

# 1993 DEVELOPMENTS IN INDIANA PROPERTY LAW

WALTER KRIEGER\*

## I. CONCURRENT OWNERSHIP: JOINT BANK ACCOUNTS

Indiana's Non-Probate Transfer Act<sup>1</sup> provides that upon the death of a party to a joint account, the funds in the account belong to the surviving party or parties as against the estate of the deceased party unless there is clear and convincing evidence of a different intent at the time the account was created.<sup>2</sup> The Indiana law governing rights of survivorship in joint accounts continues to slowly develop.

Last year, in *Voss v. Lynd*,<sup>3</sup> the Indiana Court of Appeals held that the removal of the wife's name from joint certificates of deposit (CDs) by the husband without the wife's consent did not destroy her right of survivorship, and that upon the death of the husband, the CDs passed to the wife. In *dictum*, *Voss* suggests that had the husband cashed in the CDs (closed the joint account by removing the funds), the wife would have been entitled to recover the funds from the estate of the deceased husband because one party to a multiple-party account has no right to withdraw all the funds without the consent of the other parties to the account.<sup>4</sup>

This year the *dictum* in *Voss* almost became law. In *Shourek v. Stirling*,<sup>5</sup> Lillian Jonas added the name of her late husband's niece, Suzanne Stirling, to several of her bank accounts, including a checking account and four CD's. A few hours before Jonas' death, Suzanne closed out the checking account and cashed the CDs. Suzanne and her husband Jack made all the funeral arrangements, and Jack was appointed administrator of Jonas' estate. Later, when it was discovered that Jonas had a son, Frank Shourek, Jack withdrew as administrator of Jonas' estate and Shourek was named successor administrator. Shourek brought this action alleging that Suzanne and Jack had converted the funds in the joint accounts. The trial court granted summary judgment in favor of the Stirlings and Shourek appealed.<sup>6</sup>

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\* Associate Professor of Law, Indiana University School of Law—Indianapolis. A.B., 1959, Bellarmine College; J.D., 1962, University of Louisville; LL.M., 1969, George Washington University.

1. IND. CODE § 32-4-1.5 (1979 & Supp. 1993).

2. IND. CODE § 32-4-1.5-4 (1979). The term "joint account" is defined as a contract of deposit in a financial institution payable on request to any one or more of the parties. IND. CODE § 32-4-1.5-1(4).

3. 583 N.E.2d 1239 (Ind. Ct. App. 1992).

4. For a discussion of the *Voss* decision see Walter W. Krieger, *Recent Developments in Indiana Property Law*, 26 IND. L. REV. 1114, 1114-16 (1993).

5. 607 N.E.2d 402 (Ind. App. 1993).

6. *Id.* at 403-04.

The court of appeals, in affirming the granting of the summary judgment, observed that in order to maintain an action for conversion, the estate must prove an immediate and unqualified right to possession of the property. While she lived, Jonas could have maintained an action for conversion against Suzanne for removing the funds from the account, because during the lifetime of all the parties to the account, the funds belong to the parties in proportion to their net contributions, and Jonas had contributed all the funds to the account. However, when Jonas died, her interest in the account died with her and the funds in the account then became Suzanne's.<sup>7</sup>

In a dissenting opinion Judge Staton observed that only "sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the deceased party."<sup>8</sup> When Suzanne withdrew the funds before Jonas' death, she also withdrew the survivorship protection of the statute, and the portion of the funds which belonged to Jonas during her lifetime passes to her estate. Since Suzanne had not contributed any of the funds in the account, she had no ownership interest in the funds withdrawn before Jonas' death.<sup>9</sup> No one can dispute the logic of Judge Staton's argument, and in fact, there are decisions from other jurisdictions which support his position.<sup>10</sup> Nevertheless, the majority opinion followed the rationale of *Voss* that one party to a multiple-party account can not destroy the right of survivorship by withdrawing all the funds from the account without the other party's consent. Thus, even though Suzanne removed the funds belonging to Jonas from the account, and Jonas could have sued her for conversion while she lived, once Jonas died her interest in the account died with her and Suzanne, as the surviving joint owner, was entitled to all the funds. The only problem with this rationale, as Judge Staton points out, is that it conflicts with the wording of Indiana Code section 32-4-1.5-4(a), which expressly limits the right of survivorship to "sums remaining on deposit at the death of a party."<sup>11</sup> Here there were no sums remaining on deposit upon which the statute could operate.

After the survey period had ended, the Indiana Supreme Court granted transfer, set aside the court of appeals opinion, reversed the trial court's grant of summary judgment in favor of the Stirlings, and remanded the case for further

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7. *Id.* at 404.

8. *Id.* at 405 (Staton, J., dissenting) (quoting IND. CODE § 32-4-1.5-4(a)).

9. *Shourek*, 607 N.E.2d at 405 (Staton, J., dissenting).

10. *See, e.g., Wiggins v. Parson*, 446 So.2d 169 (Fla. Dist. Ct. App. 1984) (the "better rule" is that the withdrawal of all the funds by one of the parties destroys the right of survivorship); *In re Estate of Kohn*, 168 N.W.2d 812 (Wisc. 1969) (the withdrawal of the funds severed the joint tenancy and the funds contributed by the deceased party and wrongfully withdrawn by the survivor belonged to the estate of the deceased party to the account).

11. *Shourek*, 607 N.E.2d at 405 (Staton, J., dissenting) (quoting IND. CODE § 32-4-1.5-4(a)).

proceedings consistent with the opinion.<sup>12</sup> In reversing the summary judgment in favor of the Stirlings, the supreme court adopted the rationale of Judge Staton's dissent in the court of appeals opinion. Since Suzanne Stirling had removed all the funds from the joint accounts before the death of Jonas, the presumption that funds in a joint account at the death of a party to the account belong to the survivor does not apply. However, even though Stirling could no longer rely upon the presumption of survivorship the court noted that there was evidence suggesting that Jonas' intent was to make a present gift of the funds to Stirling subject to the availability of these funds for Jonas' immediate needs. In addition to Suzanne Stirling's authority to make withdrawals, the Stirlings were given physical possession of some of the CDs, and a key to Jonas' house with instructions as to where to find the passbooks for the remaining joint accounts.<sup>13</sup>

Should the act of removing the funds from the account a few hours, or even a few days before the death of the other party, result in the termination of the right of survivorship in the intended beneficiary? To those untrained in the law it may appear prudent to withdraw all the funds from the account before the death of the other party to avoid having the account frozen for an indefinite period of time by the bank, the executor of the estate of the deceased party, or the Indiana Department of Revenue. To hold that this seemingly harmless act by the surviving party results in the loss of the right to the funds withdrawn appears rather harsh and may furnish a sufficient rationale for the majority opinion of the court of appeals.

## II. EASEMENTS; PRESCRIPTIVE

To acquire a prescriptive easement it is necessary to show actual, hostile, open, notorious, continuous, uninterrupted, adverse use for a period of twenty years under a claim of right or by continuous adverse use with knowledge and acquiescence of the owner of the servient estate.<sup>14</sup> In *Bauer v. Harris*,<sup>15</sup> the court discussed the nature and extent of the use needed to acquire a prescriptive

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12. *Shourek v. Stirling*, 621 N.E.2d 1107 (Ind. 1993).

13. *Id.* at 1110.

14. IND. CODE § 32-5-1-1 (1979). *Greenco, Inc. v. May*, 506 N.E.2d 42, 45 (Ind. Ct. App. 1987); *Searcy v. LaGrottee*, 372 N.E.2d 755, 757 (Ind. Ct. App. 1978).

15. 617 N.E.2d 923 (Ind. Ct. App. 1993).

easement.<sup>16</sup> The court focused on three elements: the exclusivity, the continuity and the adversity of the use.

