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### STATEMENT OF ISSUES

Whether the trial court properly dismissed a complaint where the plaintiffs lost two trials on the same allegations, and want to set aside final orders of the guardianship court and workers compensation board that they chose not to appeal years ago?

Whether the trial court clearly erred in refusing to enforce an unsigned family agreement which required signatures before a notary and court approval which Appellants never sought, and involved an offer appellees never saw and never accepted?

Whether the Court should dismiss the appeal of the trial court's final order denying enforcement of the unsigned family agreement because the Appellants failed to timely notice the appeal, thus depriving the Court of jurisdiction?

### STATEMENT OF CASE

Appellants filed a civil complaint against Susan and Deborah concerning their actions as co-guardians while Kenneth was still alive. Appellants allege that the estate should receive proceeds of an annuity after Kenneth died. As to a purported family agreement, Appellants filed a petition to enforce it in the civil action, though they captioned the agreement in the decedent's estate. *App.165*.<sup>1</sup> The disputed property involved the settlement of a workers compensation claim. *Aee.171*. To understand the dispute the Indiana Court of Appeals should review what occurred in four cases: the guardianship case, Cause Number 85C01-9203-GU-20; the workers compensation board, Application Number C-157568; the probate estate, Cause Number 85C01-0505-EU-59; and the civil action, Cause Number 85C01-0512-PL-635.

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<sup>1</sup> Appellants' appendix abbreviates "*App.*" Appellees' appendix, "*Aee.*".

*The Guardianship*<sup>2</sup>

On March 5, 1992 the court appointed Kenneth's spouse, Sarah J. Sellers Wilson, as guardian. On September 15, 1998 she resigned and the court appointed Kenneth's daughter, Amy Sellers Schlichter (future appellant). Attorney Eldon E. Stoops represented both guardians. On November 17, 2000 Amy resigned and the court appointed Kenneth's sisters, Susan and Deborah (appellees). *Aee.100.*

On October 6, 2000 attorney Mark Guenin appeared for Susan and Deborah.<sup>3</sup> *Aee.103.* On March 22, 2002 attorney Michael Valentine appeared for the ward, Kenneth Sellers. *Aee.104.* That is when the co-guardians filed a petition that the court accept several settlement agreements, part of which involved the annuity. *Aee.164.* On April 17, 2002 the court held a hearing and approved the settlement agreements. *Aee.166.*

Thereafter the court approved three guardianship accountings. *Aee.170, 174, 188.* The court sent civil notices showing these filings to Mr. Stoops, attorney for Amy. *Aee.187, 198.* She never filed any objections to the accountings nor appealed any orders. On June 22, 2005 the co-guardians filed their final accounting and petition to terminate. *Aee.200.* They sent a copy to Mr. Guenin, their prior attorney who now represented Appellants as co-personal representatives. *Aee.199.* Appellants did not object to the final accounting, and did not appeal the court's order of approval. *Aee.241.*

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<sup>2</sup> At a hearing to enforce the family agreement, all parties agreed that the court in the civil action could take judicial notice of all matters in the guardianship case. *App.253 transcript p.49, ll.8-15).*

<sup>3</sup> Mr. Guenin moved to withdraw as attorney for Deborah (one of the two appellees) on February 19, 2003. He has never moved to withdraw as attorney for Susan. *Aee.105.* Mr. Guenin later represented Appellants when they opened the decedent's estate.

Nearly two years after the court signed the order approving the final accounting and terminating the guardianship, on April 9, 2007 Appellants filed petitions to reopen the guardianship, set aside the order approving the final accounting, *see.112*, and modify the order approving the settlement agreements, *see.116*. On June 12, 2007 the court held an evidentiary hearing on these motions. *See.107*. On July 9, 2007 the court denied the motion to reopen the guardianship. *See.111*. On July 25, 2007 the court denied all other motions. *See.108*.

