MESSAGE FROM THE CHAIR

The practice of estate planning continues to evolve, particularly now that same-sex marriages are legal in Indiana. There are a couple of pointers that practitioners should keep in mind with this new development. First, following the Supreme Court’s decision last year in United States v. Windsor, these newly married couples will be able to take advantage of the federal marital deduction to transfer unlimited assets tax-free to each other during life or at death. Second, spouses will be able to combine their annual gift tax exclusions to jointly give $28,000 to each donee in 2014. Third, a surviving spouse will be entitled to roll-over retirement plans into his/her own plan and delay taking distributions until the surviving spouse turns age 70 ½. Practitioners also need to consider portability issues and whether a surviving spouse should elect to use any portion of the decedent’s unused lifetime exemption.

In short, practitioners should extend their same estate-planning considerations to their same-sex couple clients. During the 2013 annual meeting and in conjunction with the Family & Juvenile Law Section, our Section presented a CLE entitled “The Changing Legal Landscape of Same Sex Relationships.” On December 17th at 10:00 am in the Regions Conference Center, our Section will provide an updated version of the CLE in light of the recent change in Indiana law. The CLE will be followed by our Section’s Holiday Luncheon, beginning at noon in the Regions Event Center. Additionally, the Section will be collecting hats, gloves & scarves for children in need this year (any size – boy or girl). If you are able to participate, please bring your donated items to the holiday CLE and Luncheon on December 17. Please watch our Section’s e-mail listserve for registration information, and we hope to see you there.

The Section extends a warm thank you Amy Comer Elliott for her service and leadership as Chair. We particularly appreciate her efforts in shepherding along this Section’s proposed legislation creating a statute of repose for actions related to legal services, which will be sponsored during the next legislative session.

The Probate Review Committee will be meeting at 9:00 am on January 17, 2015, on the fifth floor of the Regionals Bank Building, and the Council meeting will follow immediately afterward. We hope to see you there, and in the meantime hope that you and your family enjoy a festive holiday season.

- Sarah Jenkins, Chair

PROBATE REVIEW COMMITTEE

The Probate Review Committee (PRC) of the Probate Trust and Real Property Section of the Indiana State Bar Association met October 9, 2014 at 10:00 am at the Sheraton Hotel in conjunction with the Indiana State Bar Association Annual meeting.

1. 2015 PROBATE LEGISLATION. The PRC reviewed the pending Probate legislation and the changes resulting from the repeal of Probate Codes Study Commission. Paige Felts reported on the avenues now available to get legislation adopted.

2. 2015 REAL PROPERTY LEGISLATION. John Carr summarized upcoming issues in real property. He, Mary Slade and Dan Gordon are still working on the issue of life estates under the current partition statute.

Continued on next page
3. PENDING ISSUES.

3.1 DIGITAL PROPERTY INFORMATION. The PRC and the Section approved the Uniform Fiduciary Access to Digital Assets Act marked up to conform to existing Indiana law. This will be added to the legislative agenda.

3.2 MULTIPLY TRUSTEES – DUTIES – LIABILITIES. Jeff Dible and the committee of Dave Forbes, Bob Adams and Sean Fahey provided new language for the trust code to cover the issue of advisors, trust protectors and multiple trustees and their duties. This language was approved and it will be added to the legislative agenda.

3.3 FUNERAL – PRIORITY. Kinglsey Regnier provided changes to the funeral priority statute to separate spouses and adult children, and add personal representatives and step children. These changes were approved and will be added to the legislative agenda.

3.4 UNIFORM POWER OF APPOINTMENT ACT. Cindy Wolfer led the discussion on the Uniform Power of Appointment Act and the changes made the Uniform Act to conform with Indiana law. The language was approved and will be added to the legislative agenda.

3.5 TOD – DISCLAIMER. The committee of Jeff Hawkins, Jeff Dible, John Carr and Jim Martin continue to work on the issue of disclaimers and TOD property.

3.6 TRUST CONTEST – PROCEDURE. Cindy Wolfer, Bob Hamlett and John Cremer and Jerry Cowan and Sarah Jenkins continue looking at trust contests and procedural issues such as bonding and attorney fees.

3.7 DECANTING – PROCEDURE – OBJECTION. Jeff Dible, MaryEllen Bishop and Steve Williams continue to look at the procedure to follow if a beneficiary objects to decanting.

3.8 PARENTAL DELEGATION – HEALTH CARE. MaryEllen Bishop, Jeff Dible and John Carr presented language to change IC 29-3-9-1 to cover health care. The language was approved to add health care to the list of powers to be delegated and will be added to the legislative agenda.

3.9 PROPERTY TAX – DEDUCTIONS. Bob Hamlett now chairs the committee with John Carr, Dan Gordon and Don Hopper are working on the issue of property tax deduction for property being held in an entity such as a trust. Cindy Wolfer will also join this committee.

