

In the Indiana Court of Appeals
No. 53A01-0306-CV-220

IN THE MATTER OF THE GUARDIANSHIP OF)	Appeal from the
)	Monroe Circuit Court
JOSEPHINE A. HICKMAN.)	
)	Trial Court Cause No.
)	53C07-0108-GU-60
LEO E. HICKMAN, JR., Appellant/Respondent,)	
)	The Honorable
vs.)	Viola J. Taliaferro,
)	Presiding
IRWIN UNION BANK, Appellee/Movant.)	

APPELLANT'S BRIEF

Dated: November 10, 2003

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION 1

STATEMENT OF ISSUES..... 2

STATEMENT OF THE CASE..... 3

STATEMENT OF FACTS 8

 Background 8

 The issue of rescission 9

 Attorney Fees 14

SUMMARY OF ARGUMENT 15

ARGUMENT 18

 A. THE TRIAL COURT HAD NO JURISDICTION TO ADDRESS
 RESCISSION IN THE FIRST PLACE..... 18

 B. THE TRIAL COURT HAD NO JURISDICTION TO ADDRESS
 RESCISSION AFTER THE CASE ENDED..... 24

 C. FINDINGS OF UNDUE INFLUENCE WERE NOT
 SUFFICIENT. 27

 1. No complaint and summons..... 28

 2. No jury trial. 28

 3. Leo never a party..... 29

 4. The Bank picked a remedy. 29

 5. The remedy of rescission was waived or estopped in this case. 29

 6. Leo never given an opportunity to defend against rescission. .. 30

7. Rescission is beyond the scope of a guardianship case..... 33

8. Improper standing..... 35

9. Undue influence not in dispute..... 35

10. *Res judicata*, preclusion or estoppel do not apply..... 36

11. Leo denied Due Process of Law. 39

D. LEO ENTITLED TO AUTOMATIC CHANGE OF JUDGE..... 40

E.. EXCESSIVE ATTORNEY FEES..... 43

CONCLUSION..... 47

WORD COUNT CERTIFICATE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Bartle v. Health Quest</i> , 768 N.E.2d 912 (Ind.App. 2002)	36, 37
<i>Bradley v. State</i> , 649 N.E.2d 100, 106 (Ind. 1995)	25, 27
<i>Briggs v. Clinton County Bank</i> , 452 N.E.2d 989, 1004 (Ind. App. 1983)	40
<i>Brownlee v. Switzer</i> , 49 Ind. 221 (1874).....	43
<i>Burnheimer v. Noble Circuit Court</i> , 234 Ind., 139, 124 N.E.2d 379 (Ind. 1955)	40
<i>Chavis v. Patton</i> , 683 N.E.2d 253, 257 (Ind.App. 1997).....	43
<i>City of Elkhart v. Smith</i> , 191 N.E.2d 522 (Ind. App. 1963)	1
<i>City of New Haven v. Allen County Zoning Board</i> , 694 N.E.2d 306 (Ind. App. 1998)	25, 27
<i>Connecticut Indemnity v. EBI</i> , 652 N.E.2d 880, 883 (Ind.App. 1995)	36, 37
<i>Curtis v. Loether</i> , 415 U.S. 189, 94 S.Ct. 1005 (1974)	28
<i>Dickhut v. Chambers</i> , 185 N.E.2d 436, 437 (Ind. 1933).....	34
<i>Emry v. Beaver</i> , 137 N.E.55 (Ind. 1922)	23, 33
<i>Estate of Jaworski v. Jaworski</i> , 479 N.E.2d 89 (Ind.App. 1985)....	19, 20, 33
<i>Fairchild v. Criminal Court of Marion County</i> , 103 N.E.2d 352 (Ind. 1952)	25, 27
<i>Farley v. Farley</i> , 300 N.E.2d 375, 380 (Ind.App. 1973)	25
<i>Farner v. Farner</i> , 480 N.E.2d 251 (Ind.App. 1985)	40
<i>Florida National Bank of Palm Beach County v. Genova</i> , 460 So.2d 895 (Fla. 1985)	34
<i>Freeman v. Lane</i> , 504 So.2d 1297 (Fla.App. 1987)	34

<i>Halpen v. Schwartz</i> , 426 F.2d 102 (2 nd Cir. 1970).....	37, 38
<i>Harper v. Wheatley</i> , 244 Ind. 245, 191 N.E.2d 708 (Ind. 1963)	40
<i>Harrison v. Bishop</i> , 30 N.,E., 1069 (Ind.1982).....	23
<i>Hudson v. Hudson</i> , 484 N.E.2d 579 (Ind.App. 1985)	25
<i>Illinois central Gulf R.R. Co. v. Parks</i> , 390 N.E.2d 1078, 1081 (Ind.App. 1979)	36
<i>Indiana & Mich.Elec. Co. v. Terre Haute Indust., Inc.</i> , 467 N.E.2d 37 (Ind.App. 1984)	30
<i>Inlow v. Henderson Daily</i> , 787 N.E.2d 385 (Ind.App. 2003)	35
<i>Inlow v. Inlow</i> , 771 N.E.2d 1175 (Ind. App. 2002)	35
<i>In re Appeal Wickersham</i> , 594 N.E.2d 498, 501 (Ind.App. 1992)...	43
<i>In re the Commitment of Heald v. Blank</i> , 785 N.E.2d 605 (Ind Ct. App. 2003).	20, 24, 34
<i>In re Estate of Inlow</i> , 735 N.E.2d 240 (Ind.App. 2000).....	45
<i>In the Matter of the Guardianship of Knowlton</i> , No. 83-CA-15, 1983 WL 7125 at *2 (Ohio App. 1983).	22, 34
<i>In the Matter of the Johnson Trust, Lowe v. Johnson</i> , 469 N.E.2d 768, 771 (Ind.App. 1984)	40
<i>In re the Marriage of Barley</i> , 712 N.E.2d 537 (Ind.App. 1999)	25, 27
<i>In re Schneider</i> , 710 N.E.2d 178 (Ind. 1999)	45
<i>In re Van Houten’s Will</i> , 124 N.W. 886 (Iowa 1910).....	20, 24
<i>Johnson v. Cody</i> , 212 Ind. 247, 8 N.E.2d 971 (Ind. 1937)	40
<i>Kney v. Gahimer</i> , 193 N.E.395 (Ind.App. 1935)	40
<i>Kutzner v. Meyers</i> , 108 N.E. 115 (Ind. 1915)	19, 33
<i>Lasher v. Gerlach</i> , 23 N.E.2d 296, 299 (Ind.App. 1939).....	20, 23, 24, 29

<i>Long v. Marion Superior Court</i> , 418 N.E. 2d 218, 219 (Ind. 1981)	18
<i>Major v. OEC</i> , 743 N.E.2d 276 (Ind.App. 2001)	45
<i>Matter of Goetcheus</i> , 446 N.E.2d 39 (Ind.App. 1983)	40
<i>Miller v. Paulson</i> , 169 N.W.203 (Iowa 1918)	20, 24, 33
<i>Nesbitt v. Rising Sun-Ohio County Cmty. Sch. Corp.</i> , 720 N.E.2d 447 (Ind. Ct. App. 1999)	19
<i>Oliver v. Oliver</i> , 554 N.E. 2d 8, 10 (Ind.App. 1990)	33
<i>Palace Pharmacy, Inc. v. Gardner & Guidone, Inc.</i> , 39 N.E.2d 642 (Ind.App. 1975)	1
<i>Paternity of Fox v. Fox</i> , 514 N.E.2d 638, 641 (Ind.App. 1987)	18
<i>Penn Gen. v. Pennsylvania</i> , 294 U.S. 189, 196, 55 S.Ct. 386, 389, 79 L.Ed. 850, 856 (1935)	18
<i>Penney v. Pritchard & McCall</i> , 49 So2d 782, 787 (Ala. 1951)	43
<i>Peterson v. Culver Educational Foundation</i> , 402 N.E.2d 448, 461 (Ind.App. 1980)	36, 37
<i>Pivarnik v. Northern Ind.</i> , 636 N.E.2d 131, 135 (Ind. 1994)	18
<i>Ray-Haynes v. Heinemann</i> , 760 N.E.2d 172, rehearing granted 768 N.E.2d 899 (Ind. 2002)	28
<i>Rios v. Rios</i> , 717 N.E.2d 187 (Ind.App. 1999)	30
<i>Rosenfield v. Rosenfield</i> , 6 N.E.2d 938 (Ind. 1937)	34
<i>Schroeder v. Dickinson Trust Co.</i> , 38 N.E.2d 868 (Ind.App. 1942)	21
<i>Seligman v. Dean</i> , 542 N.E.2d 1030, 1032 (Ind.App. 1989)	36
<i>Songer v. Civitas Bank</i> , 771 N.E.2d 61 (Ind. 2002)	28
<i>State v. LaPorte County Superior Court</i> , 247 Ind. 137, 211 N.E.2d 612 (Ind. 1965)	40

<i>Stockton v. Leopold</i> , 227 Ind. 426, 429, 86 N.E.2d 530, 531 (Ind. 1949)	40
<i>Taylor v. Taylor</i> , 93 N.E.9, 11 (Ind. 1910)	23, 33
<i>Thorn v. Cosand</i> , 67 N.E.257 (Ind. 1903)	22
<i>Town of Flora v. Indiana Service Co.</i> , 53 N.E.2d 161, 163 (Ind. 1944)	36
<i>Trojnar v. Trojnar</i> , 698 N.E.2d 301, 303 (Ind. 1998)	43
<i>Underhill v. Dean</i> , 442 N.E.2d 1136, 1139 (Ind.App. 1982)	22
<i>Vadas v. Vadas</i> , 762 N.E.2d 1234, 1242 (Ind. 2002)	39
<i>White v. McBride</i> , 937 S.W.2d 796, 803 (Tenn. 1996)	44

Constitutional Law

<u>Unites States Constitution</u> , Amendment VII	28
<u>Indiana Constitution</u> , Article 1, Section 20	28
<u>Indiana Constitution</u> , Article 1, Section 12	39

Statutes and Court Rules

Ind. Code § 29-1-5-1	23
Ind. Code § 29-1-7-2.....	18
Ind. Code § 29-1-7.5-3(22).....	22
Ind. Code § 29-1-13-10.....	21
Ind. Code § 29-1-15-12.....	21
Ind. Code § 29-3-2-2(d)	18

Ind. Code § 29-3-2-2(e).....	18
Ind. Code § 29-3-2-6(a).....	18
Ind. Code § 29-3-2-6.....	20
Ind. Code § 29-3-3-4.....	21
Ind. Code § 29-3-9-9(a).....	1
Ind. Code § 29-3-5-1(e).....	1, 28
Ind. Code § 29-3-5-3.....	19
Ind. Code § 29-3-5-5.....	19
Ind. Code § 29-3-6-2.....	22
Ind. Code § 29-3-8-3(2).....	27
Ind. Code § 29-3-8-4(20).....	22
Ind. Code § 30-4-3-3(a)(11).....	22
Ind. Code § 33-4-2-3.....	18

Court Rules

Indiana Appellate Rule 8.....	6, 27
Ind. Rule 1.5 of Professional Conduct.....	44
Ind. Trial Rule 3.....	18, 28
Ind. Trial Rule 12(B)(8).....	19
Ind. Trial Rule 54(B).....	28
Ind. Trial Rule 58(B)(4).....	25
Ind. Trial Rule 65(C).....	1