On August 9, 2007 Appellants filed a motion to correct error, *see.284*, which the court denied on August 15, 2007, *see.296*. Appellants may yet appeal the order denying their petition.

#### *The Workers Compensation Board*

The settlement agreements approved by the guardianship court resolved a workers compensation claim. *App.24*. On July 30, 2002 Kenneth's former employer, Trisco Systems, Inc. & Restoration Consulting Services, by its Insurer St. Paul Fire and Marine Insurance Company, petitioned the Workers Compensation Board to approve the agreements. *See.171*. On August 12, 2002 the workers compensation board approved the settlement agreements. *See.173*.

Appellants did not appeal the decision, and did not petition to reopen the claim, or change the order.

#### *The Estate*

On May 2, 2005 Kenneth Sellers passed away. The court appointed Appellants as co-personal representatives on May 25, 2005. *See.49*. They negotiated a purported family agreement under the estate caption. *App.165*. On March 7, 2006 Appellants filed a petition to recover assets which included the annuity at issue in this appeal. *See.50*. On February 16, 2007

the court held an evidentiary hearing on the petition. *App.125*. On March 6, 2007 the court denied the motion to recover the annuity. *Aee.64*. Appellants did not file a motion to correct error or a notice of appeal within thirty days of the order.

On July 9, 2007 the court denied the petition to recover the medicare set aside account. *Aee.65*. On August 9, 2007 Appellants filed a motion to correct error. *Aee.66*. On August 16, 2007 the court denied this. *Aee.81*. Appellants may yet appeal the order denying their petition.

### *The Civil Action*

Appellants have adequately recited the record in their statement of the case, with one exception: After the court denied their motion to enforce the purported family agreement, Appellants did not file a motion to correct error or a notice of appeal within thirty days.

### ***STATEMENT OF FACTS<sup>4</sup>***

The guardianship court appointed Susan and Deborah as co-guardians of Kenneth's property. Although not required, out of an exercise of caution they sought court approval of a workers compensation claim settlement. The Board approved several settlement agreements, which order has never been challenged. After Kenneth died, Susan and Deborah sought and obtained court approval of their final accounting, and gave notice to the Appellants, all without objection or appeal.

In a new case Appellants contend the annuity involved a void transaction. Yet the settlement agreement approved by the court did not name anyone as a beneficiary of an annuity.

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<sup>4</sup> The *Statement of Facts* provides a glimpse of a great deal of detail. Citations in the record to all facts appear in the argument section of the appellee brief.

It simply gave Kenneth the right to select a beneficiary and to change his selection at any time. Susan and Deborah never named themselves as beneficiaries of the annuity. St. Paul Fire & Marine owned the annuity, and designated Susan and Deborah as beneficiaries after talking with Kenneth. Mr. Guenin, representing Susan and Deborah, was present at this meeting by telephone. Just as wards under guardianship can sign valid Wills, Kenneth properly selected who he wanted to inherit non-probate property.

On December 8, 2005 Mr. Guenin (now representing Appellants) sent a facsimile to Mr. Valentine, which the Appellants want enforced as a family agreement. Susan and Deborah never saw the facsimile or any terms of the purported family agreement. Susan and Deborah never told the Appellants that any attorney could bind them to any agreement. “Mr. Shirley: “did you ever have any discussions with [Susan or Deborah] that Mike Valentine represented them? Mr. Guenin: No.” None of the parties to the family agreement signed it, even though on its face the facsimile required signatures by a specific date and time before a notary to be accepted.

Susan and Deborah are understandably upset at Mr. Guenin. He was their attorney as co-guardians. He represented them while Mr. Valentine represented Kenneth to settle the workers compensation claim. Yet after Kenneth died, Mr. Guenin changed sides. Mr. Guenin drafted and wants enforced a purported family agreement that even gives all attorneys a full release of any liability.