The Bauers claimed a prescriptive right to use a twelve foot wide path or driveway across the southern portion of the land of their neighbors, the Harrises. The Bauers had used the driveway since 1904 to gain access to their property from a road to the east of the Harrises' land. From 1904 until 1940 a railroad was in service along the east/west boundary between the Bauer and Harris properties and the public used the driveway for access to the railroad. The Bauers operated a granary business on their property until 1921, and their customers also used the driveway for access to the Bauers' property. From 1921 until 1945 the granary facility was used as a barn for storing farm implements and from the 1930's until 1979 the Bauers leased a driveway across their land to a neighbor for access to the neighbor's garage. In order for the neighbor to use the driveway across the Bauers' property, it was necessary for him to use the driveway across the Harris property. The Bauers leased their property in 1987 to the Peyronnin Construction Company, which also used the driveway across the Harrises' property to gain access to the Bauers' property and placed gravel over the driveway to facilitate traffic. The Harrises acquired title to the servient estate in March 1989 and Peyronnin complied with the Harrises' request to remove the gravel and plant grass over the Driveway. In May 1989, after the Harrises had protested the location of a sign advertising the sale of the Bauers' property, the Harrises placed a fence across the Driveway. The Bauers then filed this suit.<sup>17</sup>

The trial court found that the Bauers had failed to prove their use of the Driveway was exclusive, continuous and under a claim of right and entered judgment for the Harrises. The Bauers appeal.<sup>18</sup>

The trial court found that the use of the easement by the Bauers was not exclusive because during the statutory period the path was also used by members of the general public.<sup>19</sup> This interpretation of exclusivity was rejected by the court of appeals. Use by members of the general public does not render another use of the easement non-exclusive. Exclusivity does not require that the driveway be used solely by the claimant. Instead, it requires only that the use

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16. Indiana courts have noted that, except for the statutory periods, the elements necessary to establish a prescriptive easement and those need to acquire title to the land of another by adverse possession are virtually identical. *Bauer*, 617 N.E.2d at 930 n.4; *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*, 550 N.E.2d 778, 782 n.2 (Ind. Ct. App. 1990). While the statutory period to acquire title by adverse possession is only ten years, IND. CODE § 34-1-2-2(6) (1979), the statutory period required to establish a prescriptive easement is twenty years, IND. CODE § 32-5-1-1 (1979).

17. *Bauer*, 617 N.E.2d at 925-26.

18. *Id.*

19. The trial court reached this conclusion through an interpretation of the language in *DeShields v. Joest*, 34 N.E.2d 168 (Ind. App. 1941) (must be exclusive as against the right of the community at large). *Bauer*, 617 N.E.2d at 927.

by the claimant not be dependant upon the right of others to use the driveway. The Bauers did not rely upon the right as a member of the general public to use the easement, but used the driveway for their personal and business purposes. It was irrelevant that others were also using the easement at the same time.<sup>20</sup> In addition, the use of the driveway by the general public ended in 1940, while the use by the customers and lessees of the Bauers continued until 1989.<sup>21</sup>

Next the court examined the requirement that the prescriptive use be continuous. The trial court made two findings of fact relevant to this issue. First, the court found that prior to 1945 the Bauers' predecessors in title had maintained a garden on their property and rented the property to other members of the general public for farming. The driveway across the Harris property was used to gain access to the Bauers' property. The court's second finding was that from 1960 to the present the Bauers and their predecessors hayed and mowed the property twice each year. Based on these findings the trial court concluded that the use "was intermittent and occasional, not continuous and uninterrupted."<sup>22</sup> The court of appeals did not agree with the trial court's conclusion. Continuous use does not necessarily mean constant, and a mere intermissions in use of a reasonable duration does not constitute an abandonment. The easement was used consistent with the nature of the use of the dominant estate.<sup>23</sup>

Furthermore, the court observed that under certain circumstances the use of an easement by members of the general public can actually support a claim to a prescriptive easement.<sup>24</sup> The court distinguished between an indiscriminate use of property by the general public, which indirectly benefits a business owner who does not own the property, and a situation in which the owner of a business directs members of the public who are customers, lessees, or invitees, to use the property over which he claims an easement. In the former situation the owner of the business can not claim an easement based upon the indirect benefit of the general public's voluntary use of the property. In the latter situation, however, the direction to customers, lessees, or invitee of the business to use the property is attributable to and derivative of the business owner's claim.<sup>25</sup> The court of

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20. *Id.* at 927-28.

21. *Id.* at 928.

22. *Id.* at 928-29.

23. *Id.* at 929. The court held that "no intent to abandon the use of the easement can reasonably be inferred from mere lapses in use during those periods when haying, mowing, gardening and farming were not in season." *Id.* The court noted that in *Bromelmeier v. Brookhart*, 570 N.E.2d 90 (Ind. Ct. App. 1991), *trans. denied*, the non-use of a pier for two years while it was being repaired was not an abandonment of the easement and did not stop the statutory period from running.

24. *Id.*

25. *Id.* at 929-30. The court cited *Greenco, Inc. v. May*, 506 N.E.2d 42 (Ind. App. 1987) as an example of the former situation. Members of the general public, and not just customers of the business, used parking lot without any direction from the owner of the business. The court held that

appeals determined that the trial court's findings did not support its conclusion that the Bauers' use of the driveway was not continuous for the statutory period.<sup>26</sup>

The trial court also concluded that the use by the Bauers was permissive and not adverse. In rejecting this finding, the court of appeals observed that once open and continuous use of the land of another commences with the knowledge of the owner, such use is presumed to be adverse.<sup>27</sup> Thus it was not necessary for the Bauers to formally assert a claim. The trial court's findings that the driveway was used to facilitate the Bauers' family business, and that Bauers' lessees had used the driveway for access to the Bauers' property could lead to only one inference: "[T]hat the Harrises acquiesced in the Bauers' use of the Harris property as a means of access, not that the Harrises gave the Bauers permission to use their property."<sup>28</sup>

Finally, the court examined the extent and purpose of the use during the statutory period to determine the scope of the easement acquired by prescription. The nature and extent of the right acquired by prescription is determined by the actual use during the period of prescription. The court noted that the width of the driveway was twelve feet wide at the time of its creation and was used by the Bauers and their lessees to gain access to the Bauers' property.<sup>29</sup>

The court concluded that the findings of fact did not support the trial court's judgment in favor of the Harrises, but instead supported the Bauers' claim to a twelve foot wide prescriptive easement over the Harrises' property. The judgment was reversed and the case remanded for proceedings consistent with the opinion.<sup>30</sup>

### III. GIFTS OF LAND

In *Walter v. Balogh*,<sup>31</sup> the Indiana Supreme Court set aside a court of appeals opinion<sup>32</sup> which concluded that the trial court had exceeded its equitable jurisdiction in ordering completion of an intended inter vivos gift of land.<sup>33</sup> In

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no easement resulted from such voluntary use by the general public. *Id.* at 46. The court cited *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*, 550 N.E.2d 778 (Ind. App. 1990) as an example of the latter situation. The court found adverse possession of property where the business owner directed its patrons to park on the property and prohibited non customers from using the lot. *Id.* at 782-84.

26. *Bauer*, 617 N.E.2d at 930.

27. *Id.* at 930 (citing *Searcy v. LaGrotte*, 372 N.E.2d 755, 757 (Ind. Ct. App. 1978)).

28. *Bauer*, 617 N.E.2d at 930-31.

29. *Id.* at 931-32.

30. *Id.* at 932.

31. 619 N.E.2d 566 (Ind. 1993).

32. *Walter v. Balogh*, 604 N.E.2d 1226 (Ind. Ct. App. 1992).