Ind. Trial Rule 69.....	26
Ind. Trial Rule 70.....	26
Ind. Trial Rule 71.....	26
Ind. Trial Rule 75(E).....	27
Ind. Trial Rule 76.....	40
Ind. Trial Rule 76(C)(6)	4

Other Authorities

9 A.L.R.3 rd 774, <u>“Mental Condition Which Will Justify The Appointment of Guardian, Committee, Or Conservator Of the Estate For An Incompetent or Spendthrift,”</u> Sec. 3(b) (1966)	33
E.C. 2-17.....	44
E.C. 2-18.....	44
<u>Restatement of the Law, Second, Judgments, Section 27, Issue Preclusion Comment (i)</u>	37, 38
<u>Restatement of the Law, Second, Judgments, Section 27, Issue Preclusion Comment (h)</u>	38

INTRODUCTION

Leo E. Hickman, Jr. (“Leo”) here files a third appeal concerning his siblings’ desire to place their mother under a guardianship.¹ After the guardianship case was over, the newly appointed guardian of the estate, Appellee Irwin Union Bank (“Bank”), filed a motion to rescind shares of stock Josephine had given Leo prior to the guardianship case being filed. Leo objects to the trial court granting such relief, denying his motion for automatic change of venue from the judge, and ordering Josephine’s estate to pay Joseph three hundred sixty seven thousand forty three dollars and fifty cents (\$367,043.50) in attorney fees and expenses.²

¹ In the first appeal Leo objected to the trial court signing a preliminary injunction which effectively mandated a non-party corporation, Hoosier Outdoor Advertising Corporation (“Corporation”), to provide health care insurance benefits to six of Josephine A. Hickman’s (“Josephine”) adult, emancipated children, including the Appellee/Petitioner Joseph D. Hickman (“Joseph”). The Court of Appeals has affirmed the preliminary injunction, but the Supreme Court of Indiana has yet to rule on Leo’s petition to transfer. In the second appeal Leo objected to the trial court denying him a right to a Jury trial contrary to I.C. § 29-3-5-1(e) and permitting the *guardian ad litem* to testify. Recall that the trial court impaneled an advisory jury, accepted its verdict in favor of a guardian of the estate, but rejected its verdict against a guardianship of the person. Leo also objected to the denial of his motion for change of judge because of the trial judge’s *ex parte* conduct in this case.

² Leo adopts herein the appeal briefs and all issues raised in Cause Number 53A01-0208-CV-328 and Cause Number 53A01-0211-CV-446 so as to avoid repetition and to avoid any argument of waiver. Obviously the trial court rescinded gifts and awarded attorney fees as if she would be affirmed on all issues. For example, should the appeal in CV-446 result in a change of judge or that a Jury should rehear the case, a new judge and a new Jury would need to readdress issues concerning rescission and fees. Should the trial court’s appointment of a guardian of Josephine’s estate be reversed, then the Bank had no standing to request rescission of the stock in the first place and such order should be vacated. Should the trial court’s appointment of a guardian of Josephine’s person be reversed (e.g., because the trial court should have upheld the advisory jury’s verdict), then the Bank’s motion to rescind would no longer have any findings of undue influence to support it. If successful, Leo would also be entitled to attorney fees for providing a benefit to Josephine. I. C. § 29-3-9-9(a). Should the injunction in CV-328 be reversed, Leo would be entitled to attorney fees for having defended against it. Trial Rule 65(C); Palace Pharmacy, Inc. v. Gardner & Guidone, Inc., 329 N.E.2d 642 (Ind.App. 1975); City of Elkhart v. Smith, 191 N.E.2d 522 (Ind.App. 1963). This list is not exhaustive because the

STATEMENT OF ISSUES

A. During a case involving a petition for guardianship, whether the trial court has jurisdiction to declare the validity of the prospective ward's gifts to her children that occurred prior to the guardianship case being filed?

B. After the Court of Appeals has jurisdiction over final orders appointing guardians of the person and estate of a ward, whether the trial court can expand its judgments and rescind gifts that the ward made before the guardianship petition was even filed?

C. Whether the trial court's findings of undue influence in granting judgment in favor of a guardian of the ward's person are sufficient to invalidate gifts: (1) where the recipient did not receive any complaint or summons, (2) was denied a Jury, (3) was never a party, (4) where the guardian of the estate picked the remedy at the last minute, (5) where the trial court and all other parties acted all along as if the gifts were not an issue, (6) where the recipient was not given an opportunity to defend himself, (7) where the gifts occurred over a year before, (8) where the parties to the guardianship had no standing to attack the gifts, (9) where

possible outcomes of the prior two appeals and how each might effect the issues in this appeal are too numerous to mention, much less address. Any number of possible outcomes in CV-446 and CV-328 could have an impact on whether the trial court should have rescinded Josephine's gifts and to what extent any family member would be entitled to attorney fees and expenses. Once the appeals in CV-446 and CV-328 are final and mandates issued, Leo requests that this Court remand the orders involved in this third appeal to the trial court for reconsideration in light of any other appellate opinions, or permit further briefing. Leo has written his appellant brief under the assumption that the trial court is affirmed on all issues in the prior appeals.

the ward's incapacity was not contested so undue influence was not even an issue, (10) where estoppel by verdict or finding does not apply, or (11) where the trial court denied the recipient of the gifts Due Process of Law.

D. Where a newly appointed guardian of an estate files a motion to rescind gifts, whether the trial court should have granted the recipient of the gifts an automatic change of judge under Trial Rule 76(C) because it was the first time the trial court attempted to address the issue or the “defendant” in his individual capacity?

E. Where the only issue in a guardianship proceeding is whether the ward needs a guardian of the person and/or estate, whether she should have to pay her son \$367,043.50 in attorney fees and expenses where he employs 13 people to work on the case, has 4 attorneys sit through the entire trial, and has 2 attorneys work on virtually every facet of the case, including matters solely related to him personally?

STATEMENT OF THE CASE

On March 19, 2002 Joseph filed a “Petition for Appointment of Permanent Guardian Over the Person and Estate of Josephine Hickman”. *App, CV-446, p.109*.³ Two days later Leo filed a written response in opposition and requested

³ The appellant has filed a 1271 page appendix in this case that attempts not to recopy what has already been provided to the Court of Appeals in the prior two appeals. Citations to the appendix in the appeal from the preliminary injunction (Cause No. 53A01-0208-CV-328) will appear as “*App, CV-328, p.—*“. Citations to the appendix in the appeal from the orders appointing guardians (Cause No. 53A01-0211-CV-446), will appear as “*App, CV-446, p.—*“. Citations to the appendix filed in this appeal will appear as “*App, CV-220, p.—*“.

a “trial by jury on all issues and matters raised in the guardianship petition and counterclaim”. *Id.*, p.139. The trial court denied Leo a jury. *Id.*, p.247. In response to Joseph’s petition the trial court appointed Susan H. Nelson as Josephine’s *guardian ad litem* and Robert L. Ralston as Josephine’s attorney. *App*, CV-220, p.3.

On July 12, 2002 all of Leo’s siblings filed a separate lawsuit challenging his control of the Corporation which is pending in another division of the Monroe Circuit Court in Cause Number 53C07-0207-PL-1237. *App*, CV-446, p.181. Leo filed defenses and counterclaims in PL-1237 pertinent to control of the Corporation, which the guardianship court in GU-60 has never considered. *Id.*, p.89. At the pretrial Josephine’s *guardian ad litem*, Ms. Nelson, referred to this as follows: “As far as control of this corporation, that is now subject to an additional lawsuit.” *App*, CV-328, p.460.

Nearly a year after the guardianship case began, on June 25, 2002, Joseph filed a motion for a temporary restraining order to prevent Leo from canceling his siblings’ health insurance. *App*, CV-446, p.146. The trial court granted the motion, without notice to Leo or his counsel. *Id.*, pp. 180-82, 207. Leo filed a verified application for change of judge pursuant to Trial Rule 76(C)(6) because of the *ex parte* conduct, *id.*, pp. 206-20, which the trial court denied. *App*, CV-220, p.9. On July 24, 2003 the trial court entered a preliminary injunction against Leo. *App*, CV-446, pp.231-32. Leo appealed, and this Court affirmed. *App*, CV-220, p.574. Leo filed a petition with the Supreme Court of Indiana to accept

transfer, which is pending. *Id.*, p.597.

An advisory jury sat for a four day trial. *Id.*, pp.259, 297. At the conclusion of the evidence the trial court denied both Joseph's and Leo's motions for judgment on the evidence. *Id.*, pp.307-08. The advisory jury rendered a verdict "that Josephine A. Hickman is an incapacitated person and that the appointment of a guardian is necessary as a means of providing care and supervision of her property." *Id.*, p. 36. The trial court accepted this verdict and entered judgment accordingly.⁴ The advisory jury also rendered a verdict that "whether or not Josephine A. Hickman is an incapacitated person, the appointment of a guardian is not necessary as a means of providing care and supervision of her physical person." *Id.*, p.34. The trial court rejected this verdict. *Id.*, p.43. Instead, on October 15, 2002 the trial court signed Joseph's proposed findings of fact, conclusions of law, *verbatim*, and entered judgment in favor of Joseph on his petition for appointment of guardian of the person.⁵ *Id.*, pp.41-57. On December 18, 2002 the trial court appointed Joseph as guardian of Josephine's person and the Bank as guardian of her estate.⁶ *Id.*, p.61. Leo appealed these decisions which this Court has under

⁴ "On September 6, 2002, the advisory jury returned a verdict that granted the Petition and found that Josephine A. Hickman is an incapacitated Person and that the appointment of a guardian is necessary as a means of providing care and supervision of her property. The court accepts the advice of the jury, and the Motion for Special Findings and Conclusion is denied as to this verdict." *App, CV-446, p.32.*

⁵ "Based on the findings of fact and conclusions of law set out above, the Court hereby GRANTS Joseph Hickman's petition for a permanent guardian over Josephine Hickman's person." *App, CV-446, p.56.*

⁶ "Based upon the findings of fact and conclusions of law set out above, the Court hereby appoints Joseph Hickman as guardian of Josephine's person and Irwin Union

review.

The Court of Appeals acquired jurisdiction over all judgments and orders of the trial court on October 31, 2002 when the trial court clerk issued its Notice of Completion of Clerk's Record.⁷ *App, CV-446, p.19.*

On November 20, 2002 Joseph petitioned the Court for instructions asking the Bank to pay his attorney fees and expenses. *App, CV-220, p.873.* At the hearing on November 22, 2002 the trial court requested that the attorneys file their time records. Joseph submitted his on December 2, 2002 and supplemented them on May 5, 2003. *Id., pp.885, 1076.* Respectively on December 11, 2003 and on May 27, 2003, Leo responded to Joseph's petitions and objected to the excessive amounts requested. *Id., pp.977, 1122.*

On December 2, 2002 Leo filed his petition for fees, which were supplemented on December 4, 2002. *App, CV-220, pp.1166, 1182.* On December 9, 2002 Joseph responded. *Id., p.1229.* On May 29, 2003 the trial court held a hearing on all outstanding issues. *Id., p.320.* Thereafter, on June 9, 2003 and then on June 16, 2003 the trial court awarded attorney fees and expenses to Barnes & Thornburg in the amount of \$297,020.50, and to Thomas McGlasson in the amount of \$70,023.00.⁸ *Id., p.572.* The trial court denied Leo a dime. *Id., p.569.*

Bank as guardian of Josephine's estate." *App, CV-446, p.70.*

⁷ Appellate Rule 8.