## STANDARD OF REVIEW

Appellants did not accurately state the appropriate standard of review. When the trial court granted Susan and Deborah's motion to dismiss the civil case, the court and parties relied on the complaint and attached exhibits. So trial rules 12(B)(6) and 12(B)(8) converted the motion to dismiss to one for summary judgment.<sup>5</sup>

This Court should affirm summary judgment when the evidentiary matter designated by the parties shows no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>6</sup> Summary judgment should be denied only if material facts conflict or undisputed facts lead to conflicting inferences.<sup>7</sup> All courts should exercise caution in evaluating the summary judgment process so parties get a fair determination of the issues.<sup>8</sup>

Concerning the order denying enforcement of a purported family agreement, the court made some specific findings and conclusions.<sup>9</sup> This Court reviews whether any evidence

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<sup>5</sup> *Carrell v. Ellingwood*, 423 N.E.2d 630, 633-34 (Ind.App. 1981).

<sup>6</sup> {HYPERLINK "[http://web2.westlaw.com/find/default.wl?rs=WLW6.04&tf=-1&docname=INSTRPR56&db=1000009&tc=-1&fn=\\_top&referenceposition=1127&mt=Westlaw&vr=2.0&sv=Split&referencepositiontype=S&rp=%2ffind%2fdefault.wl&findtype=L](http://web2.westlaw.com/find/default.wl?rs=WLW6.04&tf=-1&docname=INSTRPR56&db=1000009&tc=-1&fn=_top&referenceposition=1127&mt=Westlaw&vr=2.0&sv=Split&referencepositiontype=S&rp=%2ffind%2fdefault.wl&findtype=L)" \t "\_top"}.}

<sup>7</sup> *Shourek v. Stirling*, 652 N.E.2d 865, 867 (Ind.App. 1995).

<sup>8</sup> *E. Z. Gas v. Hydrocarbon*, 471 N.E.2d 316 (Ind.App. 1984).

<sup>9</sup> Appellants assert that the motion to enforce the family agreement concerned "the construction of the terms of a contract". *Brief*, p.5. Not so. Their motion involved whether there was a contract at all. The court construed no terms.

supports the specific findings, and whether the conclusions support the judgment.<sup>10</sup> As to a general judgment (which involved the resolution of disputed facts and conclusions not specifically mentioned), this Court will affirm if any legal theory supports the judgment. Findings and conclusions stand unless clearly erroneous; that is, unless no evidence supports them. This Court does not reweigh evidence or assess witness credibility, and considers only the evidence most favorable to the judgment.<sup>11</sup>

### **SUMMARY OF ARGUMENT**

Kenneth suffered a serious injury at work. As guardian his wife took care of him until their divorce. His kids stepped in until a falling out. Then his sisters took him home, and not to a nursing home. Settlement of the workers compensation claim provided enough funds for Kenneth to better enjoy the rest of his life. Yet he died suddenly and unexpectedly, at far too young an age – 56.

In funding the settlement agreement, St. Paul insurance company had purchased an annuity. Five people from St. Paul met with Kenneth and he designated Susan and Deborah as payable on death beneficiaries. Lisa Day, a representative of St. Paul, signed the form that the Appellants want to void. Susan and Deborah never knew who Kenneth selected until after he died. The guardianship court did nothing wrong in approving settlement agreements that gave Kenneth the choice on who to select.

After Kenneth died the co-guardians filed their final accounting and sent a copy to the Appellants' attorney. Months after the guardianship court approved it, the Appellants

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<sup>10</sup> *Keesling v. T.E.K. Partners*, 861 N.E.2d 1246, 1250 (Ind.App. 2007); *Fowler v. Perry*, 830 N.E.2d 97, 102 (Ind.App. 2005).

<sup>11</sup> *Id.*.

filed a civil case trying to attack an order they chose not to appeal. The Appellants have filed allegations in three separate courts in order to receive the annuity proceeds. They want to reverse the trial court's dismissal of the civil action so their complaint can be heard on the merits. But the Appellants have had two hearings on the merits and lost both. Enough already.