33. *Id.* at 1234-36.

setting aside the court of appeals opinion and affirming the judgment of the trial court, the supreme court relied on the maxims “equity looks to the substance and not the form” and “equity requires to be done that which in good conscience ought to be done.”<sup>34</sup>

In 1984, Alwilda Walter, a seventy-nine year old widow with no children, contacted her attorney about making a gift to Barry Hoepfner and his business partner Mark Balogh, of the 600 acres of Walter’s land that they were farming. Barry and Mark were close friends of Alwilda and her late husband, Martin, who died in 1983. Alwilda’s attorney advised her that an immediate gift of the land would result in a large gift tax liability. To lessen this tax liability, Alwilda’s attorney drafted conditional sales contracts conveying the land to Barry and Mark and their spouses. Alwilda intended to forgive the payments under the contracts as they became due each year, thus taking maximum advantage of the annual gift tax allowance.<sup>35</sup> Unfortunately, after the contracts had been executed, Alwilda’s attorney discovered that the stated contract price was less than half the fair market value of the land and that the immediate tax liability resulting from the difference between the fair market value and the sales price would exhaust Alwilda’s unified gift and estate tax credit. To solve this problem she suggested the 1984 agreement should be redrafted. In 1985, a new agreement, consisting of a series of notes and mortgages, was drafted. As part of the new agreement, Alwilda executed a Second Codicil to her will agreeing to forgive any indebtedness owed by the transferees at her death.<sup>36</sup>

In June 1984, Alwilda, who was then eighty-four years of age, became confused and forgetful and her niece became involved in her financial affairs. Alwilda named her niece as her attorney and revoked the provision in the Second Codicil to her will forgiving any balance of the Baloghs’ and Hoepfners’ indebtedness under the 1985 notes upon her death. In August 1988, the Fort Wayne National Bank was appointed guardian of Alwilda’s estate, and as her guardian the bank issued a notice of default on the notes and mortgages. Appellees then filed the present action for declaratory judgment, requesting that the 1985 notes and mortgages be declared null and void, and that the 1984 land contract be reinstated. The trial court found that Alwilda intended the gift to be immediately effective in 1984, and that she never had any intent of collecting any payments under the contract. Alwilda’s revocation of the provision in the Second Codicil to her will forgiving any indebtedness due at her death was a

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34. *Walter*, 619 N.E.2d at 568-69.

35. *Id.* at 567. The supreme court opinion is deliberately short and sketchy “in the interest of space,” and the court recommends that the reader interested in a more detailed discussion of the facts of the case or the trial court judgment should consult the court of appeals opinion. *Id.* at 569.

36. *Id.* at 567. For a more detailed discussion see *Walter*, 604 N.E.2d at 1229-30.

failure of consideration for the 1985 notes and mortgages and rendered them null and void.<sup>37</sup>

The court of appeals, however, found that the trial court had exceeded its equitable jurisdiction in ordering that the notes and mortgages be set aside and in reinstating the 1984 agreement. The 1984 agreement was without consideration and was intended to convey title at a future date. It was unenforceable and insufficient to establish a gift inter vivos and the trial court's conclusion that the gift was complete and fully vested was clearly erroneous.<sup>38</sup> The Indiana Supreme Court did not agree. While finding that the court of appeals opinion did "an excellent job of setting forth the law concerning arms-length contracts between parties and the law concerning conditional gifts," the supreme court agreed with the trial court that Alwilda had no intent of exercising control over the property after 1984, and that the gift was meted out piecemeal for the sole purpose of taking advantage of the gift tax situation. The handling of Alwilda's affairs by her niece and the bank under the 1985 agreement would have defeated her intended purpose to make a gift of the land to the plaintiffs.<sup>39</sup> The supreme court also agreed with the trial court that Alwilda's revocation of the Second Codicil was a failure of consideration for the 1985 promissory notes and mortgages, rendering them invalid and reinstating the 1984 real estate contract.<sup>40</sup>

Finally, the appellants claimed that the undue influence practiced on Alwilda by Howard Hoepfner, the father of the plaintiff Barry Hoepfner, warranted the rescission of all documents, an accounting, and a return of all property.<sup>41</sup> The court found there was no evidence that Howard Hoepfner had used his power of attorney to defraud Alwilda or that he had failed to account to her for his actions as her attorney in fact. The trial court's judgment was affirmed.<sup>42</sup>

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37. *Id.* at 1230-32.

38. *Id.* at 1232-36.

39. *Walter*, 619 N.E.2d at 568-69.

40. *Id.* at 569.

41. *Id.* at 569; *Walter*, 604 N.E.2d at 1233. Howard Hoepfner had been a close and trusted friend of Alwilda and her husband Martin for many years. After Martin's death in 1983, Alwilda executed a Durable Power of Attorney naming Howard her attorney in fact, and also named him personal representative of her estate in her 1983 will. *Id.* at 1228. The appellants claimed that this fiduciary relationship created a presumption of undue influence with regard to the gift to his son Barry. The court of appeals agreed and remanded for a determination as to whether this presumption had been overcome. *Id.* at 1233-34. The supreme court found no evidence to suggest undue influence and saw no need to remand for further findings of fact. 619 N.E. 2d at 569.

42. *Id.* at 569.

In a second decision involving a gift of land, *Womack v. Womack*,<sup>43</sup> the trial court found that an elderly husband had given real estate to his wife as a gift and that his wife was not guilty of undue influence.<sup>44</sup>

On appeal the husband argued that the trial court was in error when it found no undue influence by the wife. The court of appeals observed that, in Indiana, transactions between parties to certain legal and domestic confidential relationships give rise to a presumption of constructive fraud where it is shown that the transaction resulted in an advantage to the dominant party.<sup>45</sup> Among the confidential relationships often cited as giving rise to a rebuttable presumption of constructive fraud are attorney and client, guardian and ward, principal and agent, pastor and parishioner, husband and wife, and parent and child.<sup>46</sup> The law presumes that the first party (the attorney, the guardian, the principal, the pastor, the parent) is dominant and that the second party (the client, the ward, the agent, the parishioner, the child) is subordinate.<sup>47</sup> However, the court concluded that times have changed and the law should no longer presume that one party in the marital relationship is dominant and the other subordinate: "Instead, the burden of proving undue influence remains on the party seeking to set aside the transaction."<sup>48</sup> Here, the trial court found no evidence of undue influence on the part of the wife.

Finally the court addressed the issue of the husband's competency at the time of the alleged gift to the wife. The marriage took place in January, 1988 and the husband purchased the property in question in September, 1990. The opinion indicates that the marriage lasted only twenty months, and that at the time of the action for dissolution, the husband was eighty-five years old and the wife was seventy-eight. Both parties appeared to be "less than fully alert." Each gave the wrong year of their marriage to their attorneys, the wife thought the "pre-nuptial agreement" was drafted by Congressman Lee Hamilton instead of Bob Hamilton, a local attorney, and the husband could not remember that he lived in Seymour, Indiana.<sup>49</sup> While the husband was in poor health since his fall in July or early August of 1990, the evidence indicated that he appeared to

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43. 605 N.E.2d 221 (Ind. Ct. App. 1992).

44. *Id.* at 222.

45. *Id.* at 224.

46. *Id.* (quoting *Lucas v. Frazee*, 471 N.E.2d 1163, 1167 (Ind. Ct. App. 1984)).

47. *Womack*, 605 N.E.2d at 224 (citing *Lucas*, 471 N.E.2d at 1167).

48. *Womack*, 605 N.E.2d at 225. A subsequent court of appeals opinion, *Matter of Estate of Goins*, 615 N.E.2d 897 (Ind. Ct. App. 1993) found that the wife had overcome the presumption of undue influence and therefore it was not necessary to "decide whether we agree with the reasoning employed by the *Womack* court." *Id.* at 900. However, the court noted *McClamrock v. McClamrock*, 476 N.E.2d 514 (Ind. Ct. App. 1985), had reached a different result regarding the presumption of undue influence between a husband and wife. *Id.* at 900 n.1.