⁸ In particular, "The court, having considered the fees and expenses submitted by Thomas McGlasson, now orders the guardian to pay the attorney fees and expenses for Barnes & Thornburg in the amount of \$297,020.50, and the attorney fees and expenses for Thomas M. McGlasson in the amount of \$70,023.00." *App, CV-220, p.572.*

On March 12, 2003 the Bank filed a “Motion to Rescind Stock Transfer and Restore Shares to Incapacitated Person”. *App, CV-220, p.119*. That same day Leo asked the trial court for a scheduling order for time to address the Bank’s motion. *Id., p.119*. Joseph and the Bank objected. *Id., pp.129, 138*. The Court held the issue in abeyance until it denied Leo’s motion at the hearing. *Id., p.565*. At the May 29, 2003 hearing Leo presented argument and adopted by reference specific papers previously filed with the Court. *Id., pp.327-59*. On June 2, 2003 the trial court granted the Bank’s motion to rescind gifts and ordered the share certificates delivered to the Bank.⁹ *Id., p.558*. This shifted voting control of the Corporation to Josephine (and thus the Bank).

Also in response to the motion for rescission, on March 14, 2003 Leo filed a motion for automatic change of venue from the judge, along with a supporting brief. *App, CV-220, p.168*. On April 15, 2003 the Bank responded. *Id., p.275*. Leo replied on May 29, 2003. *Id., p.285*. On June 9, 2003 the trial court

⁹ The Order being appealed reads as follows: “Petitioner, Irwin Union Bank, Guardian of the Estate of Josephine A. Hickman, by counsel, filed its Motion to Rescind Stock Transfer and Restore Shares to Incapacitated Person. The court, being duly advised in the premises, now finds that the Motion to Rescind Stock Transfer and Restore Shares to Incapacitated Person is hereby granted. IT IS THEREFORE ORDERED by this court that the July 19, 2001 transaction to transfer stock from Josephine Hickman to her child is hereby rescinded. IT IS FURTHER ORDERED that the 120 shares of voting stock purportedly transferred to Leo Hickman, Jr. on July 19, 2001, and the 124 shares of nonvoting stock purportedly transferred to each of Leo Hickman, Jr.’s siblings on July 19, 2001 shall be restored to Josephine Hickman’s estate on or before June 6, 2003 at 5:00 o’clock p.m. Leo Hickman, Jr. and each of his siblings shall execute the stock certificates and any other documents necessary to comply with this Order. SO ORDERED FROM THE BENCH ON THE 29TH DAY OF MAY 2003 AND ENTERED OF RECORD THIS 2ND DAY OF JUNE 2003.” *App, CV-220, p.558*.

denied Leo's motion for automatic change of judge.¹⁰ *Id.*, p.565.

On June 4, 2003 Leo filed his notice of appeal and motion to stay enforcement of this additional judgment. *App*, CV-220, p.560. The next day the trial court denied it. *Id.*, p.564. Leo then filed a motion to stay in CV-220 and a petition for writ in aid of appellate jurisdiction in CV-446. *Id.*, p.796. After oral argument the Court of Appeals denied both motions on July 10, 2003.

STATEMENT OF FACTS

Background

This paragraph is a summary of the facts recited to this Court by Leo and Joseph in their prior appeal briefs: Josephine is an elderly widow who resides at Meadowood Retirement Community in Bloomington, Indiana. She has seven adult children, including Leo and Joseph. All of the family members own shares of stock in Hoosier Outdoor Advertising Corporation. The Corporation's stock is divided into voting and non-voting shares. Between them, Josephine and Leo own all of the voting stock. At Josephine's death, her purported Will dated September 18, 1986 provides for Leo to inherit all of the voting stock Josephine owns at the date of her death and for Leo's siblings to inherit her non-voting stock. In February, 1988, Josephine fell climbing her back steps and hit her head. Up until 1997, however, she engaged in a pattern of making annual gifts of Corporation

¹⁰ The Court's Order reads "Leo E. [sic] Hickman, Jr.'s' Motion for Automatic Change of Judge filed on March 14, 2003 was Denied. The Motion to Rescind Stock Transfer and Restore Shares filed by the Guardian of the Estate did not state or allege a new cause of action." *App*, CV-220, p.565.

stock to her children. Consistent with the dispositions provided for in the 1986 Will, Josephine always gave voting stock to Leo, and non-voting stock to his siblings. She made no gifts in 1998, 1999 or 2000. On July 19, 2001, Josephine gave Leo 120 shares of voting stock and each of his siblings 124 shares of non-voting stock. Although all of Josephine's children ended up owning the same number of shares, the gift to Leo was sufficient to shift to him majority control of the Corporation. *App., CV-220, pp.608, 707.*

The issue of rescission

After Joseph filed a petition for guardianship over his mother, all of Leo's siblings filed a separate lawsuit against him challenging his control of the Corporation which is pending in another division of the Monroe County Circuit Court in Cause Number 53C07-0207-PL-1237. *App, CV-220, p.181.* Leo filed defenses and counterclaims pertinent to control of the Corporation, which the guardianship court has never considered. *Id., p.189.*

After appointment as Josephine's guardian of the estate, on March 12, 2003 the Bank filed a "Motion to Rescind Stock Transfer and Restore Shares to Incapacitated Person". *App, CV-220, p.119.* The motion sought to nullify Josephine's gifts on July 19, 2001. The Bank has never filed a complaint against Leo. Instead the Bank relied on the trial court's prior findings (in the order appointing a guardian of the person) that Leo's actions of July 19, 2001 amounted to

an undue influence transaction. *App, CV-446, p.52.*

At the pretrial conference on July 24, 2002 it was clear that matters involving Josephine's gifts on July 19, 2001 were not to be included in the guardianship trial. *App, CV-220, pp.102, 293.*

Mr. Delaney, attorney for Joseph, stated the following: "There are just two elements to make out the guardianship. One is that the person is not competent as defined and the second is that there's a necessity for the guardianship. We believe those two issues can be addressed to the jury." *July 24, 2002 hearing, p.117, lines 12-16.*

The Court: "of course, the issues concerning the guardianship are whether or not Ms. Hickman is competent and whether there's a necessity for it." *Id., p.127, lines 21-24; again on p.131, lines 10-11.* As to the length of the trial, the Court stated: "I think that one day or three-fourths of a day for each one [side], because the issues are really relatively narrow here." *Id., p.128, lines 23-25.*

Mr. Shirley: He [Mr. Delaney] just said something that was brand new and I want to make sure the clerk of the court caught it. And that is that the issues involving this corporation, what's going on with the corporation, are going to be discussed at this guardianship hearing. Because it does go to the necessity. And that's, that was new. ... we're definitely going to have an issue before this jury on why Joseph brought this guardianship petition in. What is really going on here. And this, these corporation documents are going to be a part of it. *Id., pp.136-37, lines 22-9.*

The Court's response: "No. No, you're not either. No, you're not. No, you're not." *Id., p.137, lines 10-11.*

Mr. Delaney stated: "we'll file a request that the Court restrict Mr. Hickman from in any way clouding the title of the voting shares." *Id., p.150, lines 10-12.* (Joseph never filed any such request.)

Mr. Delaney continued: “He [Leo Hickman] claims that on July 19th he, of last year, he became the majority shareholder. We believe that that’s in dispute and that that’s an asset that should come under the estate.” *Id.*, p.151, lines 22-25. In response the Court stated “My order [of August 29, 2001] did not reach that, no.” *Id.*, p.152, l.2.

Mr. Shirley: “He’s [Mr. Delaney] now asking to restrict his [Leo’s] ability to sell something he owns.” *Id.*, lines 12-13.

Mr. Delaney: “I will file that by the 29th, Your Honor.” *Id.*, line 20. (Joseph never filed anything by July 29, 2002.)

The Court: “Then it’s just like everything else that people filed, file, there will be answers. If we have to have a hearing, we’ll have a hearing. But we’re going to do all of this, whatever we’re going to do, so that on September the 3rd, I’m going to have a jury here. So do you want to file it, file it. I am going to be going on vacation on the 16th. I will hear it before that time. I will make the time. You can come down at 5:00 o’clock in the afternoon for a hearing. It’s fine by me. *Id.*, p.152-53, lines 21-5.

The trial court made it clear that if any matter involving the corporation was going to be addressed at trial, Joseph would have to file such a request by July 29, 2002. He did not.

At trial, concerning the issue of undue influence the trial court gave Joseph the opportunity to introduce evidence from her doctor and nursing home providers that Josephine lacked capacity. Joseph also questioned Leo as to what happened on July 19, 2001. Leo attempted to respond to Joseph’s version of the facts surrounding the events of July 19, 2001 (whether they be valid gifts as Leo maintained or the result of undue influence as Joseph maintained). But the trial

court did not allow Leo to testify on the issue of undue influence and would not allow Leo to impeach any of Joseph’s witnesses on this issue. The trial transcript shows the following:

Mr. Shirley to witness Joseph Hickman: Question: “Did you file a motion with the Court in the guardianship proceedings to have Leo or the corporation provide you with free health insurance? *App, CV-220, p.866. . . .*

Objection by Mr. Delaney: “It is not relevant. If he had the worst motives in the world, it doesn’t matter if his mother needs a guardian and if in fact her assets need protection. He’s [Mr. Shirley] trying to try another case here.

The Court: “That’s right and we’re not going to do it.” *Id., p.867.*

* * * *

Mr. Shirley to witness Leo Hickman: “Do you believe that your siblings are after control of the corporation?”

Mr. Delaney: “Your honor I object. It’s the same question.

The Court: “I believe that’s the same thing I just said. Let’s focus on whether or not Mrs. Hickman is competent or not competent, whether or not she needs a guardian over the person, over the estate and necessity for it. If you can stay there with that then I think we can move on.” *Id., p.868.*

* * * *

Ms. Nelson [Josephine’s *guardian ad litem*]: “Your honor it has always been my position in this case that the issue of voiding the stock transfers of July last year is not before the Court, and so I think this instruction [number 8 that the trial court did not give] really gets there.” *Id., pp.869-71.*

* * * *

The Court: “[T]here is precious little else that will have to be decided once the jury comes back, other than who the Petitioner [guardian] is going to be.” *Id.*, p.872.

Obviously the trial court’s finding of undue influence is the bedrock of the Bank having obtained rescission. In addition to the trial court’s rulings concerning the scope of the evidence, the Court of Appeals should consider the timing and necessity of any finding of undue influence. By the time the trial had concluded, the issue of incapacity was not in dispute.¹¹ The trial court and the Jury were left to resolve only the issues of whether Josephine needed a guardian of the person or needed a guardian of the estate. *App, CV-220, pp.776-77.* (“Mrs. Hickman, as you saw here in the courtroom here, here for two days, is not in good shape and we don’t dispute that. . . . I’m not going to focus on this incapacity issue. . . . whether or not she’s in good shape or bad shape. Whether or not she’s totally incapacitated. Whether or not she’s insane. Whether or not she’s entirely demented, that doesn’t matter. You have to return a verdict for Leo Hickman if a guardian of her person is not necessary.”). In addition to the question of incapacity not being a dispute before the Jury, by the time the trial court signed specific findings of undue influence she had already found incapacity by having accepted the Jury’s verdict concerning a guardian of the estate. *App, CV-446, p.51* (conclusion of

¹¹ That is not to say that Leo admitted to unduly influencing his mother. Far from it. The trial court led Leo to believe throughout the proceedings that the events of July 19, 2001 were not at issue in the case. For purposes of the guardianship case, Leo simply

law number 6: the Advisory Jury's verdict and the trial court's subsequent judgment "necessarily means that the jury concluded that Josephine was incapacitated").