In the midst of all this, Appellants want to require Susan and Deborah to accept the terms of a purported family agreement that they never saw before the motion to enforce it. Appellants want it enforced on the strength of an email from Kenneth's attorney, Mr. Valentine. But he did not have any authority to bind Susan or Deborah. The terms of the family agreement required signatures from Amy, Emily, Susan, and Deborah, before notary publics. Not a single person signed it. Because the purported family agreement involved the compromise of what the Appellants believed to be estate property, the Adjudicative Compromise Statute required it to be signed by all interested persons, and submitted to the court for approval if it met certain conditions. No agreement. No signatures. No court approval. No enforcement.

After the court denied enforcement of the purported family agreement the Appellants did not file a notice of appeal within thirty days. They choose to go on with the civil lawsuit and the same allegations in the estate and guardianship cases in hope of collecting the entire annuity. Only after the court dismissed their case have they thought the family agreement an option.

### **ARGUMENT**

#### **THE TRIAL COURT PROPERLY DISMISSED THE COMPLAINT**

##### **Appellants already had two trials and lost both on the merits**

Appellants filed a civil complaint alleging that the estate (and they as beneficiaries) should receive the death benefit of an annuity, which Susan and Deborah moved to

dismiss. *App.11*. Appellants then filed a petition to recover assets in the probate court involving the same allegations. *Aee.50*. On February 16, 2007 the court held a hearing on both motions. *App.130-32, 147-54*.

Appellants appeal the order of dismissal but neglect to include anything about the order denying their petition to recover assets in their brief or appendix. Significantly, the trial court denied (not dismissed) Appellants' motion to recover the annuity. *Aee.64*.

What the civil action dismissed at the complaint stage the estate action decided on the merits.<sup>12</sup> The Indiana Court of Appeals should compare Appellants' complaint in their appendix on pages 11-18, with their petition to recover assets copied in the appellees' appendix on pages 50-54. Same allegations; same request for relief. The decision by the first court to rule raises both *res judicata* and claim preclusion.<sup>13</sup>

This Court should not give Appellants a do-over by remanding the civil action for a hearing on the merits, when Appellants already had a full and fair opportunity for a hearing and decision on the merits in the estate case.<sup>14</sup>

Appellants' complaint also raised the same allegations as their petitions to reopen

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<sup>12</sup> Appellants failed to file a motion to correct error or a notice of appeal within thirty days of the final order denying their petition to recover the annuity assets. See *Estate of Garwood*, 400 N.E.2d 758 (Ind. 1980). Whether they should have already appealed the order, or can appeal after the probate court later disposed of their petition to recover the medicare account is not at issue here. If Appellants want to pursue the annuity proceeds, they must appeal the probate court's determination on the merits. The civil case is moot under any scenario.

<sup>13</sup> *Perry v. Gulf Stream*, 871 N.E.2d 1038 (Ind.App 2007).

<sup>14</sup> After Appellants failed to present any evidence at the hearing on their petition to recover assets, they indicated an intention to file an amended complaint in this proceeding. *App.154*. They never did.

the guardianship, to set aside the court's order approving the final accounting, and to modify the settlement agreements copied in the appellees' appendix on pages 112-135. The guardianship court rulings on the merits should moot any attempt by the Appellants to have this Court reverse dismissal of the civil action for yet a third trial. *Aee.108, 111.*

### **Appellants Cannot Collaterally Attack Guardianship Orders**

The guardianship court appointed Susan and Deborah as co-guardians of Kenneth's property. They filed a petition to approve settlement agreements involving the decedent's workers compensation claim, which the court approved after a hearing on April 17, 2002. <sup>15</sup> *Aee.166.* Appellants received notice of the petition, hearing, and order, yet neither objected nor appealed the final order.<sup>16</sup>