49. *Womack*, 605 N.E.2d at 222 n.1.

be quite lucid when he made the loan with the bank about three days after the Labor Day weekend of 1990. Title to the property was placed in the wife's name on September 14, 1990. Two weeks later, the husband filed a petition to dissolve the marriage. The court found the evidence sufficient to support the finding that the transaction was a valid gift and that the wife was entitled to the property. Judgment affirmed.<sup>50</sup>

#### IV. LANDLORD AND TENANT

##### A. *Liability of Landlord for Conditions on Leased Premises*

Indiana continues to adhere to the common law rule that the landlord is not liable for injuries to the tenant or his guests caused by defective conditions on the leased premises where the tenant is in control and possession of the premises. However, a number of exceptions to the landlord's tort immunity have developed over the years.<sup>51</sup> In *Dickison v. Hargitt*,<sup>52</sup> the court examined two of these exceptions to the non-liability rule.

Dickison, the tenant's (Moody's) social guest sued the landlord (Hargitt) for injuries sustained when he fell through an alleged rotted wooden balcony railing. The trial court granted the landlord's motion for judgment on the evidence because the plaintiff had failed to show Hargitt was negligent and because the plaintiff's own conduct precluded recovery. Plaintiff appealed.<sup>53</sup>

The court of appeals first addressed the negligence issue. At common law the rule of caveat lessee applied: "[A] landlord who gives a tenant full control and possession of the leased property generally will not be liable for personal injuries sustained by the tenant or other persons lawfully upon the leased premises."<sup>54</sup> Having said this, the court then noted two exceptions to the doctrine of caveat lessee: (1) where the landlord knows of a hidden defect unknown to the tenant and fails to warn the tenant; and (2) where the landlord agrees to make repairs and either fails to do so or repairs negligently.<sup>55</sup>

With regard to "hidden defects" known to the landlord and unknown to the tenant, the court observed that it is first necessary to show the landlord had actual knowledge of the hidden defect before the landlord can be charged with

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50. *Id.* at 225-26.

51. For a general discussion of Indiana's exceptions to the common law rule that the landlord is immune from tort liability for injuries caused by defective conditions on the leased premises see Walter W. Krieger, *Recent Developments in Property Law*, 24 IND. L. REV. 1065, 1085-90 (1991).

52. 611 N.E.2d 691 (Ind. Ct. App. 1993).

53. *Id.* at 693.

54. *Id.* at 694.

55. *Id.*

a duty to warn the tenant.<sup>56</sup> The fact that the landlord should have known is not sufficient.<sup>57</sup> Here, however, the court found that there were sufficient facts from which a jury might infer the landlord had actual knowledge of a hidden defect.<sup>58</sup> Dickison introduced photographs showing dark spots on the wood railing, most likely caused by moisture, and a small piece of rotted wood collected by a friend from the wooden railing. This evidence suggested a defective railing. However, Dickison established that the dark spots were inconspicuous and that the railing appeared normal but in need of painting. Thus the jury could find that Dickison was unaware of the defect. Hargitt on the other hand, admitted that he knew the railing was made of pine, a soft wood prone to water damage, and that he had warned the tenant to be careful when using the balcony. Further, he had inspected the railing twice, once when he bought the property the previous year and once with Moody when she became a tenant. Hargitt also admitted that he possessed a trained eye in matters of the condition of wood. He held a degree in civil engineering, owned a residential construction business and had refurbished old balconies. From these facts the court concluded a jury could reasonably infer that Hargitt had actual knowledge of the hidden condition, that the plaintiff was unaware of the hidden condition, that Hargitt failed to warn anyone of the condition, and that the condition was the proximate cause of the injury. The court also found that the statement to Moody to be careful while using the balcony was not sufficient to fulfill Hargitt's obligation to warn her of the defective condition of the railing.<sup>59</sup>

Dickison further contended that in addition to his duty to warn of the defective condition, Hargitt had a duty to repair the balcony. In response, the court observed that "a landlord has no duty to undertake repairs of premises in the tenant's exclusive possession unless the landlord agrees to do so by contract or otherwise."<sup>60</sup> Here there was an issue of fact as to whether Hargitt had

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56. *Id.* at 695.

57. *Id.*

58. *Id.* at 695-96.

59. *Id.* at 694-97.

60. *Id.* at 697. Indiana courts continue to repeat this no duty to repair rule. E.g., *Childress v. Bowser*, 546 N.E.2d 1221 (Ind. 1989); *Zimmerman v. Moore*, 441 N.E.2d 690 (Ind. Ct. App. 1982). Such a rule seems inconsistent with Indiana's recognition of an implied warranty of habitability in residential leases. E.g., *Breezewood Management Co. v. Maltbie*, 411 N.E.2d 670 (Ind. Ct. App. 1980). It is generally recognized that the implied warranty of habitability requires the landlord to maintain the premises in a habitable condition throughout the term of the lease. E.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir 1970), *cert denied*, 400 U.S. 925 (1970) (the old nonrepair rule cannot coexist with obligations imposed upon landlord by typical modern housing code); *Glasoe v. Trinkle*, 479 N.E.2d 915 (Ill. 1985) (warranty requires that the dwelling remain habitable throughout the term of the lease); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) (warranty of habitability creates a continuing duty on part of landlord to maintain the habitability of the dwelling throughout the term of the lease); *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970) (premises

agreed to make repairs to the apartment. However, the court noted that even if the jury found that Hargitt had agreed to make repairs this would not create a duty "to search Moody's premises for hidden defects," and proof of his actual knowledge of the defective condition would still be necessary to find a breach of his duty to repair.<sup>61</sup>

Finally, the court addressed the issue of whether Dickison's own conduct precluded recovery. Dickison admitted to drinking several beers and smoking marijuana. He was attempting to kiss Moody at the time of the injury and slipped on some twigs or branches on the balcony floor as he took a step towards her and fell against the railing. The trial court characterized Dickison's injuries as "self-inflicted," and concluded that under Indiana's Comparative Fault Act, Indiana Code section 34-4-33-1 et. seq., recovery for his intentional acts is not allowed.<sup>62</sup> The court of appeals, however, found that while Dickison had intentionally drank beer and smoked marijuana, "he did not intentionally fall through the defective railing and crack his head open."<sup>63</sup> Thus Dickison's conduct did not bar his recovery as a matter of law.

### B. Security Deposits Statute

In *Raider v. Pea*,<sup>64</sup> the landlord (Pea) sued for rent and damages in a small claims court and the tenants (the Raiders) counterclaimed for the return of their \$300 security deposit, attorney fees, and court costs.<sup>65</sup> The counterclaim was based on the landlord's failure to comply with the notice of damages provisions of the Security Deposits statute.<sup>66</sup> Failure to comply with the notice of damages requirement constitutes an agreement by the landlord that no damages are due, and the landlord must return the full security deposit to the tenant.<sup>67</sup> If the landlord fails to return the security deposit to the tenant, the tenant may recover the security deposit from the landlord together with reasonable attorney fees and

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must remain habitable throughout the term of the lease). Therefore, one could conclude that the warranty creates an implied covenant to repair and that the landlord has a duty to repair without an express agreement to do so in the lease.

61. *Id.* at 697.

62. *Id.* at 697-98. Under Indiana's Comparative Fault Act recovery for intentional acts is not allowed. IND. CODE § 34-4-33-1 (West Supp. 1993).

63. *Id.* at 698.

64. 613 N.E.2d 870 (Ind. Ct. App. 1993).

65. *Id.* at 871.

