's death. IUHP moved for summary judgment based on a theory that the Estate was not entitled to additional recovery because it had already received $1.25 million from Mourouzis, which would have to be set off against the statutory cap, which is also $1.25 million. The trial court granted summary judgment to IUHP.

The Court of Appeals held the trial court erred when it granted summary judgment to IUHP. The common law rule of joint and several liability is available in medical malpractice actions in Indiana, and Indiana follows the one-satisfaction doctrine, which means that payment of the full amount of a plaintiff's damages by any tortfeasor satisfies plaintiff's claims against all tortfeasors. Thus, as in reviewed caselaw, jury verdicts against some tortfeasors were reduced by settlements from other tortfeasors. For trial court to calculate the losses remaining after set-off of other settlement amounts, the court needed first to have a jury trial to determine the total amount of plaintiff's loss. Plaintiff's total loss was not controlled by statutory medical malpractice cap. Reversed and remanded for proceedings.

P. STATUTE OF LIMITATIONS

Robertson v. State, 141 N.E.3d 1224 (Ind. 2020). David, Rush, Massa & Goff; Slaughter concurs with opinion

Holdings:

1. **Pursuant to IC 5-11-5-1, statute of limitations for misappropriation of public funds begins to run when the Office of the Attorney General (OAG) receives the final, verified report.**
2. **Statute of limitations for claim under Crime Victims Relief Act (CVRA) is governed by IC 34-24-3-1, so the general discovery rule controls when the limitations period begins.**

Cathy Jo Robertson was bookkeeper for Clerk of the Jennings Circuit Court from 2009-2011. In 2014 the State Board of Accounts (SBOA) investigated the Clerk's records and found $61,000 in cash had been removed by a "checks substituted for cash" scheme. None of the check substitutions occurred on days when Robertson was away from office. In December 2014, SBOA asked Robertson to return the money, and it sent a letter and preliminary report to Jennings County officials, the Jennings County prosecutor, and the OAG. SBOA discussed the preliminary report with county officials in January 2015. In January 2016, the SBOA's final report was verified and made public.

On May 5, 2017, the OAG filed a complaint to recover the misappropriated public funds from Robertson pursuant to IC 5-11-5-1(a) and to collect treble damages from Robertson pursuant to

the CVRA. Robertson filed a motion to dismiss claiming the complaint had been filed outside the two-year statute of limitations period.

Supreme Court held general discovery rule did not apply to misappropriation claim under IC 5-11-5-1 because Legislature provided a different rule in the statute -- filing the claim was permissive under subsection (e), when the OAG received the preliminary report, but was mandatory under subsection (a), when the OAG received the final, verified report. Thus, misappropriation claims were timely. Claim under CVRA was untimely, however, because its limitations period was controlled by IC 34-24-3-1, which contains no indication the Legislature intended other than the discovery rule to control the limitations period.

** In footnote 1, Supreme Court notes it applied the two-year statute of limitations from IC 34-11-2-4 by agreement of the parties, but the appropriate limitations period may instead have been the five or six years provided by IC 34-11-2-6 for actions against a public officer.

Q. TORT CLAIMS ACT

Burton v. Benner, 140 N.E.3d 848 (Ind. 2020). David, Rush, Massa, Slaughter, & Goff

Holding:

1. **State trooper driving his unmarked vehicle in excess of speed limit while off-duty and in plain clothes was not "clearly outside scope of employment" and so he remained immune from personal liability under the Indiana Tort Claims Act (ITCA).**

The State Police issued an unmarked Dodge Charger (commission) to Trooper Benner. Operation of commission is subject to Standard Operating Procedure (SOP) that controls driving on-duty & off-duty and driving in emergency & non-emergency situations. SOP requires trooper to remain in radio contact at all times while driving commission (even off-duty), to follow traffic laws unless necessary to perform official duties, and to respond to emergency situations when assigned or nearby. SOP also allows de minimis use of commission for limited and reasonable personal transportation.