Attorney Fees

As to attorney fees and expenses, at issue in this appeal is not what the attorneys did, but how much Josephine should pay for it.¹² The underlying facts relevant to this are not in dispute. Joseph submitted documentation in support of what his attorneys did in this case. *App, CV-220, pp.885, 1076*. Joseph never provided the trial court with any written fee agreement with his attorneys. The time sheets show that Joseph had four (4) attorneys present at trial, and a total of thirteen (13) people involved in billing on this case. The time sheets show that Joseph involved more than one attorney on virtually every facet of this case. *Id., pp.885*.

Leo provided the Court with a copy of Joseph's time sheets circling all of the occasions when more than one attorney billed for the same matter. *App, CV-220, p.977*. At the hearing the Bank introduced evidence showing the double and triple time spent by Joseph's attorneys. *Id., p.1254*. That upwards of \$340.00 per

conceded that Josephine was incapacitated at the time of trial (September, 2002), over a year after the July 19, 2001 gifts.

¹² Leo believes that he will ultimately succeed in obtaining a new judge to hear this case. Leo also believes that he and Josephine will succeed in having no guardian appointed, either through a new trial or the affirmance of the Advisory Jury's verdict which found no need for a guardian over her person. If so, Leo will again request attorney fees and expenses. Should the Court of Appeals affirm the trial court on these issues, however, Leo is not appealing the denial of his attorney fees and expenses.

hour was excessive for a guardianship case. *Id.*, p.1269 (asserting the highest paid attorney should receive no more than \$250.00 per hour, not the \$340.00 per hour requested). And the Bank listed separately what matters Joseph wanted to pay his attorneys for that did not involve Josephine at all. *Id.*, p.1262 (a total of \$176,621.74 of unrelated charges). The Bank sought to reduce Joseph's request from \$367,043.50 to \$171,991.50. *Id.*, p.1269. The trial court did not deduct a dime.

SUMMARY OF ARGUMENT

A few years before Josephine hurt herself in February, 1988, the family had a falling out. Leo was her favorite child and ran the family owned Corporation. She told her children that Leo would control and inherit the Corporation and his siblings went ballistic. After the dust settled Leo gave them \$300,000 of life insurance on Josephine that he personally paid for, and she arranged for the Corporation to give them \$500,000 more. Knowing that they would split \$800,000 in life insurance upon Josephine's death, Leo's siblings sat content. Josephine continued her gifting of voting shares to Leo and non-voting shares to his siblings.

After Josephine fell in 1988, Joseph filed his first petition for temporary guardianship, without any notice to Leo, that eventually lost steam. Although the trial court had appointed Joseph and his sister, Jamie, as temporary guardians, they gave up any attempt at court involvement. Josephine's gifts to her children, however, continued every year.

Even though Josephine's capacity to take care of herself diminished, all of her children believe her competent to make gifts because they accepted hundreds of thousands of dollars in gifts from her after the accident.

When Leo was a few shares shy of obtaining majority control of the voting stock under the gifting program, Joseph met with Leo and demanded that the distinction between voting and non-voting stock be eliminated. Joseph wanted to nullify the previous family agreement and moot the provisions of Josephine's Last Will & Testament that gave Leo all of her voting shares. Having been responsible for the Corporation's growth for decades, Leo naturally refused. Gene Tuite, a close friend and advisor to Josephine for many years, called this "sweat equity". Josephine had wanted, and wants now, for Leo to run the Corporation because of his love, trust and hard work. Even if Leo's siblings could contest Josephine's wishes, it is not uncommon that testators in her position would advance an inheritance in conformity to her wishes. In response, Joseph and his siblings (who were members of the board of directors)¹³ made Leo's life a living Hell.

Prior to Joseph demanding that Leo give all of his siblings an equal share of the company (contrary to Josephine's wishes and the articles of the Corporation), the minutes took up less than one page. After Leo refused the settle, however, what were annual board meetings turned into monthly ones. The length of the meetings also increased, the minutes of which were now several pages single

¹³ Josephine elected Leo's siblings to the board of directors only for the purpose of deducting the health insurance premiums she paid for them, and to deduct their travel expenses when they came to visit for the Holiddays.

spaced. Leo as “vice president” turned into Leo as “general manager”. Micro-management at its finest.

For years Leo talked with his mother about what his siblings were up to. Josephine was incensed. Her gifts to Leo on July 19, 2001 were a culmination of a consistent pattern of gifting that Joseph and his siblings had simply stopped.

Because Joseph and his siblings could not file a lawsuit against Josephine directly to overturn what she wanted to give her children, they instead pursued a petition for guardianship. Not because Josephine needed one. By most accounts her condition had not changed much from 1988 to the present. Rather, Leo’s siblings used the guardianship process in an attempt to have the trial court side with them, all the while expecting Josephine to pay for their attorneys fees and expenses and hope for a \$800,000 windfall.

Leo cannot cite to any appendix and explain to the Court of Appeals what has really occurred. But you know. His siblings never invested their own money in this case. Leo believes that this Court should remand the issues involved to a trial court that will address them on the merits, with a balanced scale of justice, and with respect for the narrow issues involving a possible guardianship over Josephine, an eye toward what is solely in her best interests.

ARGUMENT

A. THE TRIAL COURT HAD NO JURISDICTION TO ADDRESS RESCISSION IN THE FIRST PLACE.

The Indiana Probate Code gives exclusive jurisdiction over estates and trusts to the probate courts.¹⁴ The guardianship code by contrast, permits any Indiana state court to exercise jurisdiction, subject to a motion for change of venue to a court with probate jurisdiction.¹⁵ Thus, the Monroe County Circuit Court has subject matter jurisdiction over Josephine.¹⁶ But when the end result of this case is an order that Leo return gifts, the issue here is whether the trial court had jurisdiction over him, not her.¹⁷

“[J]urisdiction over a case becomes exclusive in the court in which the case is first instituted.”¹⁸ Joseph filed a petition for guardianship against Josephine

¹⁴ I.C. § 29-1-7-2.

¹⁵ I.C. § 29-3-2-2(d) & (e) (“Nothing in this section shall be construed as a requirement of jurisdiction.”).

¹⁶ I.C. § 33-4-2-3 (authority “to make all proper judgments, sentences, decrees, orders and injunctions ... in conformity with the constitution and laws of this state”).

¹⁷ Long v. Marion Superior Court, 418 N.E.2d 218, 219 (Ind. 1981) (“exclusive jurisdiction over the particular cause of action vests when the complaint or other equivalent pleading” is filed as provided by Trial Rule 3). This includes *in rem* actions. Penn Gen. v. Pennsylvania, 294 U.S. 189, 196, 55 S.Ct. 386, 389, 79 L.Ed. 850, 856 (1935). Pursuant to I.C. § 29-3-2-6(a) and I.C. § 29-1-7-2 “The entire proceeding and the administration of a decedent’s estate is a proceeding *in rem*.” Thus, the trial court never had personal jurisdiction over Leo. He appeared in the guardianship proceeding to have a say in what the State of Indiana wanted to do to his mother. Such an appearance cannot act as a waiver or otherwise expand the strictly *in rem* jurisdiction of the guardianship court.

¹⁸ Pivarnik v. Northern Ind., 636 N.E.2d 131, 135 (Ind. 1994). This rule applies even “where the subject matter before the separate courts is the same, but the actions are in different forms.” Paternity of Fox v. Fox, 514 N.E.2d 638, 641 (Ind.App. 1987).

and a civil action against Leo. Joseph must have believed the guardianship court had no jurisdiction over Leo concerning her prior gifts or Joseph and his siblings would not have filed the second lawsuit. Indiana does not require defendants to defend twice.¹⁹

Joseph's petition for guardianship gave the trial court authority to determine whether Josephine is incapacitated; and if so, whether she needs a guardian of her person or estate; and if so, who to appoint.²⁰ The trial court did not have jurisdiction to determine whether Josephine made valid gifts a year earlier. The case of Kutzner v. Meyers, 108 N.E. 115 (Ind. 1915), is particularly instructive. "The court did not err in excluding evidence as to the mental capacity of appellant to make a deed at the time he conveyed certain real estate to Mrs. Lamb. The validity of such deed was not in issue and could not be decided in this proceeding."²¹ The fact that a deed was signed and conveyed for no consideration was admissible to show why a guardian might be needed, but the guardianship court had no jurisdiction to address the validity of such a gift.

In accord the more recent case of Estate of Jaworski v. Jaworski, 479 N.E.2d 89 (Ind.App. 1985), where the parties fought about removing the executor.

¹⁹ Trial Rule 12(B)(8).

²⁰ I.C. § 29-3-5-3 (the issues are whether the proposed ward "is an incapacitated person" and there needs to be a guardian appointed "as a means of providing care and supervision of the physical person or property of the incapacitated person"); I.C. § 29-3-5-5 (the issue is to select the person best qualified to serve as guardian); see Nesbit v. Rising Sun, 720 N.E.2d 447 (Ind.App. 1999).

²¹ Kutzner v. Meyers, 108 N.E. 115, 117 (Ind.1915).

In its opinion the Court of Appeals stated that “Appellants have also attempted to raise one additional issue. It involves the Probate Court’s finding that the land contract between Josephine and Aloysious is valid. This finding is mere surplusage and has no effect.”²² If the Court of Appeals did not permit the Probate Court to decide the validity of the land contract in Jaworski, the trial court had no jurisdiction to decide the validity of Josephine’s pre-guardianship gifts in this case.

The Court in Lasher v. Gerlach, 23 N.E.2d 296 (Ind.App. 1939), reversed on this very issue.

“It is manifest that such record cannot be admitted as evidence of a former adjudication in the ordinary sense of that term. It is more nearly like a proceeding in rem where, as a matter of public interest and right, and for his own protection, the mental competency of an individual is determined. If a person be insane, and thereby a menace to public safety, or, if not violent or dangerous, yet so mentally unsound that he is liable to waste his estate and become a public charge, the law provides methods by which the rights and interests of the public and of the insane person himself may be preserved and protected. . . . In neither case is the proceeding an adversary one in the sense that the plaintiff seeks or can be granted any relief against the defendant.”²³

This Court should also consider a couple of statutory sections in the Guardianship Code and the Probate Code that explain the proper exercise of

²² Estate of Jaworski v. Jaworski, 479 N.E.2d 89, 90 n.1 (Ind.App. 1985).

²³ Lasher v. Gerlach, 23 N.E.2d 296, 299 (Ind.App. 1939) (emphasis added), citing In re Van Houten’s Will, 124 N.W. 886 (Iowa 1910); Miller v. Paulson, 169 N.W. 203 (Iowa 1918) (past transactions by the alleged incompetent, offered to show her lack of capacity to manage her affairs, were admissible only upon the inquiry of her competency at the time of trial; the validity of the past transfers could not be at issue). See In re the Commitment of Heald v. Blank, 785 N.E.2d 605 (Ind.App. 2003) (which case shows that the State of Indiana takes the position that issues of mental competency concern the ward’s “current mental competency”, not earlier).

jurisdiction over a ward's property. Indiana Code Section 29-3-2-6 provides that certain statutes involved in the Probate Code apply in the guardianship context as well. Indiana Code Section 29-1-13-10 (commonly known as the Intermeddler Statute) is what Joseph or the Bank could have attempted to use in this case.