4. NEW ISSUES.

4.1 SMALL ESTATE AFFADAVIT – PROCEDURE – AMOUNT. Jim Martin, Amy Elliott, Aline Anderson and Jeff Dible will take a look at the existing small estate affidavit procedure and amount.

4.2 RESUMPTIVELY VOID TRANSFERS. Don Evans, Ted Waggoner and Dave Forbes will take a look at a recent Illinois statute designed to protect seniors from fraudulent transfers to decide if Indiana should consider similar protection.

4.3 CHARITY – STATE REGISTRATION. The PRC voted to take no further action on registration requirements for charity fund raiser.

4.4 WILL – DIGITAL COPY. The PRC voted to take no further action on whether digitalized copies should be considered the same as the original for an executed will.

4.5 WILL CONTEST – VENUE. Paul Crowley, John Cremer and Jim Martin will take a look at clarifying the property procedure and venue for a will contest.

5. NEXT MEETING. The next meeting will be downtown on the fifth floor of the Regions Bank Building on January 17, 2015 at 9:00 am.

6. ADJOURNMENT. Meeting was adjourned at approximately noon.
GUARDIANSHIP – JURISDICTION – PARENTAL VISITATION – ATTORNEY FEES.

In Re the Paternity of B.J.N., 2014 Ind. App. LEXIS 509 (Ind. App. 2014). B.J.N. was born in 2009 and remained in mother’s custody until March 2010 when she was made a ward of the State of Illinois and placed into foster care. In 2010, the father, who had been incarcerated, was released and began visiting with B.J.N. Father filed a paternity action in Kankakee County, Illinois and was adjudicated the father in 2011. In 2013, the mother brought B.J.N. to Greensburg in Decatur County, Indiana where B.J.N. lived with P.C., a friend of the father. The father lived in Hendricks County and consented to the guardianship and the child living with P.C. The Decatur Court granted the guardianship. Six (6) months later, the father filed a petition in Hendricks where he lived to register the order of the Kankakee County, Illinois Court recognizing his paternity. He then filed a motion in Decatur court to vacate the guardianship order, alleging Decatur County lacked jurisdiction when it awarded custody. The Decatur court denied the petition and granted the guardian’s petition to restrict the father’s parenting time and requiring supervision. The Hendricks County court dismissed the father’s cause of action and awarded attorney fees to the guardian.

The Court of Appeals affirmed the Decatur court’s finding that there was jurisdiction and that there was sufficient evidence to support the limitation of father’s visitation. It affirmed the Hendricks court in its granting of the Motion to Dismiss the father’s petition but reversed as to attorney fees. On the jurisdictional issue, the Court of Appeals noted that the father admitted the court had personal jurisdiction and focused on subject matter jurisdiction or jurisdiction over the particular case. Obviously, the circuit court had general subject matter jurisdiction. The Court of Appeals then focused on whether there was jurisdiction over the case. It did not see any reason why the determination of paternity in Illinois would remove jurisdiction nor did it see any issue under the Uniform Child Custody Jurisdiction Act which is codified in both Illinois and Indiana. The payment of attorney fees was reversed because there was no evidence in the record about the resources of the parties or their ability to pay.

TRANSFER ON DEATH ACT – RETROACTIVE APPLICATION - REHEARING.

In Re the Estate of Ruth M. Rupley, Charles A. Rupley v. Michael L. Rupley, 2014 Ind. App. LEXIS 468 (Ind. App. 2014). The Court of Appeals granted rehearing to clarify its previous ruling summarized in the last newsletter. Charles Rupley (“Charles”) executed a promissory note to Ruth Rupley (“Ruth”). The note indicated that it was payable on Ruth’s death to Charles. When Ruth died the successor co-personal representative petitioned the court for instructions as to whether the note was an estate asset. Charles argued that the Indiana Transfer on Death Property Act applied retroactively to the note and when Ruth died the note was owned by Charles. Charles’ brother argued that the Act did not apply and that the note was an asset of Ruth’s estate. The trial court ordered that the note was part of the estate.

The Court of Appeals reversed. The Court noted that absent an express indication in a statute, the presumption is that statutes and amendments thereto apply prospectively only. The TOD Act clearly indicates that it applies retroactively to a “transfer on death security, transfer on death securities account and a pay on death account created before July 1, 2009.” The Court treated the note as a pay on death account subject to the TOD Act.

After rehearing, the Court of Appeals clarified its earlier decision by holding that the note was a “transfer on death security” to which the Transfer on Death Property Act applied retroactively and the note belonged to Charles and not to the estate.