On June 4, 2015, Trooper Benner finished his shift, went home to change into street clothes, and left in his commission for his son's baseball game. On the way, to pass a car in front of him on a two-lane road, Trooper Benner sped up and pulled his commission into the oncoming lane when he saw no oncoming traffic. Once in the oncoming lane, he saw a motorcycle approaching from 139 yards away, so Trooper Benner quickly slowed and returned to his appropriate lane. However, the oncoming motorcycle locked its brakes, swerved, rolled over, and ejected the operator and passenger.

The motorcycle operator, Burton, sued Trooper Benner for negligence. Trooper Benner moved for summary judgment, asserting he was immune from personal liability under the ITCA (IC 34-13-3) because he was acting within the scope of his employment. The trial court dismissed

claim against Trooper Benner in his personal capacity because he was not "clearly outside" the scope of his employment. Court of Appeals reversed because a question of fact existed about whether Trooper Benner was outside his scope of employment. Supreme Court determined Trooper Benner's driving seven to ten miles above the speed limit at the time of the accident was not sufficient to render his operation of his commission "clearly outside" the scope of his employment, so Trooper Benner was personally immune from lawsuit.

Murray v. Indianapolis Public Schools, 128 N.E.3d 450 (Ind. 2019). David, Rush, Massa, Slaughter, & Goff

Holding:

1. **Pursuant to IC 34-51-2-2, the Comparative Fault Act does not apply to governmental entities. Instead, the common law of contributory negligence applies, and under that law, a plaintiff cannot recover if plaintiff's own negligence was "even slightly the cause of the alleged damages." Leaving school to purchase guns or drugs was contributory negligence that bars the estate's claims against defendants.**

Sixteen-year-old Jaylan Murray was shot and killed in February 2016 after he left Arlington Community High School without permission and to either engage in a firearms deal or buy marijuana. His estate sued IPS and the high school for wrongful death. Defendants moved for summary judgment under the Indiana Tort Claims Act and because Jaylan was contributorily negligent. The trial court entered summary judgment for Defendants without findings or conclusions.

The Supreme Court declined to address whether defendants were immune from suit under the ITCA. Instead the Court noted that the Comparative Fault Act does not apply to governmental entities and that the common law of contributory negligence prevents a plaintiff from recovering if the plaintiff's negligence was a cause of the damages alleged. Because Jaylan was 16, he was chargeable with exercising the standard of care of an adult, which is reasonable care and caution for his own safety. There was no question of fact that leaving school to purchase guns or drugs was not reasonable care or caution for his own safety, such that Jaylan was contributorily negligent and his estate's claims were barred.

Madison Consolidated Schools v. Thurston, 135 N.E.3d 926 (Ind. Ct. App. 2019). Riley, Vaidik, & Bradford

Holding:

1. **Summary judgment is precluded by a genuine issue of material fact about whether School was estopped from asserting Thurston failed to comply with the notice requirements of the Indiana Tort Claims Act.**

On September 5, 2014, sixteen-year-old Thurston was injured while riding on a Madison Schools' bus that hit a guardrail and car on I-64. Schools' insurer, Liberty Mutual, contacted Thurston's mother, Jacqueline. Jacqueline and Liberty Mutual had multiple conversations over the following months. Liberty Mutual recommended waiting to discuss settlement of Thurston's claim after all of her treatment was completed, and it told Jacqueline that the claim needed to be resolved before April 17, 2018. On April 11, 2018, Liberty Mutual advised Jacqueline that because Thurston was about to have her 20th birthday, she needed to "retain counsel to protect the statute of limitations." On April 16, 2018, Thurston filed a Complaint. On July 31, 2018, Schools filed a motion for summary judgment based on Thurston's failure to provide pre-suit notice in accordance with the Indiana Tort Claims Act. The trial court denied Schools' motion based on a genuine issue of material fact about whether Schools was estopped from asserting waiver. Schools brings an interlocutory appeal.

Generally, the ITCA requires notice of intent to bring a tort claim be given to political subdivisions within 180 days of the claimant's loss. Thurston concedes she did not give such notice. Instead she asserts representations made by Schools or their agents induced her to believe no formal notice was necessary. Thurston's designated evidence was sufficient to create a question of fact about whether Liberty Mutual's representations to Jacqueline estopped Schools from relying on Thurston's failure to file notice. Denial of summary judgment affirmed.