66. The Security Deposits statute requires the landlord to mail to the tenant within 45 days after termination of the rental agreement and delivery of possession, a written itemized list of any damages claimed for which the security deposit is being applied, together with a check for the difference between the damages claimed and the amount of the security deposit being held by the landlord. IND. CODE §§ 32-7-5-12 (West Supp. 1993).

67. IND. CODE § 32-7-5-15 (West Supp. 1993).

court costs.<sup>68</sup> The landlord raised, as a defense to the counterclaim, the tenants' failure to provide him with their new mailing address as required by Indiana Code section 32-7-5-12(a)(3): "[L]andlord is not liable under this subsection until supplied by the tenant with a mailing address to which to deliver the notice and amount prescribed by this subsection."<sup>69</sup> Pea testified that he had attempted unsuccessfully to obtain the Raiders' new address and that he was able to file his claim for rent and damages only upon learning they had returned to Rushville. The tenants responded that they had left a change of address with the U.S. Post Office and had informed the landlord they were moving to St. Louis, Missouri. After hearing this evidence, the trial court awarded the landlord \$300 damages and denied the tenants' counterclaim. The tenants appealed.<sup>70</sup>

The court of appeals noted that an ambiguity is created by the Security Deposits statute.<sup>71</sup> The obligation of the landlord to provide an itemized statement of damages to the tenant within forty-five (45) days after the tenant's termination of occupancy, is contained in both Indiana Code sections 32-7-5-12(a)(3) and 32-7-5-14, but the duty of the tenant to provide the landlord with a mailing address to which to deliver the notice is set forth only in Indiana Code section 32-7-5-12(a)(3). The court found the wording of the statute unclear as to when the tenant's duty to supply the mailing address to the landlord should apply. In resolving this apparent ambiguity, the court adopted the general rules of statutory construction which requires that the wording of a single section of a statute is to be considered in the context of the entire statute, and that where two statutory provisions cover the same subject they are to be harmonized where possible to avoid an absurd result "that the legislature, as a reasonable body could not have intended."<sup>72</sup> Applying these rules, the court determined that the tenant's obligation to provide the landlord with a new mailing address applied to all provisions of the statute which obligate the landlord to provide the forty-five days notice of damages.<sup>73</sup>

The court also rejected the tenants' argument that supplying the U.S. Post Office with a forwarding address as well as informing the landlord they were moving to St. Louis, Missouri, were sufficient to satisfy the mailing address requirement of the statute.<sup>74</sup> The wording of the statute requires that the landlord be "supplied" with the tenant's the new mailing address, and the new

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68. IND. CODE §§ 32-7-5-12(b), 32-7-5-16 (West Supp. 1993).

69. *Id.*

70. *Raider*, 613 N.E.2d at 871-72.

71. *Id.* at 872.

72. *Id.* at 872.

73. *Id.* at 873.

74. *Id.*

address was never delivered to the landlord.<sup>75</sup> Thus the forty-five day notice period never commenced to run. Judgment affirmed.<sup>76</sup>

## V. LEGISLATION

### A. Residential Real Estate Sales Disclosure

During the 1993 session the Indiana legislature passed several statutes affecting the sale of residential real estate. Indiana Code section 24-4.6-2<sup>77</sup> provides that an owner of residential real estate "must complete and sign a disclosure form and submit the form to a prospective buyer before an offer is accepted for the sale of the residential real estate."<sup>78</sup> However, because no disclosure form now exists, and the legislation gives the Indiana real estate commission until April 30, 1994, to draft a disclosure form that meets the requirements of Indiana Code section 24-4.6-2, the "owner is not required to provide a disclosure form to a prospective buyer of residential real estate in transactions where offers to purchase are accepted before July 1, 1994."<sup>79</sup>

The statute requires that the disclosure form contain a disclosure by the owner of known conditions in the following areas: the foundation; mechanical systems; roof; structure; water and sewer systems, and "[o]ther areas that the Indiana real estate commission determines are appropriate."<sup>80</sup> In addition, the disclosure form is to contain a notice to the prospective buyer in substantially the following language:

The prospective buyer and the owner may wish to obtain professional advice or inspections of the property and provide for appropriate provisions in a contract between them concerning any advice, inspections, defects, or warranties obtained on the property.

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75. *Id.*

76. *Id.*

77. Pub. L. No. 209-1993.

78. IND. CODE § 24-4.6-2-10(a) (West Supp. 1993). The disclosure form requirement "only applies to a sale of, an exchange of, an installment sales contract for, or a lease with option to buy residential real estate that contains not more than four (4) residential dwelling units." IND. CODE § 24-4.6-2-1(a) (West Supp. 1993). Numerous types of transfers, including those ordered by a court, by a fiduciary in the course of administration of a trust, guardianship or estate and transfers involving the first sale of a dwelling that has not been inhabited, are excluded from the disclosure requirement. IND. CODE § 24-4.6-2-1(b) (West Supp. 1993).

79. Pub. L. No. 209-1993, § 2, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 24-4.6-2).

80. IND. CODE § 24-4.6-2-7(1) (West Supp. 1993). The statute permits the owner to prepare his own disclosure form that contains the information required in section 7 "and any other information the owner determines is appropriate." IND. CODE § 24-4.6-2-8 (West Supp. 1993).

. . . .  
The representations made in this form are those of the owner and not the agent, if any. This information is for disclosure only and is not intended to be a part of any contract between the buyer and the owner.<sup>81</sup>

Section 9 indicates that the disclosure form is not a warranty by the owner or the owner's agent and may not be used as a substitute for any inspection or warranty the owner or buyer later obtain.<sup>82</sup>

The statute provides that the owner is to complete and sign the disclosure form and submit it to the prospective buyer before an offer is accepted, and an offer is not enforceable against a buyer before closing until the owner and prospective buyer have signed the disclosure form.<sup>83</sup> The owner will not be liable for an error, inaccuracy or omission in information required to be provided, if the information was not within the actual knowledge of the owner or was based upon information supplied by a public agency or other person with a professional license or special knowledge who provided a written or oral report or opinion that the owner reasonably believed was correct.<sup>84</sup> If information is discovered before settlement, "the owner is required to disclose any material change in the physical condition of the property, or certify to the purchaser at settlement that the condition of the property is substantially the same as it was when the disclosure form was provided."<sup>85</sup>

If a prospective buyer receives a disclosure form or an amended disclosure form after an offer has been accepted which discloses a defect, the prospective purchaser may within two (2) business days after receipt of the disclosure form nullify the contract by delivery of a written rescission to the owner or the

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81. IND. CODE § 24-4.6-2-7(2)&(3) (West Supp. 1993).

82. IND. CODE § 24-4.6-2-9 (West Supp. 1993).

83. IND. CODE § 24-4.6-2-10(a) & (c) (West Supp. 1993). However, once the closing has taken place, the owner's failure to deliver the disclosure form to the buyer will not by itself invalidate a real estate transaction. *Id.*

84. IND. CODE § 24-4.6-2-11 (West Supp. 1993). However this section further requires that the owner not be "negligent in obtaining information from a third party and transmitting the information." *Id.*

85. IND. CODE § 24-4.6-2-12(a) (West Supp. 1993). However, a literal reading of the section does not require the owner to notify the buyer of any error, inaccuracy or omission contained in the disclosure form subsequently discovered by the owner. Section 12(a) requires only that he notify the purchaser of any material changes in the condition of the property (presumably since the time the disclosure form was provided) or certify that the condition of the property is substantially the same as it was at the time the disclosure form was provided. The owner would only be liable for such error, inaccuracy or omission if he had actual knowledge of it at the time he provided the disclosure form to the buyer or if he was negligent in obtaining such information from a third person and transmitting it to the buyer. IND. CODE § 24-4.6-2-11 (West Supp. 1993).