PROPERTY

REPORTED CASES

ABANDONED MOBILE HOMES - AUCTION.
Mobile Home Management Indiana, LLC v. Avon Village MHP, LLC, State of Indiana Bureau of Motor Vehicles, Treasurer of Hendricks County,
Indiana, 2014 Ind. App. LEXIS 440 (Ind. App. 2014). Bank of America foreclosed on a mobile home park with a Receiver appointed over the real estate. Several mobile homes were on the property at the time of foreclosure. Many were owned by Avon Leasing (Old Avon). The real estate sold at sheriff’s sale to Special Services Asset Management Company. New Avon then purchased the real estate, but did not purchase the mobile homes owned by Avon Leasing. Avon Village then sought to acquire ownership of the mobile homes. Pursuant to I.C. 9-22-1.5 et seq., New Avon began the process of obtaining ownership of the mobile homes. After providing notice to the owners on May 30, a second notice on June 13 and conducting an auction on July 9, New Avon acquired 17 mobile homes but did not seek to transfer title with the BMV. Meanwhile, Mobile Home Management Indiana (“MHMI”) purchased the 17 mobile homes from Old Avon on July 15. Old Avon provided MHMI with Certificates of Title and a bill of sale. MHMI then requested new titles from the Hendricks County Treasurer and informed New Avon of its ownership interest in the mobile homes. New Avon then informed the Treasurer of its interest in the mobile homes, and as a result of the dispute, the Treasurer took no action on issuing new titles. New Avon sought Declaratory Judgment, MHMI counterclaimed for ownership, rents and possession of the mobile homes. After cross-motions for summary judgment, the trial court granted summary judgment for New Avon and denied summary judgment for MHMI.

The Court of Appeals reversed and remanded, directing that judgment be entered in favor MHMI. The issue on appeal was the interpretation of I.C. 9-22-1.5-2 through 4. MHMI contended that sections 3 and 4 each require 30 days after sending their respective notices. New Avon contended that these sections only require that 30 days pass between the first notice and the auction. Together, sections 2 through 4 provide that a property owner may sell an abandoned mobile home “only if has it been on the property without permission for thirty days.” Under section 3, this 30 day clock starts with the first notice being sent. Upon the expiration of the first 30 day period, New Avon could then follow section 4, which requires an additional 30 days from the second notice before auction can be held. In essence, there is a 60-day time period between the first notice and the auction. Here, only forty-two days passed from the first notice and the auction. New Avon failed to comply with the statutory requirements.

ANNEXATION – NO REQUEST FOR STAY – DISMISSAL. Certain Martinsville Annexation Territory Landowners v. City of Martinsville, 2014 Ind. App. LEXIS 491 (Ind. App. 2014). The City of Martinsville sought to annex approximately 5,000 acres surrounding the City, and shortly thereafter, the City adopted Ordinance 2012-1667 in which the amount of land to be annexed decreased to 3,030 acres. The landowners filed a petition remonstrating against the annexation. The trial court entered judgment against the landowners and upheld the annexation. The landowners then appealed. The Court of Appeals dismissed the landowners’ appeal. The issue was whether the appeal should be dismissed as moot because the annexation had become final and no effective relief could be granted to the landowners. Annexation is an essentially legislative function. As a result, the annexation is subject to judicial review by statute. There are only two options to challenge annexation. First, landowners may seek a remonstrance for relief from annexation proceedings. Second, city taxpayers may seek a declaratory judgment. After a remonstrance is filed, a trial court must determine whether the city operated within its authority and adhered to the statutory requirements for annexation. The city bears this burden. The Court of Appeals followed the long-standing rule that a case is moot when no effective relief can be issued to the parties. If the case involves a question of great public interest, then the Court may issue an advisory opinion. However, the Court of Appeals in a prior case determined that once an annexation becomes final, then the case is moot. The landowners failed to request a stay prior to the annexation becoming final. The city complied with all necessary requirements to finalize the annexation. In addition, the landowners also failed to petition for disannexation. Finally, the Court of Appeals determined the great public interest exception did not apply because the annexation
was not a taking of property and did not deprive the landowners of any property.

ATTORNEY – DISCIPLINE – MORTGAGE – NEGLECT – COMMUNICATION. In the Matter of Jesse L. Coleman, 15 N.E.3d 998 (Ind. 2014). Coleman met with the client to discuss a foreclosure action filed against them on their residential mortgage. Coleman recommended bankruptcy and was hired to file the action. Client paid the bankruptcy filing fee and agreed to a fixed legal fee for the bankruptcy payable in installments. Coleman filed an appearance in the foreclosure action and asked for a continuance. Coleman filed his appearance in the foreclosure action to simply monitor the case but had no defense to present on behalf of the client. The foreclosure court entered a default judgment against the client and decree of foreclosure. Three months later Coleman filed a Chapter 13 bankruptcy proceeding for the client but failed to notify the foreclosure court. The foreclosure plaintiff objected to the bankruptcy plan as the property had already been sold at sheriff’s sale and the bankruptcy court thereafter rejected the Chapter 13 plan. Coleman filed a notice of automatic stay in the foreclosure action. Coleman failed to show for the first meeting of creditors in the bankruptcy proceeding. Foreclosure plaintiff moved for relief for the stay and the bankruptcy court granted the relief. Client was evicted from their home as they never had the financial resources to fund a chapter 13. Coleman filed notice to convert the Chapter 13 filing to a Chapter 7 liquidation but the case was closed without any discharge of debts as client failed to complete the required personal financial management course. Court found that Coleman had violated Rule 1.3 for failure to act with reasonable diligence and promptness in failing to promptly notify the foreclosure court of the bankruptcy filing and for failure to attend the first meeting of creditors and Rules 1.4(a)(3) and 1.4(b) for failure to keep a client reasonably informed of the status of their matter. Coleman was suspended for 60 days with automatic reinstatement.