Weikart v. Whitko Community School Corp., 134 N.E.3d 484 (Ind. Ct. App. 2019). Baker, Kirsch; Crone concurs in result with opinion

Holding:

1. **Fact that student passed information about drug activity at school to school's resource officer did not create a special duty for the resource officer to protect the student.**

Weikart was a student in Whitko Schools, and Matthew Gilbert was a police officer employed as the School's resource officer. In 2017, Weikart reported drug activity to Officer Gilbert and also told him that she had been gang raped on two occasions. Officer Gilbert told Weikart he had reported the rapes and was investigating them, but in fact he did not report the assaults to the Sheriff's Department. Officer Gilbert, however, had not reported those assaults, which resulted in his being charged with Class B misdemeanor failure to make a report and in the public disclosure of the rape allegations. In 2019, Weikart sued the School and Town of South Whitley under the doctrine of respondeat superior. The School and Town filed a motion to dismiss, which the trial court granted because "Indiana's caselaw consistently holds that there is no civil cause of action [for] failure to report."

On appeal, Weikart concedes there's no private action for failure to report and asserts instead that Officer Gilbert owed her a "special duty." After noting this special duty argument was waived for being raised for the first time on appeal, the Court of Appeals addressed the argument on the merits. Typically, police officers have only a general duty to protect citizens that does not

give rise to liability. However, a "special duty" to a particularized individual can be created if circumstances are such that the police conduct create a special obligation. For example, if a citizen collaborates with police in an "investigation of criminal activities, a special duty to protect that [citizen] from criminal retaliation may arise if that danger appears reasonably likely to occur." Weikart's claim alleged she had simply passed information to him about drug activity, not that they had engaged in any form of coordinated investigation, and that allegation is inadequate to support Officer Gilbert having a "special duty" to Weikart. Therefore, the trial court properly dismissed Weikart's claim.

Indiana Dept. of Child Servs. v. Morgan, 148 N.E.3d 1030 (Ind. Ct. App. 2020). Brown, Najam, Kirsch

Holding:

1. **Morgan's Tort Claim Notice was filed after the statute of limitations period had passed because evidence demonstrated that Morgan knew by second police interview that some ascertainable damage had occurred.**

Morgan had a son, Brayson, with Meghan Price on June 23, 2011. Thereafter, Price began dating Steven Ingalls, and Morgan did not see Brayson very often. Between July 18, 2014, and November 22, 2016, DCS received twelve preliminary reports of physical abuse or neglect of Brayson through its reporting hotline. Based thereon, DCS conducted six assessments but found all the reports to be unsubstantiated. On November 23, 2016, Brayson died. Morgan was interviewed by police on November 25 and 28, 2016. The State filed charges against Price and Ingalls for Brayson's death on June 23, 2017. On December 13, 2017, Morgan filed a tort claims notice alleging DCS negligently placed Brayson in a situation that endangered his life and was responsible for his death. On May 17, 2018, Morgan filed a complaint against DCS. DCS moved for summary judgment and alleged Morgan failed to timely file his notice of tort claim. The trial court denied DCS's motion, and DCS brought this interlocutory appeal.

The Court of Appeals reviewed the record, including the interview that occurred in the police station on November 18, 2016, during which Morgan and his parents expressed a number of concerns about DCS's handling of the situation, and the interviewing officer expressed concerns about why DCS had not informed the police of the number of injuries Brayson had received. Because an action accrues "when some ascertainable damage has occurred" and a plaintiff need not know the full extent of the damage, Morgan's claim for the wrongful death of his son accrued by November 18, 2016, and his notice of tort claims needed to be filed by August 25, 2017. Thus, his notice filed on December 13, 2017, was untimely and the trial court erred in denying DCS's motion for summary judgment.