owner's agent. In such a situation the buyer is entitled to a return of any deposits made in the transaction.<sup>86</sup> This statute is a major departure from the then existing Indiana law which did not require a non-builder vendor of residential property to disclose defects in the condition of the property to the purchaser.<sup>87</sup>

The legislature also enacted a second statute relating to the duty of the owner of residential real estate to disclose information to a transferee at the time of the sale, rental, or lease of the property. This statute specifically excludes any requirement that the owner disclose to the buyer that property is "psychologically affected."<sup>88</sup> The statute defines the term "psychologically affected property" to include real estate or a dwelling to which one (1) or more of the following facts or reasonable suspicion of facts may apply:

- (1) That an occupant of the property was afflicted with or died from a disease related to the human immunodeficiency virus (HIV).
- (2) That an individual died on the property.
- (3) That the property was the site of:
  - (A) a felony under I.C. 35;
  - (B) criminal gang (as defined in I.C. 35-45-9-1) activity;
  - (C) the discharge of a firearm involving a law enforcement officer while engaged in the officer's official duties; or
  - (D) the illegal manufacture or distribution of a controlled substance.<sup>89</sup>

Under this statute, a real estate owner or his agent is not required to disclose to a prospective buyer "any knowledge of a psychologically affected property in a real estate transaction."<sup>90</sup> However, while the owner or agent is not liable for nondisclosure, "[a]n owner or agent may not intentionally misrepresent a fact concerning a psychologically affected property in response to a direct inquiry from a transferee."<sup>91</sup>

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86. IND. CODE § 24-4.6-2-13 (West Supp. 1993).

87. Existing Indiana law did recognize an implied warranty of habitability in the sale of a new home by a builder/vendor. *E.g.*, *Theis v. Heuer*, 280 N.E.2d 300 (Ind. 1972); *Barnes v. Mac Brown & Co., Inc.*, 342 N.E.2d 619 (Ind. 1976). However, there were no implied warranties in the sale of a used home by a non-builder vendor. *E.g.*, *Vetor v. Shockey*, 414 N.E.2d 575 (Ind. Ct. App. 1980); *Lyons v. McDonald*, 501 N.E.2d 1079 (Ind. Ct. App. 1986). The mere failure to disclose a hidden defect known to the seller but unknown to the purchaser was not considered a fraudulent concealment. *Indiana Bank & Trust Co. v. Perry*, 467 N.E.2d 428 (Ind. Ct. App. 1984).

88. IND. CODE § 24-4.6-2.1 (West Supp. 1993); Pub. L. No. 210-1993, 108th Gen. Assembly, 1st Reg. Sess. (1993).

89. IND. CODE § 24-4.6-2.1-2 (West Supp. 1993).

90. IND. CODE § 24-4.6-2.1-4 (West Supp. 1993).

91. IND. CODE § 24-4.6-2.1-5 (West Supp. 1993).

*B. Duration of Possibility of Reverter and Right of Entry*

Indiana Code section 32-1-21<sup>92</sup> provides that the possibility of reverter or right of entry for breach of a condition subsequent is invalid after thirty (30) years from the date of its creation if the breach of the condition has not occurred.<sup>93</sup> The statute specifically excludes from its application: the rights of a mortgagee based on the terms of the mortgage; a trustee or beneficiary under a trust deed in the nature of a mortgage based on the terms of the trust deed; a grantor under a vendor's lien reserved in a deed; a lessor under a lease for a term of years; or a person with a separate property interest in coal, oil, gas, or other minerals.<sup>94</sup> This is a major departure from the common law rule where the possibility of reverter or right of entry can last indefinitely.<sup>95</sup> This legislation should, and was obviously designed to, eliminate defects in the title which had outlived their usefulness and thereby increase the marketability of titles.

VI. REAL ESTATE BROKER: DUTIES AT CLOSING

Last year the Indiana Court of Appeals, in *McAdams v. Dorothy Edwards Realtors*,<sup>96</sup> concluded that the sellers' real estate broker Dorothy Edwards Realtors, Inc., could be held liable for the actions of its agent, Gary Taylor, who, after receiving the purchasers' down payment of \$40,079.68, failed to apply the funds to satisfy an existing mortgage on the property.<sup>97</sup> The purchase agreement stated that the title to the property was to be free and clear of all liens and encumbrances except those listed, and the title opinion by the purchasers'

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92. Pub. L. No. 233-1993, 108th Gen. Assembly, 1st Reg. Sess. (1993) (adding IND. CODE § 32-1-21).

93. IND. CODE § 32-1-21-2 (West Supp. 1993). A saving clause was added allowing an action to recover property, to be commenced on or before June 30, 1994 where the possibility of reverter or right of entry was created before July 1, 1963 and the breach of the condition occurred before July 1, 1993. IND. CODE § 32-1-21-3 (West. Supp. 1993).

94. IND. CODE § 32-1-21-1(2) (West Supp. 1993).

95. These two future interests were not subject to the Rule Against Perpetuities. The only limitation on the duration of the possibility of reverter or the right of entry for breach of condition subsequent was the requirement in the Indiana Marketable Title Act that notice of the interest be re-recorded in the notice index within the effective date of the fifty-year root of title. IND. CODE § 32-1-5-1 *et seq.*

96. 591 N.E.2d 612 (Ind. Ct. App. 1992).

97. *Id.* at 614-17, 621-23. Although the action is brought against Dorothy Edwards Realtors and not Gary Taylor, both the court of appeals opinion and the subsequent supreme court decision refer to Taylor as the Parnells' broker or real estate agent and note that he is the principal owner of Dorothy Edwards Realtors. *Id.* at 614; *McAdams v. Dorothy Edwards Realtors*, 604 N.E.2d 607, 609 (Ind. 1992). This would appear to eliminate any argument by Dorothy Edwards that its agent, Taylor, was acting outside the scope of his authority, and may explain why the issue was never raised.

attorney, delivered directly to Taylor, indicated that the mortgage should be satisfied and released before closing.<sup>98</sup> Instead, Taylor used a portion of the down payment to pay other expenses, including the broker's real estate fees, and distributed the balance of \$29,184.50 to the seller.<sup>99</sup> Later, when the sellers defaulted on the mortgage and moved to Florida, the McAdams brought suit charging the bank with violating federal and state consumer credit laws and seeking to recover from Taylor the amount required to clear the lien on the property. The bank in turn sought foreclosure of the property. The trial court found that Taylor was a trustee with respect to the \$40,079.68 received from the McAdams and deposited in the Dorothy Edwards Realtors, Inc. Trust Account. However, the court of appeals concluded that the payment of the balance on the land contract plus interest to the bank would satisfy and release the bank's mortgage. On appeal by the bank and Edwards Realtor, the court remanded with instructions to enter an order of foreclosure.<sup>100</sup> To avoid foreclosure, the McAdams entered into an agreement to pay the bank \$46,565.32 and not to seek transfer to the Indiana Supreme Court. The McAdams then filed a motion to recover judgment against Edwards Realtors. The McAdams appealed when the trial court denied their motion and entered judgment for Edwards Realtors. Once again the court of appeals reversed, finding that a hearing should be held to determine the amount of damages based upon the trial court's original finding that Edwards Realtors' agent had breached his duty with regard to the distribution of the funds in the trust account.<sup>101</sup> The Indiana Supreme Court granted transfer on the question of what duty, if any, a real estate broker owes a buyer "when the broker is the agent of the seller".<sup>102</sup> Not surprisingly, from the way the question was framed, the court found the broker owed no duty to the purchaser and could not be held liable for disregarding the provisions of the Purchase Agreement and title opinion requiring the lien be satisfied: "We are unaware of any authority for the proposition that a seller's agent owes a buyer a duty to act in the buyer's best interest."<sup>103</sup> In presuming the broker was acting solely as seller's agent, the court seemingly ignored facts suggesting the agent was doing much more. Taylor furnished an abstract of the title to the McAdams' attorney, Joseph Davis, and Davis rendered a written title opinion

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98. *McAdams*, 591 N.E.2d at 614, 621-23. The subsequent supreme court opinion, however, noted that the actual sales contract signed by the McAdams at the closing contained a provision allowing the sellers to maintain a mortgage on the premises which could not exceed at any time the balance owed by the McAdams to the Parnells. *McAdams*, 604 N.E.2d at 608.