ENVIRONMENTAL – CLEANUP – DISSOLVED CORPORATION – LIABILITY. Lewis Oil, Inc. v. Bourbon Mini-Mart, Inc. and Robert E. Wanamacher, 2014 Ind. App. LEXIS 452 (Ind. App. 2014). Wanamacher owned Bourbon Mini-Mart (“Mart”). IDEM filed a complaint against Wanamacher and Mart seeking to recover contamination cleanup costs on the Mart property and adjoining gas station. Lewis Oil (“Lewis”) was an Indiana business that dissolved in 1997. As part of its dissolution, it published notice that claimants could file claims against the company and indicated claims filed after two years would be barred. In 2003, Wanamacher filed a third-party complaint against Lewis alleging that it owned and operated underground storage tanks at the gas station, which contributed to the contamination. Lewis sought summary judgment because the claims were time-barred. Wanamacher and Mart argued that the notice did not include statutorily required “language.” Both sought summary judgment on Lewis’s ownership of the tanks. The trial court denied both motions, and Lewis filed interlocutory appeal.

The Court of Appeals affirmed the trial court’s denial of Wanamacher’s and Mart’s motion for summary judgment. The Court reversed and remanded Lewis’s motion for summary judgment with instruction for the trial court to enter judgment in favor of Lewis on the time-barred claim. At issue was whether the requirement that Lewis’s dissolution notice describe “the information that must be included in a claim” was intended to benefit the corporation and that the claimant. This question was one of statutory interpretation. Reading I.C. 5-3-1-2.3 (which applies to all Indiana statutes that impose a notice requirement) and I.C. 23-1-45-7 together, the Court concluded that a section 7 notice is valid even if it contains an error or omission so long as it would not mislead a reasonable person and it substantially complies with the time and publication requirements. The Court stated that the omitted information in Lewis’s notice would not mislead Wanamacher and Mart. The notice was provided and they could assert a claim, but only within the two (2) year time frame. It simply did not specify what needed to be in the claim. The Court found that Lewis substantially complied and the notice was valid.
INSURANCE – COVERAGE – AGENT.
Schweitzer v. Am. Family Mut. Ins. Co., 2014 Ind. App. Lexis 419 (Ind. App. 2014). The Schweitzer’s home was destroyed by a fire in December, 2008. Prior to the fire, the plaintiffs purchased a homeowners insurance policy issued by defendant American Family Mutual Insurance Company (“American Family”) through Jennifer Gholson Insurance Agency (“Gholson”) with a coverage limit of $261,000. After plaintiffs submitted their claim, American Family issued payments totaling $326,400, but did not provide coverage for certain damage to the plaintiff’s driveway, or for an unrelated theft claim made by plaintiffs. Plaintiffs brought suit against American Family and Gholson. As to American Family, plaintiffs claimed that not all of the benefits due under the policy were paid, and that the claims that were paid were not paid in a timely manner. As to Gholson, plaintiffs claimed that Gholson was negligent by failing to issue plaintiffs a policy for full replacement cost and that fully indemnified them against loss. In addition, plaintiffs claimed that Gholson negligently failed to make a determination of the proper amount of coverage required by plaintiffs. Defendants American Family and Gholson filed a motion for summary judgment, which the trial court granted.

The Court of Appeals affirmed. As to American Family, the Court first held that the designated evidenced demonstrated that American Family was not required to provide payment for plaintiffs’ claims that American Family disallowed. As to the timeliness of payment by American Family, the Court held that American Family paid any claims in accordance with plaintiffs’ issued policies. As to Gholson, the Court reasoned that before an insurance agent has a duty to advise a client as to the proper amount of coverage, that a special relationship must exist between the insured and the agent. The Court provided that some factors which indicate such a special relationship include when the agent (1) exercises broad discretion in servicing the insured’s needs, (2) counseled on a specialized insurance need, (3) held himself out as a highly-skilled expert, or (4) received compensation for the expert advice that is above the customary premium paid. In this case, the Court found that a special relationship did not exist, and, accordingly, that Gholson did not have a duty to advise plaintiffs as to the amount of coverage needed. In support of this, the Court pointed to the fact that plaintiffs did independent internet searched for insurance providers, and that the plaintiffs discussed American Family between the two of them. Further, Defendant Gholson met the plaintiffs at their house, that this was the first business interaction between the parties, and that the plaintiffs did not have any knowledge about Defendant Gholson’s qualifications or experience.