City of Columbus v. Londeree, 145 N.E.3d 827 (Ind. Ct. App. 2020) Kirsch, Bailey, Mathias

Holdings:

1. **Because City performed no act that would induce Londree to believe she was not required to file formal tort claim notice, City was not estopped from asserting its notice defense; and**
2. **Because spouse of injured party must file his own tort claim notice for his loss of consortium claim, trial court properly dismissed husband's complaint.**

On January 16, 2016, Debra Londeree fell on ice in the parking lot of the Foundation for Youth of Bartholomew County ("FFY"). Debra filed an incident report with FFY on the day she fell. On January 25, 2016, Debra called the City's risk office about her fall, but the office told her it had not received her incident report. Two weeks later, a City employee called Debra to tell her the insurance company would contact her. The City's insurer never contacted Debra. FFY's insurer contacted Debra, took statements and collected other evidence, but FFY's insurer never represented that it was acting on behalf of the City or the City's insurer. FFY's insurer eventually determined FFY was not liable, because the City was responsible for clearing the parking lot, but the insurer did not inform Debra until after the deadline for filing a tort claim notice with the City. Neither Debra nor her husband filed a tort claim notice with the City within 180 days of Debra's fall. Debra and her husband filed a compliant against the City, and the City moved for summary judgment as to both claims based on their failure to file the required tort claim notices. The trial court found there was a question of fact about whether the City was estopped from asserting the notice defense against Debra, so it denied summary judgment as to Debra, but it granted summary judgment as to husband because he had neither filed notice nor interacted with any insurers or employees.

On appeal, the Court held that even if the City employee indicated the insurer would call, that indication did not induce Debra to believe she did not need to file formal Notice. The acts of FFY's insurer did not mean the City had formal Notice, and the City had no other interaction with Debra. Therefore, the trial court erred in denying City's motion for summary judgment based on Debra's failure to file notice.

The trial court properly granted summary judgment to the City against husband, as a spouse must file a separate tort claim notice to bring a loss of consortium claim and husband did not file notice.

R. WRONGFUL DEATH

***Estate of Lewis v. Toliver*,** 123 N.E.3d 670 (Ind. 2019). Slaughter, Rush, David, Massa, Goff

Holdings:

1. **Trial courts have discretion to reconsider appointment of special administrator for estate without following the statutory procedures for removal of that administrator;**
2. **Trial court did not abuse its discretion when it removed father of decedent as special administrator and replaced him with mother and guardian of decedent's two children; and**
3. **Although statute controlling appointment of special administrator does not require notice to beneficiaries prior to appointment, henceforth notice should be given to beneficiaries (or their legal representatives) and a hearing should be held before a trial court appoints a special administrator.**

On July 22, 2017, Orlando Lewis Jr. ("Junior"), his wife, and his mother-in-law died in a car crash in Monroe County. Junior was survived by two children – six-year-old J.T., who lived with his mother, Shana Toliver, and two-year-old K.L., who became the ward of her aunt, Kathy Calloway, when Junior and his wife died. Three days after the accident, Orlando Lewis Senior ("Senior") sought appointment as special administrator of Junior's Estate in Johnson County (where Junior had lived), was appointed by the trial court, and filed a wrongful-death action for Junior's Estate in Monroe County. Four days after the accident, Toliver filed a petition to be appointed special administrator of Junior's Estate in Marion County, received letters of administration from the Marion County court, and filed a wrongful-death action for Junior's Estate in Marion County. One month later, Toliver moved to intervene in the Johnson County Estate proceedings and to have the court reconsider Senior's appointment as special administrator. Toliver and Calloway assert they should be special administrators because they are the legal guardians of Junior's children, who will be the beneficiaries of the wrongful-death action, while Senior had met Junior's children only a handful of times in their lives.

Appointment of a special administrator occurs under IC § 29-1-10-15. As Indiana Supreme Court held in *Hammar*, 847 N.E.2d 960 (Ind. 2006), a trial court has discretion to reconsider its initial appointment of a special administrator without invoking the removal provision found at IC § 29-1-10-6. Because Toliver and Calloway are the guardians of Junior's children, they are best suited to represent the interests of those children in the wrongful-death action. To prohibit circumstances such as this in the future, courts should give notice to all possible beneficiaries and hold a hearing before appointing a special administrator:

> The motion [for appointment as special administrator] should identify each potential beneficiary or legal representative likely to be interested in the appointment of a special administrator, along with each person's contact information. The court should then notify such persons of the motion and the date, time, and place for hearing on the motion. The hearing is to determine

whether the movant would be a suitable special administrator and to permit other interested persons the opportunity to object or to file their own requests for appointment.

A trial court should also schedule a hearing within five days if a motion is filed to reconsider appointment of a special administrator.