Also, on June 22, 2005 the co-guardians filed their final accounting and petition to terminate. *Aee.200.* They sent a copy to Mr. Guenin, the attorney who represented Appellants as co-personal representatives. *Aee.199.* He testified that "I'm sure I knew what was on the record for the final accounting." *App.247, transcript p.43, ll.22-23.* Appellants neither objected to the final accounting nor moved to reconsider the court's order approving it and

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<sup>15</sup> The court sent civil notices showing these to Mr. Stoops, Amy's attorney. *Aee.187, 198.* He also represented Sarah J. Sellers Wilson, the mother and natural guardian of Emily, a minor at the time. So both appellants received legal notice of the order settling the workers compensation claim. Contrary to arguments in their appellant brief, notice to the attorney is notice to the clients. *Reynolds v. State, 463 N.E.2d 1087, 1088 (Ind.1984); Brubaker v. Pritchard, 138 N.E.2d 233, 235 (Ind. 1956)* ("When an attorney enters his appearance of record in any litigation so long as such attorney remains the existing attorney of record, he is the agent of the party, and the party is bound by such attorney's knowledge and notice of the proceedings in that case so long as it is pending"). Trial Rule 5(B) required the attorney to receive notice, not the client. And the Code of Professional Responsibility Rule 4.2 required Mr. Valentine to communicate with Mr. Stoops and Mr. Guenin, not their clients.

<sup>16</sup> *Estate of Garwood, 400 N.E.2d 758 (Ind. 1980)* (probate court approval of family agreement required immediate appeal).

terminating the guardianship. *Aee.241*. Thus, they had only thirty days to appeal.<sup>17</sup>

Appellants assert that the Court's approval of the settlement agreement, either by way of the order approving it or by order approving the final accounting, is void under Indiana Code Section 29-3-8-5. Not so. A void transaction is not the same as a void judgment (where the court lacks jurisdiction). Even if the Court had approved a void sale or transaction between guardians and a ward, any person who wants to object must do so at the hearing, or appeal an adverse ruling. The case of *Guardianship of Knepper*, 856 N.E.2d 150 (Ind.App. 2006), and on rehearing, 861 N.E.2d 717 (Ind.App. 2007), rejected what Appellants assert in this case.<sup>18</sup>

Appellants mention the word "void" about a thousand times in their brief, as if that allows them to pick a new court, file a new action, and ignore every petition and final order in a prior case. Again, not so.<sup>19</sup>

Guardians must account to the court. Guardians must notify the ward and any other person the court directs.<sup>20</sup> If guardians give proper notice, "the order of the court

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<sup>17</sup> *Harkrider v. Lafayette National Bank*, 613 N.E.2d 36 (Ind.App. 1993).

<sup>18</sup> In their estate petition to recover the annuity proceeds, Appellants asserted that the prior guardianship order approving the "void" settlement agreements was not valid. After an evidentiary hearing the probate court rejected their argument, which they have not appealed. The law does not permit Appellants to use the word "void" for an infinite number of times before an infinite number of courts.

<sup>19</sup> *Shipman v. Shipman*, 192 N.E. 849, 852 (Ind.App. 1934) ("When the right is given and the procedure for its enforcement is provided by a special statute, such procedure excludes resort to any other or different procedure, and the methods provided in such statute must be followed.").

<sup>20</sup> I.C. §29-3-9-6(d).

approving the intermediate account or the final account is binding upon all persons.”<sup>21</sup> After the protected person dies, guardians give notice of the final accounting to his or her personal representative.<sup>22</sup> Again, if guardians give notice, the order approving the final accounting binds “all persons”.

Any person aggrieved by a guardianship court order can appeal as in every other civil case, and guardians may have a stay of proceedings without bond.<sup>23</sup> Of course, upset litigants have only thirty days to file a notice of appeal.