INSURANCE – FIRE – CASH VALUE – REPLACEMENT COST. Seeber v. General Fire & Casualty Company, Indiana Insurance Company and Peerless Indemnity Insurance Company, 2014 Ind. App. LEXIS 524 (Ind. App. 2014). Seeber owned a commercial building in Bloomington that was a total loss as a result of a fire. Seeber had an insurance policy issued by General Fire & Casualty Company. The tenant had an insurance policy with Indiana Insurance Company and Peerless Indemnity Insurance Company. The policies in total paid out the actual cash value of $512,418.12. Seeber believed he was entitled to the replacement cost because of his purchase of additional investment real estate which would be $650,812.70. Seeber filed suit asking the court to construe the insurance policy and order the payment of the replacement cost. In purchasing replacement property, Seeber actually made two different investments. One was a purchase of a 25% interest in a commercial building in Bloomington. The other was the investment in residential condominiums. The investment in the commercial building was actually less than the $512,418.12 actual cash value paid so the trial court determined he was not entitled to replacement cost. The trial court also found that the investment in residential condominiums was not a similar type investment as required by the insurance policy. As a result, the trial court granted summary judgment for the insurance companies and against Seeber.

The Court of Appeals affirmed. It reviewed the coverage under the policy and agreed with the trial court that replacement cost was only available if Seeber had invested in a similar type of property.
Because the insurance policy was clearly limited to commercial real estate and the condominiums were residential real estate, the court of appeals found that replacement cost was not available.

**INSURANCE – FIRE – TENANT – SUBROGATION.** *LBM Realty, LLC v. Mannia*, 2014 Ind. App. LEXIS 520 (Ind. App. 2014). LBM Realty, LLC (LBM) owned an apartment building destroyed in a fire believed caused by a tenant, Hillary Mannia. LBM’s insurance company filed a subrogation action against Mannia. Mannia filed a motion to dismiss. In the brief, Mannia pointed out three different approaches across the country to subrogation claims against tenant. The three approaches included: 1) the no subrogation approach, treating the tenant as a co-insured. 2) the pro subrogation approach which allows the recovery against the negligent tenant; and 3) the case by case approach where the courts determine the availability of subrogation based upon the reasonable expectations of the parties typically as shown by the lease. The trial court granted the motion to dismiss and LBM appealed. The Court of Appeals reversed and remanded without adopting any of the three approaches. On remand, the trial court once again granted Mannia’s motion for summary judgment believing that the no subrogation rule should be the rule in Indiana but acknowledging that the Court of Appeals would have to decide and tell the trial court what to do.

The Court of Appeals affirmed in part and reversed and remanded in part. The case contains a long discussion of subrogation in the three approaches set out by Mannia in its original motion to dismiss. The pro subrogation rule was not argued by either party so the opinion did not address it. The no subrogation rule based on an Oklahoma case which uses the legal fiction of the tenant as co-insured under the landlord’s policy. The court of appeals reviewed prior Indiana cases and came to the conclusion that Indiana was not a no subrogation state but rather a case by case state based upon the expectation of the parties. In this particular case, Mannia had insurance under the parents’ homeowners’ policy. In addition, the lease had several provisions which indicate that the tenant should have their own separate insurance and was not covered by the landlord’s insurance. As a result, the summary judgment was reversed to the extent that it entered judgment for Mannia with instructions for the court to apply the case by case rule and to determine the parties’ expectations.

**INVERSE CONDEMNATION – PROCEDURE – FAILURE TO NAME PARTY.** *Susan A. Snyder v. Town of Yorktown, Delaware County Surveyor, Delaware County Draining Board, Randall Miller & Associates, Inc. and Watson Excavating, Inc.*, 2014 Ind. App. LEXIS 500 (Ind. App. 2014). Snyder owns property in Yorktown which has a regulated drain on it. Yorktown decided to extend and connect its closed storm system to this regulated drain, which would require Yorktown to acquire more right-of-way or easement from Snyder’s property. The town manager contacted Snyder regarding the need for additional right-of-way or easement. Snyder did not consent to the right-of-way or easement. The Delaware County Drainage Board approved the project and contractors entered, excavated and installed a pipe on Snyder’s property starting in the fall of 2007. In March 2013, Snyder filed a tort claim notice alleging trespass against the Defendants. Without a resolution of the tort claim, Snyder filed a complaint alleging quiet title, declaratory relief, trespass, unconstitutional partial taking, among other claims. Defendants filed a Motion to Dismiss on the claims for trespass and unconstitutional partial taking based on Trial Rule 12(b)(6). The trial court dismissed the trespass claim for failure to timely file the tort claim, and dismissed the taking claim because Snyder failed to strictly follow the filing procedure in the eminent domain statute that requires her to name the lienholder as a party in her complaint. The trial court granted the defendants motion on both counts, and Snyder appealed.