If it was believed that Leo possessed property of Josephine's, such as voting shares of stock, any interested person could have requested that the trial court order Leo to appear. The purpose of the statute is to compel the production or delivery of property to see if ownership is questioned.²⁴ Where ownership is disputed, such as in this case where Leo maintains that Josephine gave him the shares, neither Joseph nor the Bank may proceed in the Guardianship Court, but must file an independent civil action, including complaint and summons, notice, the opportunity for an automatic change of venue from the judge, discovery, trial by Jury, and all other protections afforded by the Trial Rules and Due Process of Law.²⁵ Of course on July 12, 2002 all of Leo's siblings did file a separate lawsuit against him, and that cause of action is still pending.²⁶

Another example is Indiana Code Section 29-1-15-12 which involves an

²⁴ Schroeder v. Dickinson Trust Co., 38 N.E.2d 868 (Ind.App. 1942).

²⁵ Id.

²⁶ For good reason the jurisdiction of the Guardianship Court is very limited. If a petition claims that a proposed ward needs a guardian because a nursing home is not providing adequate care, whether the trial court appoints a guardian should not involve a separate negligence case against the nursing home, doctors, or medical caregivers. As in this case, guardianships usually involve a temporary appointment under I.C. § 29-3-3-4, and a hearing is required within 60 days – hardly a sufficient time period to have a trial on tangent issues such as the validity of prior gifts.

executor's or guardian's ability to sell or mortgage real estate. The Court has jurisdiction over the subject matter, but must first "issue appropriate process and notices in order to obtain jurisdiction to so proceed against adverse parties."²⁷ The trial court never sent Leo process or notice concerning the rescission of Josephine's July 19, 2001 gifts.²⁸

In Joseph's words, the purpose of a guardianship proceeding was only to determine whether Josephine required a guardian. The trial court has jurisdiction to answer this question yes or no. It is not one of degree. The trial court in rendering Judgments in this case answered with a simple "yes", with no mention of rescission of anything. A "guardianship is not for litigation of corporate matters between shareholders, the corporation and its management."²⁹

Another way of looking at the issue is to understand that even if Joseph is ultimately successful in the Court of Appeals' affirming the trial court's appointment of a guardian over Josephine's estate, this does not mean that she

²⁷ The trial court signed the June 2, 2003 Order on the basis of a "motion" from the Bank that involved no complaint and summons. At the hearing Leo objected to the motion but the Court entered what was in effect another final judgment without any evidence. Leo does not dispute that the Bank has the authority to file a complaint, with summons, in another case concerning Josephine's gifts of stock on July 19, 2001. I.C. §§ 29-3-8-4(20), 29-1-7.5-3(22), and 30-4-3-3(a)(11) support such authority.

²⁸ The only notice that Josephine and any of her children received was that required by I.C. § 29-3-6-2, which notice tracks precisely what the trial court has jurisdiction to do: "hold a hearing to determine whether a guardian should be appointed", whether Josephine "is an incapacitated person", and whether Joseph "should be appointed as guardian".

²⁹ In the Matter of the Guardianship of Knowlton, No. 83-CA-15, 1983 WL 7125 at *2 (Ohio App. 1983).

cannot right now sign a Last Will & Testament or make a gift.³⁰ Given that Josephine can give away her property right now (before or after any findings or conclusions or judgments in a guardianship case), it stands to reason that no guardianship case can address as relevant any issue concerning the validity of a gift, much less take on the task of declaring prior Wills or gifts void in the same proceeding.³¹

“The investigation of the court would be confined to the person's ability to properly handle his estate and care for himself while living. The judgment of the court was competent evidence to be introduced by appellants as a part of their defense in this case. But such judgment is by no means conclusive and is not a bar to the action herein, even as to those who participated in the application for guardianship. Nor would an adjudication, that testator was of unsound mind and incapable of managing his estate, have been conclusive that he was incapable of making a valid will.”³²

Should Irwin Union Bank in this case file a separate action to rescind the shares of stock Josephine gave all of her children on July 19, 2001, the judgments in this guardianship case are not even admissible. The Court in Lasher v. Gerlach, 23 N.E.2d 296 (Ind.App. 1939), reversed the trial court on this very issue.

³⁰ Underhill v. Deen, 442 N.E.2d 1136, 1139 (Ind.App. 1982) (holding that the requisite intent to make a gift and execute a Will are the same), citing Thorn v. Cosand, 67 N.E. 257 (Ind. 1903) and I.C. § 29-1-5-1; Harrison v. Bishop, 30 N.E. 1069 (Ind. 1892) (holding that a ward under guardianship can sign a valid Will).

³¹ Taylor v. Taylor, 93 N.E. 9 (Ind. 1910).

³² Emry v. Beaver, 137 N.E. 55 (Ind. 1922) (citations omitted). Of interest is that these Courts held that a guardianship proceeding had no effect on contests involving Wills or

“It is manifest that such record cannot be admitted as evidence of a former adjudication in the ordinary sense of that term. It is more nearly like a proceeding in rem where, as a matter of public interest and right, and for his own protection, the mental competency of an individual is determined. If a person be insane, and thereby a menace to public safety, or, if not violent or dangerous, yet so mentally unsound that he is liable to waste his estate and become a public charge, the law provides methods by which the rights and interests of the public and of the insane person himself may be preserved and protected. . . . **In neither case is the proceeding an adversary one in the sense that the plaintiff seeks or can be granted any relief against the defendant.**”³³

In Heald the Court of Appeals also held that a trial on a confinement petition did not involve issues of collateral estoppel where the State of Indiana successfully refuted the ward’s claim of insanity in a murder trial twenty years ago, even in the face of the ward’s claim that the State presented no new evidence. The Court of Appeals concluded that the parties had not “fought out” the issue of her sanity. In like manner, this Court should conclude that neither Josephine nor Leo “fought out” anything concerning rescission of corporate shares.

To the extent that the trial court did have jurisdiction over Leo, its jurisdiction ended when it signed final orders appointing the guardians.

B. THE TRIAL COURT HAD NO JURISDICTION TO ADDRESS

gifts at a time when the Guardianship Code used the same standard of “soundness of mind”, rather than the relaxed definition of “incapacity” used today.

³³ Lasher v. Gerlach, 23 N.E.2d 296, 299, citing In re Van Houten’s Will, 124 N.W. 886 (Iowa 1910); Miller v. Paulson, 169 N.W. 203 (Iowa 1918) (past transactions by the alleged incompetent, offered to show her lack of capacity to manage her affairs, were admissible only upon the inquiry of her competency at the time of trial; the validity of the past transfers could not be at issue). In re the Commitment of Heald v. Blank, 785 N.E.2d 605 (Ind.App. 2003) (which case shows that the State of Indiana takes the position that issues of mental competency concern the ward’s “current mental competency”, not earlier).

RESCISSION AFTER THE CASE ENDED.

The dispute in the guardianship case involved whether Josephine needed a guardian of her person and/or estate, and if so who to appoint. In its motion to rescind the prior gifts the Bank argued that the trial court's finding of undue influence was conclusive enough to order Leo to return her gifts on July 19, 2001. *App, CV-220, p.119*. But prior findings and conclusions are not judgments or orders.³⁴ The trial court does not have jurisdiction to change the judgments and orders now before the Court of Appeals in CV-446.³⁵

If the Bank had filed a new complaint against Leo, he would have been entitled to an automatic change of judge and to respond that the trial court's findings of fact in the prior guardianship case should not be given any deference based upon any theory of res judicata, preclusion or estoppel. The Bank did not mention any of these theories in its motion because to do so would have tacitly admitted that the Bank sought new relief that required a new complaint. Rather, the Bank chose to ask the trial court to expand the scope of its prior judgments by granting additional relief not afforded by the prior judgments.

³⁴ Trial Rule 58(B)(4) (requiring "A statement in imperative form which clearly and concisely sets forth the relief granted, any alteration of status, and right declared, or any act to be done or not done."); Farley v. Farley, 300 N.E.2d 375, 380 (Ind.App. 1973) ("recitals in a decree are usual and proper, but the rights of the parties are adjudged not by these recitals but solely by the decretal portion of the decree").

³⁵ Appellate Rule 8. In re Marriage of Bartley, 712 N.E.2d 537 (Ind.App. 1999) (trial court lacks jurisdiction to issue order clarifying its prior order once matter is with the court of appeals); City of New Haven v. Allen County Zoning Board, 694 N.E.2d 306 (Ind.App. 1998); Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995), citing Fairchild v. Criminal Court of Marion County, 103 N.E.2d 352 (Ind. 1952) a trial court 'is not permitted to intermeddle with the subject-matter of the appeal.'").

Everything that has been decided in the guardianship case is now in dispute and under review by the Court of Appeals in CV-446.³⁶ The trial court should not have interfered in such issues now on appeal.³⁷ Any order in addition to those signed on September 13, 2002, October 15, 2002, and December 18, 2002 is but a veiled attempt to amend the judgments and orders now subject to the separate appeal. The trial court did not have the authority to change its judgment or final orders by later rescinding the gifts.

In support of the Bank's motion, Joseph argued at the hearing that the new ruling would be, "in effect, proceedings supplemental". *App, CV-220, p.364*. But neither the Bank nor Joseph mentioned anything about Trial Rules 69, 70 or 71. Indeed, Trial Rule 70 shows that "If a judgment directs a party to execute a conveyance of ... other documents or to perform any other specific act" then the trial court has authority to issue writs of attachment, assistance, sequestration, and a writ of execution. So Trial Rule 70 assumes that if the Bank wanted assistance from the trial court to rescind stock gifts, there already had to be a judgment against Leo to execute such a conveyance. The motion by the Bank in the name of

³⁶ **Hudson v. Hudson**, 484 N.E.2d 579 (Ind.App. 1985) ("The court observed that a basic principle of jurisprudence is that two courts may not exercise authority over the same case at the same time. . . . upon perfection of an appeal, a trial court loses jurisdiction. . . . jurisdiction acquired by the appellate tribunal is exclusive. . . . an appeal from a final judgment rendered upon the issues in a cause carries the whole case embraced within the final adjudication to the appellate tribunal.").

³⁷ Because Joseph's attorney met with the Court *ex parte* and obtained a temporary restraining order (even though the case had been pending for nearly a year), Leo filed a verified motion for change of judge for cause. Leo has argued in the CV-446 appeal that everything the trial court signed after the *ex parte* meeting should be reversed. The Court of Appeals should have an opportunity to rule on such issues before the trial court is permitted to change the judgments and orders on appeal.

proceedings supplemental could not be a motion for the judgment itself. By raising “proceedings supplemental”, Joseph admits that the Bank’s motion raised new matters after final judgment and while the case was on appeal.