It appears from the allegations of the complaint that a final settlement was made which was approved by the court and the guardian discharged. This report still stands. The law is well settled by a long line of decisions in this state that such action by the court upon the final settlement of the guardian is an adjudication of the matters included in such report, and is conclusive upon all the parties interested until set aside by direct proceedings for that purpose, and cannot be attacked in a suit on the bond or in any other manner collaterally.<sup>24</sup>

Once a probate court has approved an estate's final report and has discharged the personal representative, however, the probate court's order cannot be collaterally attacked.<sup>25</sup>

Kellogg, as a beneficiary, could and should have asserted her breach of fiduciary duty claim when Richard petitioned the probate court for final distribution of the

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21 *I.C. §29-3-9-6(f).*

22 *I.C. §29-3-9-6(d)(2).*

23 {HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS29-1-1-22&FindType=L"} (made applicable to guardianship matters by {HYPERLINK "http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000009&DocName=INS29-3-2-6&FindType=L"}).

24 *Campbell v. First's Estate*, 97 N.E. 954, 956 (Ind.App. 1912) (citations omitted).

25 *Estate of Young v. Ind. Dept. of Rev.*, 851 N.E.2d 393, 397 (Ind.Tax Ct. 2006) (citations omitted).

estate and submitted his final accounting. Any claim of wrongful distribution therefore is barred by the principle of *res judicata*.<sup>26</sup>

Susan and Deborah did not breach their fiduciary duties as co-guardians. Even if they had, any such allegations that they did so must have been brought only as objections to the order approving the annuity agreement or as objections to the order approving the final accounting.<sup>27</sup> By not filing objections to any of the accountings Appellants are barred by estoppel, claim preclusion, issue preclusion, *res judicata*, and waiver from filing a new lawsuit.

As described in *Perry v. Gulf Stream*, 871 N.E.2d 1038, 1048 (Ind.App. 2007), “*Res judicata* serves to prevent repetitious litigation of disputes that are essentially the same. ... Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. ... Claim preclusion is applicable when a final judgment on the merits has been rendered and acts to bar a subsequent action on the same claim between the same parties. When claim preclusion applies, all matters that were *or might have been litigated* are deemed conclusively decided by the judgment in the prior action.”<sup>28</sup>

Prior notice and final orders bar later arguments by hindsight.

### **Appellants Cannot Collaterally Attack Order of Workers Compensation Board**

The workers compensation board approved the settlement agreements on August

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<sup>26</sup> *Kellogg v. Trust of Sheele*, 517 N.E.2d 418, 427 (Ind.App.1988) (citation omitted).

<sup>27</sup> *Moxley v. Indiana National Bank*, 443 N.E.2d 374 (Ind.App. 1982).

<sup>28</sup> Although an unpublished decision, *Wilson v. Meyers*, 868 N.E.2d 928 (Table), 2007 WL 1792339, (Ind.App. 2007), applied *res judicata* in refusing to allow upset beneficiaries a second round of litigation involving who should receive an annuity.

12, 2002. *Aee.173*. This was a final judgment required to be appealed within thirty days.<sup>29</sup>

Susan and Deborah asked the guardianship court to approve the agreements out of an exercise of caution. They did not want the Appellants complaining about it later. Settlement of the ward's claim for workers compensation did not require guardianship court approval. The workers compensation board has exclusive jurisdiction of such matters. Appellants have made no allegation that the workers compensation board signed a void order.

*Former Indiana Code Section 29-3-8-5 does not apply*

The settlement approved by the guardianship court involved three separate agreements: 1) Settlement Agreement and Release; *app.24*. 2) Kenneth Sellers Medicare Set-Aside Custodial Agreement; *id.31*. and 3) Kenneth Sellers Medical Custodial Agreement; *id.44*. Appellants attack only the first agreement involving a \$120,000 annual annuity payable over ten years. *See id.27*.

The Settlement Agreement and Release, opening paragraph, identifies Kenneth as the "claimant". *App.24*. Paragraph 3 states as follows:

Claimant's Rights to Payment. The Claimant acknowledges that the Periodic Payments cannot be accelerated, deferred, increased or decreased by the Claimant; nor shall the Claimant have the power to sell, mortgage, encumber, or anticipate the Period Payments, or any part thereof, by assignment or otherwise.