The Court of Appeals affirmed the Motion to Dismiss on the trespass count, and reversed and remanded the unconstitutional partial taking issue. The Indiana Tort Claim Act required Snyder to provide Yorktown with notice of trespass claim within 180 days of the alleged loss. In her complaint, Snyder alleged that Defendants entered her property in the fall of 2007, and that

*Continued on next page*
she “knew” she had been damaged in March 2012, both dates well outside the 180-day tort claim limitation. Snyder attempted to excuse the tardiness by argument of fraudulent concealment, administrative inaction and continuing wrong. The Court of Appeals concluded that based on the facts pled in her complaint, Snyder discovered the alleged damage/trespass in March 2012 at the latest, and that being outside the 180-day period, fraudulent concealment was no excuse. As for administrative inaction, the Court of Appeals focused on the information Snyder did have, and not the information she believed Defendants failed to give her. Again, Snyder knew of the damage/trespass no later than March 2012. The same rationale disposed of the continuing wrong argument, Snyder knew no later than March 2012. Turning to the inverse condemnation issue, the Court of Appeals addressed the issue of Snyder failing to add her mortgage holder to the complaint. The Court focused on the purpose of joining interested parties, which was to protect their rights and not shield a governmental entity from liability. Following the Indiana Supreme Court, the Court reiterated that “the failure to name all interested parties is not a jurisdictional defect in condemnation actions.” Moreover, Trial Rule 21(A) is relevant in that when nonjoinder is the issue, failure to name a party “is not grounds for dismissal.” Here, the trial court erred because the nonjoined party could be allowed to intervene or Snyder could have sought to add her mortgage holder to the complaint, as permitted by Trial Rule 21(A).

**LIS PENDENS – NOTICE – VALIDITY.**

*JP Morgan Chase Bank, N.A. v. Claybridge Homeowners Association, Inc.*, 2014 Ind. App. LEXIS 511 (Ind. App. 2014). This case has a long history at both the trial court and the Court of Appeals. Claybridge Homeowners Association, Inc. (Claybridge) filed a complaint against Deborah Walton in 2001 who lived in a house located in the subdivision. The lawsuit was to enforce the covenants of the subdivision. Various orders were entered over the years but it appears that the final judgment against Deborah was issued on January 16, 2007 ordering her to pay Claybridge $248.00 in damages and $64,600.00 in attorney’s fees. It does not appear that the judgment was properly shown as a lien on the property in Hamilton County. In October of 2007, Claybridge filed a complaint to foreclose the judicial lien and a *lis pendens* notice was recorded. Two weeks later in November 2007 Deborah and her mother executed a promissory note for $473,000.00 in favor of Washington Mutual Bank which was then secured by a mortgage recorded November 27, 2007. JPMorgan is the successor in interest to Washington Mutual Bank and the holder of the note and mortgage. Claybridge received a judgment allowing it to sell the property at sheriff’s sale. On December 19, 2013, JPMorgan filed a motion to intervene and vacate the order of sale claiming that it had no notice at the time of its mortgage and that its interest was not protected by anyone who was a party to the prior actions. Claybridge resisted and the court held a hearing at which time it denied JPMorgan’s motion to intervene. JPMorgan appealed.

The Court of Appeals reversed and remanded. Because the January 2007 order was not listed as a lien against the property, the only notice that JPMorgan could have received would have been the *lis pendens* notice filed two weeks before it signed the note and mortgage. In fact that is what the trial court based its order on. However, the Court of Appeals disagreed, taking time to review the history of *lis pendens* notice and when a *lis pendens* notice is properly filed and of public record. Based on its review of the statute and case law, it did not believe Claybridge properly filed a *lis pendens* notice because its judgment was personal against Deborah and was not a judgment claiming interest in the real property itself. Since the *lis pendens* notice was not valid, JPMorgan did not receive proper notice and should be allowed to intervene.

**MORTGAGE – FORECLOSURE – NOTE – HOLDER – ELECTRONIC ENDORSEMENT.**

Fargo was the current holder of the note in due course. The trial court found that Wells Fargo had standing to enforce the electronic promissory note and mortgage, but issues of material fact existed as to Good’s electronic signature on the note and the balance of the indebtedness. The trial resulted in the validation of the signature of the note and the determination of the balance of the loan.

The Court of Appeals reversed and remanded. Good and Wells Fargo continued their arguments as to the ability to hold and endorse an electronic note, Under 15 U.S.C. § 7021, an electronic note is a transferable record where the individual in control of the transferable record is a holder for purposes of the UCC and “delivery, possession, and endorsement are not required.” The Court determined that the affidavits at the summary judgment stage did not prove that Wells Fargo was in control of the electronic note. Additionally, Wells Fargo did not prove who was identified in the Note Registry as required by the note’s provisions for identifying the note holder.