In any event, the trial court does not have jurisdiction to change the judgments and orders now within the jurisdiction of the Court of Appeals in CV-446.³⁸ Leo should have the opportunity for appellate review before the trial court exercises any further jurisdiction in this matter. The Bank and Joseph acknowledged that the appeal in CV-446 involved final judgments. Had any issue such as rescission been left to resolve, then the judgments being appeal in CV-446 were not truly final.³⁹

C. FINDINGS OF UNDUE INFLUENCE WERE NOT SUFFICIENT.

The Bank argued that the trial court had authority under I.C. § 29-3-8-

³⁸ Appellate Rule 8. In re Marriage of Bartley, 712 N.E.2d 537 (Ind.App. 1999) (trial court lacks jurisdiction to issue order clarifying its prior order once matter is with the court of appeals); City of New Haven v. Allen County Zoning Board, 694 N.E.2d 306 (Ind.App. 1998).

“We note that an appeal of a conviction or final judgment has the effect of transferring general jurisdiction of a case to the appellate court, thereby suspending any further trial court jurisdiction over the action. . . . However, there are situations in which a trial court may retain jurisdiction and act notwithstanding an appeal. For example, the trial court may proceed during an interlocutory appeal of an order deciding a question of improper venue. Ind.Trial Rule 75(E). The trial court may also retain jurisdiction to perform other tasks, such as reassessing costs, correcting the record, or enforcing the judgment, . . . although a trial court “is not permitted to intermeddle with the subject-matter of the appeal.”

Bradley v. State, 649 N.E.2d 100, 106 (Ind. 1995), citing Fairchild v. Criminal Court of Marion County, 103 N.E.2d 352 (Ind. 1952).

³⁹ Trial Rule 54(B).

3(2) to “protect and preserve the property of the protected person subject to guardianship and secure protective orders or other orders that are required to protect any other property of the protected person.” *App, CV-220, p.119*. The Bank then quoted extensively from the trial court’s prior findings of fact and conclusions of law (not judgments or orders) to support its requested relief that the gifts on July 19, 2001 should be rescinded and specifically that the trial court “enter an order restoring the voting stock allegedly transferred to Leo Hickman Jr. from Josephine Hickman’s estate, back to the estate of Josephine Hickman.” *Id., pp.121-24*.

The Court of Appeals should reverse the rescission order because the trial court improperly used these prior findings against Leo for any one of the following reasons:

1. No complaint and summons.

Leo never received a complaint and summons as required by Trial Rule 3 before the trial court ordered rescission and took away his control of the Corporation.⁴⁰ *App, CV-220, p.314*.

2. No jury trial.

In response to Joseph’s guardianship petition Leo requested a jury trial. *App, CV-220, pp.32, 108-09*. Yet the trial court also denied him this right.⁴¹

⁴⁰ Ray-Hayes v. Heinamann, 760 N.E.2d 172, rehearing granted, 768 N.E.2d 899 (Ind. 2002).

⁴¹ Leo adopts herein all of the arguments he made in his appellant’s brief in CV-446

Id., p.57.

3. Leo never a party.

Although the trial court ordered Leo to return Josephine's gifts of stock, the trial court has consistently concluded that he has never been a party to the guardianship case. *App, CV-220, pp.57, 143* ("Leo E. Hickman, Jr. is not a party to this action"); *Id.*, p.565 ("Leo A. Hickman is not a party in this cause of action").⁴² No case in history has permitted a judgment to stand against a non-party.

4. The Bank picked a remedy.

Even if a Court were to ultimately conclude that Leo acted improperly in receiving the gifts of shares from his mother on July 19, 2001, whether Josephine would have an action for damages or for rescission has not been raised. *App, CV-220, pp.94-95*. In essence the Bank convinced the trial court to grant a remedy that was first requested in a "motion" after the trial and during an appeal.

5. The remedy of rescission was waived or estopped in this case.

as to why he believes he was entitled to a Jury trial in this case. *App, CV-220, p.608*. Indiana Constitution, Article 1, Section 20 ("In all civil cases, the right of trial by jury shall remain inviolate"); Songer v. Civitas Bank, 771 N.E.2d 61 (Ind. 2002); United States Constitution, Amendment VII ("In Suits at common law . . . the right of trial by jury shall be preserved"); Curtis v. Loether, 415 U.S. 189, 94 S.Ct. 1005 (1974). In CV-446 the Bank and Joseph argued Leo lacked standing to request a Jury, even though I.C. § 29-3-5-1(e) provides for a Jury concerning the "issues raised by the petition and any response to the petition". The Bank and Joseph cannot have it both ways. If Leo was to be involved in the case as a defendant or respondent to be bound by certain findings, he had sufficient standing to request a Jury.

⁴² Lasher v. Gerlach, 23 N.E.2d 296, 299 (Ind.App. 1939) ("In neither case is the [guardianship] proceeding an adversary one in the sense that the plaintiff seeks or can be granted any relief against the defendant.").

During the guardianship case Josephine's *guardian ad litem*, Ms. Nelson, consistently opined that "As far as control of this corporation, that is now subject to an additional lawsuit." *App, CV-220, pp.98*. Josephine's *guardian ad litem*, Ms. Nelson, received notice of the annual shareholder meeting held on January 15, 2002. Having conducted a meeting based upon Leo's control of the Corporation after the now disputed gifts, Josephine (and the Bank) waived any challenge to his control. *Id, pp.104, 308-09*. Leo had no reason to believe that his voting shares were being disputed after January 15, 2002. Indeed, when the trial court signed a preliminary injunction on July 25, 2002, the trial court and his siblings acknowledged Leo's role as president of the Corporation, and in effect required him to control the Corporation so as to provide health insurance to his siblings.

Leo's siblings should not get several bites at the apple.⁴³ *App, CV-220, pp.134, 289*. The lawsuit pending in PL-1237 was their elected remedy. *Id., p.181*. During the pretrial conference the guardianship court made it clear that the trial would not involve disputes over control of the Corporation. *Id., pp.102, 293*. Joseph later requested that the trial court address the issue of the July 19, 2001 gifts such as by a special verdict form. *Id., pp.103, 294-95*; but Joseph never offered one, and the trial court never addressed any of this until six months after the case was over.

⁴³ Rios v. Rios, 717 N.E.2d 187 (Ind.App. 1999) (two Indiana courts cannot entertain the same case); Indiana & Mich. Elec. Co. v. Terre Haute Indust., Inc. 467 N.E.2d 37 (Ind.App. 1984) (the test is whether the outcome of one case could effect the outcome of the other).

6. Leo never given an opportunity to defend against rescission.

The trial court did not afford Leo a full and fair opportunity to litigate the events surrounding July 19, 2001. Every time Joseph made any argument or introduced evidence on this Leo objected. At every turn the trial court ruled the events surrounding July 19, 2001 were irrelevant and immaterial to the core issue of whether Josephine was incapacitated and in need of a guardian at the hearing.⁴⁴ Whether Josephine was in need of a guardian 16 months before then was not the issue. During trial Leo attempted in opening remarks and during questioning to address issues of the July 19, 2001 gifts, to which Joseph objected and the trial court struck. *App, CV-220, pp.304-06*. If the July 19, 2001 gifts were to be an issue, then the trial court would not have prevented Leo from impeaching Joseph on this. (Keep in mind that this is important not to show that the trial court abused its discretion by making an incorrect judgment call on the admission of impeachment evidence; its central importance is to show how the trial court defined the scope of the issues at trial). The trial transcript showing how Leo was prevented from testifying on the issue of undue influence and prevented from impeaching any of Joseph's witnesses on this issue is worth repeating here:

Mr. Shirley to witness Joseph Hickman: Question:

⁴⁴ To more easily understand why the Guardianship Court could not look to Josephine's condition or anyone's presumed undue influence over her 16 months earlier, the Court should consider what the evidence might be in a petition to terminate the guardianship. If Joseph believes that his mother's condition greatly improves, no one could use her prior condition or any of the events of July 19, 2001 to keep her under guardianship.

“Did you file a motion with the Court in the guardianship proceedings to have Leo or the corporation provide you with free health insurance? App, CV-220, p.866 . . .

Objection by Mr. Delaney: “It is not relevant. If he had the worst motives in the world, it doesn’t matter if his mother needs a guardian and if in fact her assets need protection. He’s [Mr. Shirley] trying to try another case here.

The Court: “That’s right and we’re not going to do it.” Id., p.867.

* * * *

Mr. Shirley to witness Leo Hickman: “Do you believe that your siblings are after control of the corporation?”

Mr. Delaney: “Your honor I object. It’s the same question.

The Court: “I believe that’s the same thing I just said. Let’s focus on whether or not Mrs. Hickman is competent or not competent, whether or not she needs a guardian over the person, over the estate and necessity for it. If you can stay there with that then I think we can move on.” Id., p.868.

* * * *

Ms. Nelson [Josephine’s *guardian ad litem*]: “Your honor it has always been my position in this case that the issue of voiding the stock transfers of July last year is not before the Court, and so I think this instruction [number 8 that the trial court did not give] really gets there.” Id., pp.869-71

* * * *

The Court: “[T]here is precious little else that will have to be decided once the jury comes back, other than who the Petitioner [guardian] is going to be.” Id., p.872.

What Leo asserted in his counterclaim in Cause Number 53C07-0207-PL-1237 the guardianship court never took into consideration. Leo transferred his own \$300,000.00 life insurance policy (on Josephine's life) to his siblings in return for control of the Corporation. In addition, Josephine and the Corporation transferred \$500,000.00 in life insurance to Leo's siblings in exchange for him controlling the Corporation. Since the early 1980's the Corporation has paid premiums on this \$800,000.00 in life insurance to Leo's siblings for this very purpose. *App, CV-220, pp.193-94, 316.* Since the 1980s Josephine has had a regular pattern of gifting voting shares to Leo that, but for his siblings actions, would have transferred control to him years ago. In the name of rescission the guardianship court should not take control of the Corporation away from Leo without any consideration for the family's agreement.

7. Rescission is beyond the scope of a guardianship case.

Whether Josephine is incapacitated or in need of a guardian has no effect on her ability to make gifts today, much less to address past ones.⁴⁵ The guardianship case was entirely about whether Josephine needed a guardian over

⁴⁵ Emry v. Beaver, 137 N.E. 55 (Ind. 1922); Kutzner v. Meyers, 108 N.E. 115 (Ind. 1915) (guardianship court could not decide issues relating to validity of deed). In Estate of Jaworski v. Jaworski, 479 N.E.2d 89 (Ind.App. 1985), the parties presented the trial court with the issue of whether or not to remove the executor, which the trial court granted. The Court of Appeals stated that "Appellants have also attempted to raise one additional issue. It involves the Probate Court's finding that the land contract between Josephine and Aloysious is valid. This finding is mere surplusage and has no effect." *Id.*, at 90, n.1. If the Court of Appeals did not permit the Probate Court to decide Josephine's land contract in Jaworski, the trial court should not have decided Josephine's gifting in this case.

her person or estate at the time of appointment, not over a year earlier at the time she made gifts.⁴⁶ *App, CV-220, pp.306-07*. Although addressed in greater detail, *infra*, in the scope of the trial court's jurisdiction, as a practical matter the guardianship case is no place for a dispute over who owns a Corporation or against Leo as a potential defendant. *Id., pp.105-06, 143-47, 299-300*. A "guardianship is not for litigation of corporate matters between shareholders, the corporation and its management."⁴⁷

The Court should consider the teaching of Florida National Bank of Palm Beach County v. Genova, 460 So.2d 895 (Fla. 1985). Therein the Supreme Court of Florida held that a mentally competent settlor may revoke a trust, regardless of whether the decision to revoke was a product of undue influence. For undue influence on Day 1 to be a reason for the Court to act (as in the present case on Day 480), the undue influence has to be continuous. There is no showing in this case that Leo's "undue influence" over his mother continued from July 19, 2001

⁴⁶ Taylor v. Taylor, 93 N.E. 9, 11 (Ind. 1910) ("There are well considered cases holding a record of adjudication subsequent to the execution of the instrument incompetent, as only fixing a status as of the date of the adjudication, after a period as short as two years, and also as wholly inadmissible.); accord Oliver v. Oliver, 554 N.E.2d 8, 10 (Ind.App. 1990); 9 A.L.R.3d 774, "Mental Condition Which Will Justify The Appointment Of Guardian, Committee, Or Conservator Of The Estate For An Incompetent Or Spendthrift", section 3(b) (1966) ("It is the competency of the alleged incompetent at the time appointment is sought which is at issue, rather than at some other time."); Miller v. Paulson, 169 N.W. 203 (Iowa 1918) (past transactions by the alleged incompetent, offered to show her lack of capacity to manage her affairs, were admissible only upon the inquiry of her competency at the time of trial; the validity of the past transfers could not be at issue); In re the Commitment of Heald v. Blank, 785 N.E.2d 605 (Ind.App. 2003).