99. *Id.* at 609.

100. *McAdams*, 591 N.E.2d at 615-18.

101. *Id.* at 622-23.

102. *McAdams v. Dorothy Edwards Realtors*, 604 N.E.2d at 608.

103. *Id.* at 611.

based on the abstract which concluded that the existing liens on the property should be satisfied and released at the closing:

He [Davis] provided this [title] opinion not to his client but directly to Taylor. Davis did not attend the closing the next day, and it was not until the closing that the McAdams saw his written opinion regarding the liens. There was testimony at trial that it is common practice in Howard County for attorneys to provide title opinions directly to real estate agents and not attend closings with their clients.

The McAdams-Parnell closing thus was fairly typical. Taylor presided. Also present were the McAdams, the Parnells, and Roy Bergman, another Edwards Realty agent. Taylor placed the McAdams down payment of \$40,079.68 in the Edwards Realtors trust account, as is customary in such transactions.<sup>104</sup>

The trial court found that the broker had agreed to distribute the moneys to accomplish performance of the obligations under the Purchase Agreement and title opinion.<sup>105</sup> In addition, Taylor had talked to the mortgagee bank and got them to orally agree not to enforce the due-on-sale clause in the mortgage.<sup>106</sup> Taylor appears to have been the moving force in the real estate closing rather than simply the seller's agent.

This case may have an impact on the "common practice in Howard County" with regard to real estate closing. It may no longer be prudent for the purchaser's attorney to continue to permit the seller's broker to preside over the closing after this decision. The attorney can no longer rely on the real estate broker to protect his client's interest and must now take a more active role. As the court concluded: "If Taylor had advised the McAdams during the closing to step back and consult with counsel before signing such a contract, the resulting harm might have been avoided. Because Taylor was the sellers' agent, however, the law does not hold him financially accountable for failing to do so."<sup>107</sup>

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104. *Id.* at 609.

105. *Id.* at 610; 591 N.E.2d at 614-16.

106. *Id.* at 614.

107. 604 N.E.2d at 612.

VII. VENDOR AND PURCHASER

A. *Contract for Sale of Land: Statute of Frauds*<sup>108</sup>

The requirement that there be written evidence of a contract for the sale of real property has its origin in the English Statute of Frauds:

. . . no action shall be brought . . . upon any contract or sale of lands, tenements or hereditament or any interest in or concerning them... unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.<sup>109</sup>

The sufficiency of the written memorandum needed to satisfy the statute of frauds was raised in *Johnson v. Sprague*.<sup>110</sup> In *Johnson*, the purchaser (Sprague) sued for specific performance of a contract for the sale of a cottage. The seller (Johnson) appealed from the trial court's award of specific performance, claiming that the memorandum of sale did not satisfy the Statute of Frauds.<sup>111</sup>

The facts indicate that after the parties had discussed the sale of the cottage and certain personal property located inside the cottage, and had agreed upon a sale price, they drafted two virtually identical documents. Sprague gave Johnson a check for \$1000 and each of the parties signed one of the documents. The document which Johnson signed read:

Check 7414 is for down payment on cottage

42,000.00
<u>-1,000.00</u>
41,000.00

108. The test for sufficiency of the memorandum set forth in the Restatement of Contracts § 207 has been approved by the Indiana courts. See, e.g., *Block v. Sherman*, 34 N.E.2d 951 (Ind. App. 1941); *Wertheimer v. Klinger Mills, Inc.*, 25 N.E.2d 246 (Ind. 1940).

A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, . . . which states with reasonable certainty,

- (a) each party to the contract whether by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and
- (b) the land, goods or other subject matter to which the contract relates, and
- (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made.

109. Stat. 29 Car. II, c.3 § 4 (1677). The Indiana version of the statute of frauds is found in IND. CODE § 32-2-1-1 (1979).

110. 614 N.E.2d 585 (Ind. App. 1993)

111. *Id.* at 587.

I will relinquish if I don't buy or finish in one month—Aug. 13, 91.<sup>112</sup> The parties then discussed the preparation of the deed and evidence of title, and it was agreed that Sprague's attorney would prepare these documents for closing. Sprague invited friends over to the cottage and Johnson indicated to them that she had sold the cottage to Sprague. However, Johnson failed to provide any evidence of title, and on August 7, 1991, Johnson's attorney sent Sprague a letter, with Sprague's uncashed check enclosed, informing him that there was no valid contract to sell the cottage. Sprague then sued for specific performance.<sup>113</sup>

In discussing whether the written memorandum satisfied the requirements of Indiana's Statute of Frauds, the court observed that:

Under the statute, an enforceable contract for the sale of land must be evidenced by a 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. *Blake v. Hosford*, 387 N.E.2d 1335, 1340 (Ind. App. 1979), *trans. denied*.

....

The parties to a contract have the right to define their mutual rights and obligations, and a court may not make a new contract or supply omitted terms while professing to construe a contract. . . . Absolute certainty in all terms is not required, but if any essential elements are omitted or left obscure and undefined, so as to leave the intention of the parties uncertain respecting any substantial terms of the contract, the case is not one for specific performance. *Workman v. Douglas*, 419 N.E.2d 1340, 1345 (Ind. App. 1981).<sup>114</sup>

Johnson argued the written memorandum was insufficient, because it did not contain an express promise to convey title. The court observed, however, that the statute of frauds only requires "reasonable certainty in the terms and conditions of the promises made, including by whom and to whom," and that in a real estate contract the mutual intent to buy and sell is implicit—it "is the very purpose for the transaction and need not be stated expressly within the written agreement."<sup>115</sup>

Johnson further contended that because the parties failed to reach an agreement on the allocation of responsibility for the payment of real estate taxes

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112. *Id.*

113. *Johnson*, 614 N.E.2d at 587.

114. *Id.* at 588.

115. *Id.*

the agreement was missing an essential term. The court agreed that it could not supply a missing essential term to make a contract different from the one agreed upon by the parties, but concluded that a provision for the payment of real estate taxes is not an essential and substantial term which the parties must agree upon before the real estate contract is enforceable. In Indiana, real estate taxes are paid in arrears and the allocation of responsibility for their payment is usually a matter for negotiation.<sup>116</sup> Where there is no agreement regarding the payment of taxes, the existing law becomes a part of the contract.<sup>117</sup> Since the law provides the buyer is to receive good title at the closing free from all encumbrances, including any liens for real estate taxes, the seller must pay all taxes which would be a lien on the property at the time of the closing.<sup>118</sup> Similarly, the court found that the failure to agree upon the payment of a common area maintenance fee and a pier assessment was not an essential term. If these fees were Johnson's personal obligations they would remain with her after the sale, but if they are a lien on the property or could give rise to a lien then it would be the seller's obligation to convey the title free of such encumbrances.<sup>119</sup>

Next, Johnson contended that there was a parol agreement not included in the written memorandum with respect to the sale of certain personal property such as a refrigerator and stove located within the cottage. The court, however, found that an oral agreement for the sale of personal property collateral to the sale of real estate does not come within the statute of frauds, and does not render the contract for sale of real estate invalid.<sup>120</sup>

Finally, Johnson argued that the oral agreement as to who would provide evidence of title and prepare the deed was not included in the written memorandum. The court observed, however, that the oral agreement occurred after the parties had signed and exchanged the written documents and that it was not a prior or contemporaneous agreement. Again, the lack of agreement as to the

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116. *Id.* at 589. "In some cases, the taxes are pro-rated to the date of closing. In other cases the seller will pay the taxes due through a certain May or November installment, and the buyer will assume and agree to pay all taxes which become due and payable thereafter." *Id.*

117. *Id.* Had the parties orally agreed on the responsibility for the payment of taxes and it was omitted from the written memorandum, the memorandum would not have satisfied the statute of frauds, because the written agreement would not have contained all the terms agreed upon by the parties. *Block v. Sherman*, 34 N.E.2d 951 (Ind. App. 1941).