MORTGAGE – FORECLOSURE – NOTICE. Hair v. Deutsche Bank National Trust Company, 2014 Ind. App. LEXIS 486 (Ind. App. 2014). Deutsche Bank sought to provide notice of its 2011 foreclosure action by publication to a judgment creditor reflected on the judgment docket as “Hair Calvin Cross and Counterclaimant”. A default judgment was granted against all who did not respond to the complaint: Deutsche Bank successfully bid for the subject property at the January 11, 2012 foreclosure. On October 31, 2013, Calvin Hair, a judgment creditor, sought to set aside the default judgment alleging the wrongful use of service by publication given the availability of information to serve Calvin Hair. The trial court denied Hair’s motion to set aside and motion to correct error.

The Court of Appeals reversed and remanded with instructions to address Hair’s judgment. Deutsche Bank claimed Hair’s claims were moot and inequitable due to the subsequent sale of the property to a third party and the foreclosure sale only accounting for one third of Deutsche Bank’s superior judgment without any funds for any junior creditor interest alleged by Hair. The Court found these arguments unpersuasive because Hair’s interest as a junior judgment lienholder is affected by Deutsche Bank’s failure to adequately attempt to obtain service. This decision did not expound on any availability of strict foreclosure or any bona fide purchaser status for the subsequent purchaser.

PREMISES LIABILITY – ICE AND SNOW – SUMMARY JUDGMENT. Henderson v. Reid Hospital & Healthcare Services, 2014 Ind. App. LEXIS 486 (Ind. App. 2014). Reid Hospital and Healthcare Services (“Hospital”) owned property in Richmond, Indiana, that it leased to plaintiff’s employer, Richmond Cardiology. At approximately 5:55 am on February 23, 2010, the Hospital received notification that slick conditions were beginning to develop at the property. The Hospital’s engineering department contacted its maintenance crew, and, at 6:41 am, members of the maintenance crew began spreading salt and calcium chloride on the parking lot. At 7:20 am, plaintiff arrived at the building and sustained injuries when she slipped and fell after getting out of her car. Plaintiff brought suit against the Hospital claiming that her injuries were caused by a dangerous and hazardous condition known by the Hospital, and that the Hospital was negligent because the parking lot was not free of ice. The Hospital filed a motion for summary judgment claiming that it did not breach any duty of care owed to plaintiff because it did not have a reasonable amount of time to remove ice from its premises prior to the incident. The trial court granted the Hospital’s motion for summary judgment.

The Court of Appeals reversed the trial court’s decision to grant the Hospital’s motion for summary judgment. The Court held that a landowner owes an invitee a duty to exercise reasonable care to maintain its business premises, including ensuring that the sidewalks and parking lots are in a reasonably safe condition. The Court did not provide that the storm or weather condition cease before the duty attaches; however, the Court did recognize that the landowner is entitled to actual or constructive notice of the presence of snow or ice, and a reasonable opportunity to remove it. In reversing the
trial court’s grant of summary judgment, the Court noted that the record did not include any designated evidence that established whether the actions taken by the Hospital were reasonable under industry standards, or what constitutes such standards. As such, the Court reversed the trial court’s decision to grant summary judgment, and remanded.

Judge May dissented concerning the standard of care owed to invitees and did not agree with the Court’s determination that the designated evidence did not determine that the Hospital acted reasonably. Instead, Judge May states that, based upon the facts in the record, the only inference that could be drawn is that the Hospital did everything it could in the situation, and thus acted reasonable in the situation.

SALES DISCLOSURE – MISREPRESENTATION – ACTUAL KNOWLEDGE – DAMAGES.

_Hays v. Wise_, 2014 Ind. App. LEXIS 518 (Ind. App. 2014). In 2000, the Hayses built a residential home in Wolcottville. Hays had never built a house before and used four (4) friends to help him. He obtained a location improvement permit, which required him to undertake certain activities, but he never obtained a certificate of occupancy. In 2007, the Hayses sold the house to the Wises giving them a sales disclosure basically denying any problems with the property. When the Wises sought a location improvement permit to build a road, they discovered that there was no certificate of occupancy. In an effort to obtain a certificate of occupancy, the county official produced a long list of defects, which would have to be improved before the certificate of occupancy could be issued. The county official recommended an inspection by an engineer. The inspection by the engineer was even worse, showing failure to comply with the most basic of building code requirements. One witness, who had built millions of square footage of residential housing, stated he had never seen such bad construction. The case originally went to the Court of Appeals on the trial court’s dismissal of the Wises’ complaint. After reversal and remand, the trial court held a two-day bench trial and submitted extensive findings of facts and conclusions regarding the house. The judgment was entered on behalf of the Wises in the amount of Two Hundred Eighty One Thousand Sixty Two Dollars and Seventy Seven Cents ($281,602.77) which included attorney fees. The Hayses appealed.