⁴⁷ In the Matter of the Guardianship of Knowlton, No. 83-CA-15, 1983 WL 7125 at *2 (Ohio App. 1983). Dickhut v. Chambers, 185 N.E.2d 436, 437 (Ind. 1933); Rosenfield v. Rosenfield, 6 N.E.2d 938 (Ind. 1937).

through the time of trial, which was the only influence relevant to the appointment of a guardian.⁴⁸ There is no evidence that Leo's purported undue influence over Josephine continued after July 19, 2001, so Josephine or her *guardian ad litem*, Ms. Nelson, had many opportunities by the time of trial to challenge the gifts. Their silence speaks volumes.

8. Improper standing.

Joseph as a petitioner never had standing to raise any allegation on behalf of Josephine against Leo.⁴⁹ *App, CV-220, p.110.* Josephine's *guardian ad litem*, Ms. Nelson, never challenged Leo's control over the Corporation. As the Bank readily admitted, "Neither Joseph Hickman, nor any of his siblings, have standing to request that this Court rescind the stock that was purportedly transferred during the July 19, 2001 transaction or restore it to Josephine A. Hickman's estate." *Id., pp.133, 286-87.* If the Bank admits that Leo's siblings never had standing to obtain rescission, the Bank can hardly obtain such relief without filing its own complaint.

9. Undue influence not in dispute.

When the trial court signed the findings of fact that supports the

⁴⁸ Freeman v. Lane, 504 So.2d 1297 (Fla.App. 1987) (complaint alleging only undue influence cannot invalidate a revocable trust).

⁴⁹ Inlow v. Henderson Daily, 787 N.E.2d 385 (Ind.App. 2003) (holding that the fiduciary and not the heirs are the real parties in interest); Inlow v. Inlow, 771 N.E.2d 1174 (Ind.App. 2002) (same holding, although petition for transfer granted, opinion vacated, then case settled).

Bank's position that Leo unduly influenced his mother to make gifts to all of her children, the issue of Josephine's incapacity was not in dispute.⁵⁰ Such findings were never relevant nor necessary. Leo's attorney conceded incapacity in closing argument to the Jury. The trial court found incapacity as a matter of law when it accepted the Advisory Jury's verdict and entered Judgment that she was incapacitated and needed a guardian over her estate. The trial court should not be able to thereafter rubber stamp special findings of incapacity when the only issue was whether Josephine needs a guardian over her person.

The Bank requested rescission based entirely upon findings by the trial court on whether Josephine needed a guardian of her person. (There were no findings but merely acceptance of an advisory jury verdict on the issue of a guardianship over her estate). *App, CV-220, p.312*. Guardianship over the person concerns where she lives and what kind of medical treatment she might receive.⁵¹ Had Joseph petitioned only for a guardianship over Josephine's person, none of the evidence or findings concerning her property or gifts or shares would have been permitted, much less lead to the current rescission order. *Id., p.152*.

10. Res judicata, preclusion or estoppel do not apply.

⁵⁰ Had the Advisory Jury found in favor of Joseph on all issues, the trial court would have rendered judgment accordingly and there would have been no special findings of fact. Without doubt the guardian of the estate would have then had to file a separate lawsuit against Leo to obtain rescission. It is only because the Advisory Jury ruled against Joseph that he had the opportunity to draft such ominous findings in the first place.

⁵¹ Seligman v. Dean, 542 N.E.2d 1030, 1032 (Ind.App. 1989) ("the duties of a guardian over the person and one with custody over a child are synonymous").

The trial court's findings in the guardianship case cannot serve as *res judicata* concerning any motion to rescind. *App, CV-220, pp.174-76, 290-91, 297-98.* The Bank had the burden to show that the judgments in favor of Joseph, granting his petition for guardianships (if affirmed on appeal), could not have been rendered without deciding anything concerning the July 19, 2001 gifts.⁵² The trial court record is void of any such evidence. What is involved has been labeled estoppel by verdict or finding. One consideration is whether Joseph could have succeeded in his guardianship petition without any mention of Josephine's gifts on July 19, 2001. Joseph dare not admit the singular importance of Josephine's purported gifts on July 19, 2001. He would never concede that the Court of Appeals in CV-446 can reverse should it rule that these particular findings were not proper.

Had Joseph lost in his petition to have a guardian appointed over Josephine's estate, he still could have tried to file his own lawsuit against Leo involving his ownership of the majority of voting shares in the Corporation.⁵³

"Findings not essential to or material to the judgment do not affect collateral estoppel. Estoppel does not extend to matters not expressly adjudicated and which can only be inferred by argument and "[t]here is no estoppel where anything is left to conjecture as to what was necessarily involved and decided, as where the judgment, which might

⁵² Illinois Central Gulf R.R. Co. v. Parks, 390 N.E.2d 1078, 1081 (Ind.App. 1979); Town of Flora v. Indiana Service Corp., 53 N.E.2d 161, 163 (Ind. 1944); Connecticut Indemnity v. EBI, 652 N.E.2d 880, 883 (Ind.App. 1995); Peterson v. Culver Educational Foundation, 402 N.E.2d 448, 461 (Ind.App. 1980); Bartle v. Health Quest, 768 N.E.2d 912 (Ind.App. 2002); Restatement of the Law, Second, Judgments, Section 27, Issue Preclusion, comment (i); Halpen v. Schwartz, 426 F.2d 102 (2nd Cir. 1970).

⁵³ Joseph and his siblings did file a civil action against Leo under Cause No. 53C07-0207-PL-1237.

have been based upon one of several grounds, does not show upon which ground it was based."⁵⁴

When discussing the situation of determinations not essential to the judgment, a survey of the relevant case law shows the following:

⁵⁴ Connecticut Indemnity v. EBI, 652 N.E.2d 880, 883 (Ind.App. 1995), quoting Peterson v. Culver Educational Foundation, 402 N.E.2d 448, 461 (Ind.App. 1980); Bartle v. Health Quest, 768 N.E.2d 912 (Ind.App. 2002) (holding that “Collateral estoppel does not extend to matters which were not expressly adjudicated and can be inferred only by argument.”).

“If issues are determined but the judgment is not dependent upon the determinations, relitigation of those issues in a subsequent action between the parties is not precluded. Such determinations have the characteristics of dicta, and may not ordinarily be the subject of an appeal by the party against whom they were made. In these circumstances, the interest in providing an opportunity for a considered determination, which if adverse may be the subject of an appeal, outweighs the interest in avoiding the burden of relitigation.”⁵⁵

Concerning the situation where the Court makes a determination concerning two or more issues, either of which standing independently would be sufficient to support the result, a survey of the relevant case law states persuasively that any judgment in the first case is not conclusive with respect to either issue standing alone:

“[A] determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta. Second, and of critical importance, the losing party, although entitled to appeal from both determinations, might be dissuaded from doing so because of the likelihood that at least one of them would be upheld and the other not even reached. If he were to appeal solely for the purpose of avoiding the application of the rule of issue preclusion, then the rule might be responsible for increasing the burdens of litigation on the parties and the courts rather than lightening those burdens.”⁵⁶

These cases teach that a trial court’s findings and conclusions are just that, nothing more. The trial court cannot order a quasi-bifurcated trial by hindsight. She improperly permitted the Bank to use prior findings that led to a guardianship in order to obtain entirely separate relief in the name of rescission.

⁵⁵ Restatement of the Law, Second, Judgments, Section 27, Issue Preclusion, comment (h).

⁵⁶ Id., comment (i); Halpen v. Schwartz, 426 F.2d 102 (2nd Cir. 1970).

11. Leo denied Due Process of Law.

Given the procedures involved in a guardianship case, the trial court's limited jurisdiction, and the specific statutory requirements involved in the Guardianship Code, for the trial court to rescind gifts that Josephine gave to Leo prior to the guardianship petition is a denial of Leo's Due Process of Law.

“The minimal requirements of due process are notice reasonably calculated to apprise an interested party of the pendency of the action, the opportunity to present evidence on one's behalf, the opportunity to cross-examine witnesses, and the opportunity to be fully heard. These rights apply to third parties who are needed to adjudicate an issue, just as they do to any other party to a proceeding.”⁵⁷

The teaching of the Vadas opinion can apply equally in this case:

“Because [Leo] was never given the benefit of any of the procedures required by Trial Rule 4, he was not put on notice that his rights were being adjudicated. Formal summons and service can be waived, but waiver requires a set of circumstances where the person charged with waiver is aware he has been served and takes actions inconsistent with asserting failure of service. When [Leo] appeared at his [mother's] trial and testified, he could expect his [mother's] rights to be adjudicated, but he had no reason to believe his own interests were to be resolved.”⁵⁸

In this case Leo appeared at the guardianship trial to defend his mother. The Bank's motion after the case was over was the very first instance when any of her children were put on notice that the trial court could rescind the gifts Josephine gave them on July 19, 2001. Leo objected and preserved all of the

⁵⁷ Vadas v. Vadas, 762 N.E.2d 1234, 1242 (Ind. 2002) (Boehm, J., dissenting). Indiana Constitution, Article 1, Section 12 (“due course of law”).

⁵⁸ Id., 762 N.E.2d at 1242-43.

arguments under the Indiana trial rules, and under the federal and state constitutions. No matter the evidence, and no matter the story that Joseph or the Bank wish to tell, there is a right way and a wrong way to address issues. Due Process is about affording Leo fairness in how the trial court goes about signing orders. The Court of Appeals should reverse the rescission order because of the lack of proper process Leo received.

D. LEO ENTITLED TO AUTOMATIC CHANGE OF JUDGE.

Immediately after the Bank filed its motion for rescission, Leo moved for an automatic change of venue from the judge pursuant to Trial Rule 76(C). *App*, *CV-220*, pp.168, 170-272, 285-319. The trial court should have granted his motion.⁵⁹ *Id.*, p.565.

The Bank was a new party to the case. The Bank filed a new motion.