118. *Johnson*, 614 N.E.2d at 589. The court distinguished its holding in *Workman v. Douglas*, 419 N.E.2d 1340 (Ind. Ct. App. 1981), where it had held a provision for the payment of real estate taxes was an essential and substantial term. *Workman* involved a long term installment sales contract with payments over a 25 year period. Agreement as to the responsibility for the payment of taxes over the length of the contract was an essential term which the parties must have agreed upon. Here, the transfer of title was to occur within thirty days and the law provides for the payment of taxes absent agreement. *Johnson*, 614 N.E.2d at 589.

119. *Id.*

120. *Id.* at 589-90.

closing is not essential to the enforceability of the contract for sale: “[I]t is well settled as a matter of common and actual practice that the responsibility for providing a good and sufficient warranty deed and proof of title belongs with the seller.”<sup>121</sup>

The court concluded that while the written memorandum might have been more complete, it was sufficient to meet the requirements of the Indiana statute of frauds. It identified the parties, the real estate, the purchase price, the closing date and contained Johnson’s signature. The trial court’s judgment granting specific performance was affirmed.<sup>122</sup>

### B. *Specific Performance and Damages*

Where a party to a contract for the sale of real estate brings an action for specific performance, an award of specific performance may not make the party whole. Expenses may have been incurred as a result of the delay in performance beyond the date fixed in the contract. In *Bohlin v. Jungbauer*,<sup>123</sup> the purchasers (the Jungbauers) sought both specific performance of the contract for sale and damages resulting from the delay in closing. The trial court granted specific performance and awarded the purchaser \$20,945.18 in damages. The sellers (the Boulins) appealed \$18,576.68 of the damages.<sup>124</sup>

On appeal the court observed that the granting of specific performance of the contract “erases the breach and precludes damages at law,” but in order to adjust the equities of the parties, the trial court may award “equitable compensation.”<sup>125</sup>

A decree of specific performance enforces the contract as nearly as possible. Here the closing was to have occurred on May 1, 1991, but because of a defect in the title it was necessary for the seller to bring a quiet title action, which was

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121. *Id.* at 590.

122. *Id.* at 590. The trial court also awarded the plaintiff attorney fees. This portion of the judgment was reversed. The court of appeals noted that Indiana follows the American rule which generally requires each party to pay their own attorney fees absent a statute or contractual agreement to the contrary. Here, the court found that while the parties had agreed to share legal expenses for the preparation of the deed and evidence of title, they had not agreed to pay attorney fees for breach of contract. *Id.* at 590. Indiana does recognize an exception to the American rule where a party is guilty of “obdurate behavior.” *Gap Gamini Am., Inc. v. Judd*, 597 N.E.2d 1272 (Ind. App. 1992) (to qualify as obdurate behavior the conduct must be vexatious and oppressive in the extreme, and the defendant forced to defend against a baseless claim). Here the court found that Johnson’s position was plausible even though she did not prevail. *Johnson*, 614 N.E.2d at 590-91.

123. 615 N.E.2d 438 (Ind. App. 1993).

124. *Id.* at 439. The damages were itemized in the decision, and include such expenses as apartment rental, cost of commuting, loss of summer income, long distance phone calls, and increased lumber prices. *Id.*

125. *Id.* at 439 (citing *North v. Newlin*, 435 N.E.2d 314, 319-20 n.2 (Ind. Ct. App. 1982)).

not concluded until December, 1991. This action for specific performance and expenses caused by the delay in closing was filed in February, 1992. The recovery of expenses occasioned by the delay in closing is viewed as an accounting between the parties and not an assessment of damages.<sup>126</sup> Because the trial court failed to conduct an accounting, the court of appeals reversed and remanded. However, in so doing the court made the following observations. First, the trial court should have treated the Jungbauers as the equitable owners from the closing date and awarded them the reasonable rental value of the residence, although to prevent unjust enrichment the Jungbauers should be required to pay interest on the purchase price from the date of closing.<sup>127</sup> This would have eliminated any need to consider the rent paid by the Jungbauers for additional housing.<sup>128</sup> Second, the court observed that the party paying "for the permanent improvements, maintenance, insurance premiums, property taxes, assessments, repairs, and the like on the property" should receive credit for such expenditures.<sup>129</sup>

In examining the list of expenses claimed by the purchaser the court remarked that while Indiana law provided no specific guidance, equity should provide a complete adjustment of the rights of the parties.<sup>130</sup> With regard to the commuting expenses and the long distance phone calls, the court found them too speculative to be included in the accounting.<sup>131</sup> In addition, some jurisdictions disallow damages such as storage costs, commuting expenses, costs of moving a second time, additional housing and increased interest rates. Other jurisdictions allow these additional expenses, but only where there is a "time is of the essence" clause in the contract. The mere inclusion of a closing date in the contract does not make time of the essence unless the terms of the contract or the conduct of the parties indicate such an intention.<sup>132</sup> Here, the court found no evidence to indicate that time was of the essence and hence the Jungbauers could not recover the additional expenses sought.<sup>133</sup>

On the issue of attorney fees the court observed that the agreement provided that "in connection with any litigation arising out of this agreement, the prevailing party shall be entitled to recover all costs incurred, including reasonable attorney fees."<sup>134</sup> The court concluded that the attorney fees connected with the closing and the settlement of the claim for breach of contract

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126. *Bohlin*, 615 N.E.2d at 439.

127. *Id.* at 440.

128. *Id.* at 440 n.2.

129. *Id.* at 439.

130. *Id.* at 440 (citing *Lewandowski v. Beverly*, 420 N.E.2d 1278, 1282 (Ind. App 1981)).

131. *Bohlin*, 615 N.E.2d at 440.

132. *Id.* at 440-41.

133. *Id.* at 441.

134. *Id.* at 441.

were not part of the action for specific performance and were not recoverable under the "plain words of the Agreement."<sup>135</sup>

The Jungbauers also sought to recover appellate attorney fees. Indiana follows the American rule that, absent a statute or agreement, each party pays their own attorney fees. Here, however, the contract for sale provided that the prevailing party may recover reasonable attorney fees "in connection with any litigation arising out of this agreement." Where the parties have agreed that the prevailing party may recover attorney fees in an action to enforce the contract, the Indiana courts have found that such a provision includes appellate attorney fees.<sup>136</sup> The court of appeals directed the trial court to hold a hearing on the issue of appellate attorney fees and determine what are appropriate appellate attorney fees.<sup>137</sup>

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135. *Id.* The sellers did not dispute the award of the attorney fees in connection with the litigation for specific performance. *Id.*

136. *See* Nylén v. Park Doral Apartments, 535 N.E.2d 178, 185 (Ind. Ct. App. 1989); Radio Distrib. Co., Inc. v. National Bank and Trust, 489 N.E.2d 642, 649 (Ind. Ct. App. 1986).

137. *Id.* One might question whether any appellate attorney fees should be awarded to the Jungbauers, since it is not clear that they are the "prevailing party" in the appeal. The court reversed the major portion of the damages award and concluded that the trial court failed to conduct an accounting. While the Youngerbauers have prevailed in their action for specific performance, the Bohlin appear to have prevailed in their appeal on the issue of damages.