The Court of Appeals affirmed. The Hayses raised two main arguments. The first argument was that there was no proof of actual knowledge by the Hayses of the defects. The Court of Appeals decision spent significant time reviewing the findings of facts and the testimony which showed a house so bad that it could be inferred that the Hayses had actual knowledge. The Hayses also raised the issue of the judgment against Mrs. Hays. The Court of Appeals noted that Mrs. Hays was the owner of the property and signed the sales disclosure as well. The second issue was the amount of the damages. The Hayses argued that the damages were excessive in that they were not based on the cost of repair. The court of appeals noted one finding that repairs would cost Four Hundred Thousand Dollars ($400,000.00), thereby exceeding the fair market value of the residence. As a result, the trial court appropriately used the fair market value of the residence plus attorney fees.

SALES DISCLOSURE FORM – FRAUD – CRIME VICTIMS RELIEF ACT (CVRA).

_Wysocki v. Johnson_, 2014 Ind. LEXIS 808. This is the second time that this case has risen to the Indiana Supreme Court level. In 2006 the Johnsons sold a house they built new in 1973 to the Wysockis. The sales disclosure revealed no problems. The Wysockis had the building inspected. After moving in, the Wysockis discovered multiple problems, which they were apparently able to show were known to the Johnsons when they filled out the sales disclosure form. After a bench trial, the trial court awarded the Wysockis almost $14,000.00 in damages but no attorney’s fees, costs or damages under the CVRA. On the first trip to the Supreme Court, the Supreme Court found that sellers may be liable for fraudulent misrepresentations but that the trial court’s finding that the defects had been existing for some time and should have been obvious, fell short of establishing whether or not the Johnsons had actual knowledge. On remand, the trial court found that the defects were clearly within Johnson’s actual knowledge and reaffirmed
its judgment, including the denial of fees and costs under the CVRA. The Court of Appeals in Wysocki v. Johnson 2014 4 N.E.3rd 1218 (Ind. App. 2014) decided that damages could not be awarded under the CVRA unless there was an actual conviction of a crime and that the elements of the criminal conviction beyond a reasonable doubt be met. This created concern among many practitioners.

The Supreme Court granted the transfer, vacating the Court of Appeals decision and affirmed the trial court’s denial. The Wysockis argued that under prior Supreme Court cases, the application of the CVRA was mandatory if the elements were met. The Supreme Court stated that while that is true, the Wysockis plead alternative theories of recovery, not under the CVRA. As a result, the trial court had discretion as to how to award the damages including whether or not to award CVRA damages. The Supreme Court expressly noted that this may require choices be made in pleading a case either under the CVRA alone and forgo alternative theories and run the risk of not recovering anything. The Supreme Court also clarified that the CVRA is applicable if the elements of the crime are shown by preponderance of the evidence.

**TAX SALE – NOTICE – SUBSTANTIAL COMPLIANCE.** 219 Kenwood Holdings LLC (Kenwood) v. Properties 2006, 2014 Ind. App. LEXIS 512 (Ind. App. 2014). Kenwood Holdings LLC was the owner of property in Hammond, Indiana. The property was sold at tax sale to Unexpected Holdings LLC which later assigned the sale and its rights to Properties 2006, LLC. Properties 2006, sent Kenwood notice of its purchase and its intent to petition for a tax deed as required by I.C. 6-1.1-25-4.5. Properties 2006, later petitioned for a tax deed sending Kenwood notice. Kenwood attempted to refinance the property but was unsuccessful so Kenwood filed an objection to the issuance of the tax deed claiming that the first notice did not comply with the statute. The trial court disagreed and Kenwood appealed.

The Court of Appeals affirmed. Kenwood’s main objection was based on a literal reading of the statute claiming that Properties 2006, notice that it would petition on or after a certain date should instead have read would obtain a tax deed on a date certain. The Court of Appeals found that it would be impossible to give a notice as to when the court would issue a tax deed and disagreed. Kenwood then objected to the fact that the notice did not set out each enumerated element of the statute. The Court of Appeals found that all of the elements existed or were substantially complied with the notice narrative.

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**Probate Trust & Real Property CLE and Holiday Lunch - 2 hr. CLE**

**Dec. 17, 2014 • 10 am - 1:30 pm**

After Windsor and Baskin: Estate, Tax and Benefit Planning for Same Sex Families

The Section will be collecting hats, gloves & scarves for children in need this year (any size – boy or girl). If you are able to participate, please bring your donated items to the holiday lunch on Dec. 17.

To register online: [www.inbar.org](http://www.inbar.org), use drop down menu for CLE & Events.

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**Spring CLE & Breakfast**

**May 6, 2015**

**Trust Administration - Current Update**

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- Eric Manterfield
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