*Id.27*. This language in the settlement agreement refutes the Appellants' argument that it involved a sale, encumbrance or transaction. Kenneth had no right to sell or assign anything.

Kenneth never lost enjoyment of any benefit under the annuity. Susan and

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<sup>29</sup> *I.C. 22-3-4-8(b)*; *Cox v. Worker's Compensation Board*, 675 N.E.2d 1053, 1056 (*Ind. 1996*) ("The trial court has no jurisdiction to review the decision of the Board or determine whether the decision is correct."); *Kuhr v. Willan*, 169 N.E. 475, 477 (*Ind.App. 1930*) ("The court has no authority to modify the award or change its effect. The jurisdiction to modify the award is in the Industrial Board.").

Deborah never received any benefit during his lifetime. What they received by way of future annuity payments was an inheritance of non-probate property. Indiana Code Section 29-3-8-5 does not disqualify a guardian from receiving life insurance proceeds, joint bank accounts, retirement accounts, or in this case annuities.<sup>30</sup>

Appellants read Indiana Code Section 29-3-8-5 to prevent court approval of any transaction involving guardianship property that gives the guardian a benefit. Such a position would even prevent courts from approving a guardian's fee, or attorney fee. Courts routinely appoint spouses as guardians. As part of customary Medicaid planning, a ward routinely transfers property into annuities and names his or her spouse as beneficiary. If Indiana Code Section 29-3-8-5 prevents guardians from inheriting, spouses would never serve – which runs against the guardianship code preferring them in the first place.<sup>31</sup>

Whatever occurred in the guardianship was supervised by attorney Mike Valentine, who represented Kenneth, not the co-guardians. Had Susan or Deborah done anything wrong, Mr. Valentine would have been the first to advise the court of a potential problem.

Paragraph 4 of the settlement agreement states as follows:

Claimant's Beneficiary. Any payments to be made after the death of the Claimant pursuant to the terms of this Settlement Agreement shall be made to such person or entity as shall be designated in writing by the Claimant to the insurer or the

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<sup>30</sup> In *Estate and Guardianship of Powers v. Powers*, 849 N.E.2d 1212 (Ind.App. 2006), one of many children arranged to receive insurance benefits from his mother. After the court appointed the son as guardian, he converted the Midland Policy to an American Investors Life Policy, which both named himself as beneficiary of \$145,167.25. The trial court and the court of appeals ruled in favor of the son receiving the death benefit.

<sup>31</sup> See I.C. § 29-3-5-5(a)(2).

Insurer's Assignee. If no person or entity is so designated by the Claimant, or if the person designated is not living at the time of the Claimant's death, such payments shall be made to the estate of the Claimant. No such designation, nor any revocation thereof, shall be effective unless it is in writing and delivered to the Insurer or the Insurer's Assignees. The designation must be in a form acceptable to the Insurer or the Insurer's Assignees before such payments are made. Co-Primary Beneficiaries and Relationship: Ms. Deborah Yohe and Ms. Susan Shepard – Sisters. *App.24-25.*

Appellants believe the settlement agreement is void because Paragraph 4 mentions Susan and Deborah. But Paragraph 4 applies only if St. Paul did not purchase an annuity and funded the settlement itself. Appellants have failed to address Paragraph 5:

Right to Purchase an Annuity. The Employer and/or the Insurer, itself or through its Assignee, reserve the right to fund the liability to make the Periodic Payments through the purchase of an annuity policy from Fidelity and Guaranty Life Insurance Company ("Annuity Issuer"). The Employer, the Insurer or the Assignee shall be the sole owner of the annuity policy and shall have all rights of ownership. The Employer, the Insurer or the Assignee may have Annuity Issuer mail payments directly to the payee. The Claimant shall be responsible for maintaining a current mail address for payee with Annuity Issuer. *App.28.*