⁵⁹ In the Matter of the Johnson Trust, Lowe v. Johnson, 469 N.E.2d 768, 771 (Ind.App. 1984) (filing of a petition for instruction is a separate matter that entitles any interested person the opportunity to a change of judge under Trial Rule 76); Burnheimer v. Noble Circuit Court, 234 Ind. 139, 124 N.E.2d 379 (Ind. 1955) (petition to terminate the guardianship permits interested persons to a change of judge); Stockton v. Leopold, 227 Ind. 426, 429, 86 N.E.2d 530, 531 (Ind. 1949) (in estate proceedings, a change of judge is permitted when there are adverse parties in any action, proceeding or matter); Harper v. Wheatley, 244 Ind. 245, 191 N.E.2d 708 (Ind. 1963) (petition to remove executor and appoint special administrator permits a change of judge motion within thirty days); Briggs v. Clinton County Bank, 452 N.E.2d 989, 1004 (Ind.App. 1983) (petition to remove a guardian permits thirty (30) days to file a petition to request a mandatory change of judge); Kney v. Gahimer, 193 N.E. 394 (Ind.App. 1935) (objections to a final guardianship report is a separate civil action making available a mandatory change of judge motion); Johnson v. Cody, 212 Ind. 247, 8 N.E.2d 971 (Ind. 1937) (court must grant a change of judge when requested where an attorney files a petition for services rendered to a guardianship); Farner v. Farner, 480 N.E.2d 251 (Ind.App. 1985) (appointment of a special judge in a disputed probate matter); State v. LaPorte County Superior Court, 247 Ind. 137, 211 N.E.2d 612 (Ind. 1965) (A petition to remove a guardian has been explicitly recognized as a "civil action" entitling the guardian to seek a change of venue from the judge); Matter of Goetcheus, 446 N.E.2d 39 (Ind.App. 1983).

In its “motion” the Bank acknowledged that it “needs an Order from this Court that certain shares of stock ... should be restored to the guardianship estate immediately.” *Id.*, p.119. It looks and sounds like a complaint. It’s not a duck. This was the very first time any interested party was seeking relief from Leo in his individual capacity. (The prior injunction included Leo only in his capacity as president of the Corporation). On all other occasions Joseph consistently complained that Leo could not appear and be heard because he had not sought permission to participate. How quickly the tune changes.

The Bank’s motion was not an action to enforce any pre-existing judgment. This is not a proceedings supplemental that the Bank can take to any county where Leo happens to reside; in fact Leo’s name is nowhere on the judgments. The Bank did not file a motion for show cause as to why Leo should not be held in contempt. The Bank did not file any motion to execute on any bond. In objecting to Leo’s request for a scheduling order, the Bank acknowledged what Leo had argued so much during this lawsuit:

“Neither Joseph Hickman, nor any of his siblings, have standing to request that this Court rescind the stock that was purportedly transferred during the July 19, 2001 transaction or restore it to Josephine A. Hickman’s estate.” *App, CV-220, p.130.*

Leo never had to file a responsive pleading. The trial court never mentioned that Leo’s efforts on behalf of protecting his mother from a guardianship petition meant he waived any Due Process rights to any challenge concerning her prior gifts to him. If the Bank wants to take action to rescind any of Josephine’s

gifts to her children (and there have been many since 1988 when the trial court believes her to have been incapacitated), then it should file a separate lawsuit against all of the children.

Although it is Leo that appeals the rescission order, the record is devoid of how the trial court could sign an order requiring Joseph's non-party siblings to turn over their gifts. No attorney entered an appearance for Joseph and Leo's siblings. They have filed no paper with the trial court permitting or requiring any decision to be binding on them. The law does not permit them to stand by in the hope that one trial court will grant them relief; but if not, they can go down the hall and try again in another lawsuit.

Leo has consistently shown the trial court, and the Court has always stated, that the guardianship case was about Josephine, not the gifts on July 19, 2001. If Leo's siblings do not have standing to request rescission, the Bank cannot purport to use findings from a case on appeal where they had no standing. Joseph as a petitioner for a guardian to be appointed over his mother is hardly the person who can raise any allegation of misconduct between Josephine and Leo. Josephine has been represented by a *guardian ad litem* and an attorney for over a year, and Ms. Nelson never filed any complaint nor filed any petition raising allegations that Josephine did not validly gift shares of the Corporation to all of her children on July 19, 2001.

One of the purposes of the rule permitting an automatic change of venue from the judge is to offer the defendant an opportunity to mitigate any notion

that the plaintiff is forum shopping; or even worse, judge shopping. Control of a multi-million dollar Corporation should not pass hands on the strength of a “motion”. Leo did not even know if he would have the opportunity to respond to the motion until the trial court held a hearing on it and granted him permission to participate. *App, CV-220, p.26* (entry of 2/28/2003); *id.*, *p.28* (entry of 4/10/2003). The trial court would not call it a “new cause of action”. *Id.*, *p.565*. But it certainly requested new, extreme relief, never before requested in the case. As such, the trial court should have granted Leo a change of judge.⁶⁰

E. EXCESSIVE ATTORNEY FEES.

Indiana Code Section 29-3-9-9(a) states that “Whenever a guardian is appointed for an incapacitated person or minor, the guardian shall pay all expenses of the proceeding, including reasonable medical, professional, and attorney’s fees, out of the property of the protected person.”⁶¹ Joseph cited to the trial court the case of In re Appeal Wickersham, 594 N.E.2d 498, 501 (Ind.App. 1992), for the proposition that the trial court should award those fees that it finds “fair to the estate and reasonable for the guardian and attorneys.” *App, CV-220, pp.1229-30*. Joseph also believes that the attorney fees are permitted if “necessary to the interest of the incapacitated person”. *Id.*, *p.1230*.⁶² Indeed, Joseph goes so far as to

⁶⁰ Trojnar v. Trojnar, 698 N.E.2d 301, 303 (Ind. 1998).

⁶¹ Chavis v. Patton, 683 N.E.2d 253, 257 (Ind.App. 1997).

⁶² Citing Penney v. Pritchard & McCall, 49 So.2d 782, 787 (Ala. 1951), and Brownlee v. Switzer, 49 Ind. 221 (1874).

admit that the law does not permit the recovery of any attorney fees after he attempts to collect an excessive one. *Id.*, p.1240.⁶³

The ABA Model Rules of Professional Responsibility state that “The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, ...”⁶⁴ “The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained.”⁶⁵

Similarly, Indiana Rule 1.5 of Professional Conduct states that a lawyer’s fee shall be reasonable. In making that determination the Disciplinary Rule includes several factors: (1) the time spent by the attorneys involved; (2) what the attorneys spent their time doing; (3) the novelty of the issues involved; (4) the difficulty of the issues involved; (5) the skill level required to perform the legal service properly; (6) the likelihood that representing the plaintiff in this case would preclude his attorneys from accepting other clients; (7) the fees customarily charged in the locality for similar legal services; (8) the amount in controversy; (9)

⁶³ Citing White v. McBride, 937 S.W.2d 796, 803 (Tenn. 1996).

⁶⁴ E.C. 2-17.

⁶⁵ E.C. 2-18.

the client's reasonable requests concerning how he wishes his attorneys to proceed; (10) time limitations imposed by the client or by the circumstances of the case; (11) the nature and length of the attorney client relationship; (12) the experience, reputation, and ability of the attorneys; (13) whether the fee is fixed or contingent; (14) whether all of the several attorneys have assumed responsibility for the representation; (15) whether all of the attorneys have assumed separate roles and the division of fees is proportionate to the work involved; and (16) the results obtained.⁶⁶

In this case these factors as a whole argue in favor of denying Joseph his attorney fees in this matter.

Because Joseph never provided the trial court with any written fee agreement with his attorneys, we are left with the possibility that Joseph's attorneys made up the terms as they went along. There was no justification for Joseph having four (4) attorneys present at trial. Joseph also had no reason to have a total of thirteen (13) people involved in billing on this case (attorneys Mr. McGlasson, Mr. Jones, Mr. Delaney, Mr. Riffle, Mr. Padgett, Mr. Inskip, Mr. Kaltenmark, Mr. Valle, Mr. Karwath, Mr. Crandley, and assistants Mr. Williams, Mr. Jefferson, Ms. Hightshue). The time sheets show that Joseph involved more than one attorney on virtually every facet of this case. *App, CV-220, p.885*. Double billing or triple billing is not proper.

Leo provided the Court with a copy of Joseph's time sheets circling all

⁶⁶ In re Schneider, 710 N.E.2d 178 (Ind. 1999); Major v. OEC, 743 N.E.2d 276 (Ind.App.

of the occasions when more than one attorney billed for the same matter. *Id.*, p.977. At the hearing the Bank introduced evidence showing the double and triple time spent by Joseph's attorneys. *Id.*, p.1254. There was no showing that \$340.00 per hour was a proper fee for a guardianship case. The Bank introduced evidence that the highest paid attorney should receive no more than \$250.00 per hour, not the \$340.00 per hour requested. *Id.*, p.1269.

The trial court approved of Josephine paying Joseph attorney fees for matters that did not involve her at all. *Id.*, p.1262 (listing a total of \$176,621.74 of unrelated charges). These included time spent on addressing Corporation issues, their own personal health insurance, whether the attorneys should be disqualified for having previously represented Leo, for time spent preparing the attorney fee petition, and for time spent after the trial court appointed the Bank to handle Josephine's estate. The Bank sought to reduce Joseph's request from \$367,043.50 to \$171,991.50. *Id.*, p.1269.

After the trial court appointed Ms. Nelson as *guardian ad litem* and Mr. Ralston as Josephine's attorney, Joseph's role as petitioner was at an end. They, not Joseph, were charged by I.C. § 29-3-2-3 "to represent the interests of the alleged incompetent person." *App*, CV-220, pp.1122-23. As early as January 22, 2002 Ms. Nelson asked the trial court to appoint a Bank as guardian of Josephine's estate. *App*, CV-446, p.101. Yet the trial court found that Josephine should pay Joseph's attorney fees for trying to obtain his own appointment as guardian of the

2001); In re Estate of Inlow, 735 N.E.2d 240 (Ind.App. 2000).

estate up until the final hearing on the issue. Josephine should not have to pay Joseph for filing a petition to be appointed and losing.

The trial court found that Josephine should pay Joseph's attorney fees for time spent in federal court concerning the Corporation's health insurance plan, even though Joseph requested attorney fees from the federal district court which denied them. *App, CV-220, pp.1123-24*. The trial court also found that Josephine should pay Joseph's \$100,000.00 in attorney fees for the time period after the trial court appointed the Bank as guardian of the estate. *Id., p.1125*.

The trial court did not even deduct a dime. As a matter of law the Court of Appeals should remand so that a new trial judge can exercise proper discretion. On its face \$367,043.50 is manifestly unreasonable.

CONCLUSION

If the appeals in CV-328 and CV-446 result in a remand or reversal, the Court of Appeals should remand all of the post-trial orders in this case for reconsideration. If the trial court in CV-328 and CV-446 is affirmed in all respects, the Court of Appeals should REVERSE the trial court's order of rescission, in the alternative REMAND the Bank's motion to rescind with an order that the trial court grant Leo's motion for automatic change of judge, and VACATE the trial court's order granting Joseph's excessive attorney fees of \$367,043.50.

WORD COUNT CERTIFICATE

I verify that, according to the word-count function of the word processing system used to prepare this brief (Word 2002), this brief contains 10,552 words, exclusive of the items listed in App. R. 8.3(A)(1).

Curtis E. Shirley (#15845-49)

CERTIFICATE OF SERVICE

I certify that copies of the Appellant's Brief were served upon each of the following counsel of record in this matter being deposited in the United States mail, postage prepaid, properly addressed on November 10, 2003:

Curtis E. Shirley (#15845-49)