Paragraph 4 which appeared to name Susan and Deborah as the initial beneficiaries of the settlement does not dictate whether they were the named beneficiaries of the annuity purchased under paragraph 5. Even if Appellants were to succeed in their complaint to void Paragraph 4, it does not award them any annuity proceeds.<sup>32</sup> The settlement agreement did not cause Appellants any harm. The beneficiary form signed by St. Paul controls the annuity.<sup>33</sup>

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<sup>32</sup> St. Paul filed a counterclaim to Appellants' petition to recover assets asking the court to declare St. Paul the owner of the annuity proceeds. *Aee.82.* Appellants answered and the court ultimately dismissed the counterclaim. St. Paul did not appeal that decision.

<sup>33</sup> Rather than face the facts in the documents Appellants attached to their complaint, they instead assert that "Distribution of the future Annuity Payments should be guided by the remaining portion of the Workers Comp Settlement Agreement, which instructs payments subsequent to Sellers' death to be made to his estate." *Brief, p.16.* No. The agreement does not do this.

The settlement agreement described only how Kenneth might change it.

Settlement of the annuity occurred on October 30, 2001. *Aee.158*. Miriam Rich of St. Paul Fire & Marine sent a letter to Mr. Valentine which described the deal. The letter identified all terms and conditions of the agreement, and made no mention of who Kenneth might designate as a beneficiary of the funds should he predecease all distributions.

Who might inherit annuity proceeds after Kenneth died did not involve a term of the contract ultimately approved by the guardianship court. The annuity at issue was owned by St. Paul Fire & Marine, which designated Susan and Deborah as beneficiaries. *Aee.160*.<sup>34</sup> They did not name themselves.

The co-guardians did not buy anything from Kenneth's guardianship property. They did not arrange for any binding contract between themselves and Kenneth. Who Kenneth selected to receive any death benefits from the annuity did not involve a sale, transaction or encumbrance. They involved an estate plan.<sup>35</sup>

Nothing in the guardianship code prevented Kenneth from signing a new Will or beneficiary designation form.<sup>36</sup>

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<sup>34</sup> Although the court did not admit the beneficiary designation form into evidence, the same information was admitted by way of Deborah's testimony. *App.292* ("three men and two women ... from the insurance company ... talked to Ken privately in another room.") After Kenneth died, Deborah discovered that he designated the annuity beneficiaries at this meeting. *Id.293-294*. Significantly, Mr. Guenin was present by telephone at that meeting representing Susan and Deborah. *Id.296 transcript p.92, ll.18-25*.

<sup>35</sup> It is not disputed that Kenneth was of sound mind on November 16, 2001 when he selected the initial beneficiaries of the annuity, and was of sound mind until his death on May 4, 2005, during which time he could have changed beneficiaries on the annuity or Medicare account. [*testimony of Mr. Valentine at the June 12, 2007 guardianship hearing*].

<sup>36</sup> *Pepper v. Martin*, 92 N.E. 777 (Ind. 1910); *Emry v. Beaver*, 137 N.E.2d 55, 56 (Ind. 1922); *Marx v. State*, 141 N.E.2d 126, 129 (Ind.1957); *Estate of Covell*, 540 N.E.2d 74

*In essence the guardianship court approved an estate plan*

Under the estate planning statute in the guardianship code, the court may adopt or change an estate or gifting plan for the ward. Pursuant to Indiana Code Section 29-3-9-4, if Appellants did not approve of who Kenneth selected to receive the annuity death benefit, they could have filed a petition in the guardianship court to consider a new estate plan. They did not.

(a) Upon petition of the guardian (other than a temporary guardian) or any other person as approved by the court, and after notice to such persons as the court may direct, . . . The court may accordingly authorize the guardian to make gifts, outright or in trust, on behalf of the protected person to or for the benefit of the prospective legatees, devisees, or heirs, including any person serving as the protected person's guardian, . . . In addition, the court may also authorize the guardian to:

(1) apply or dispose of the excess principal or income for any other purpose the court decides is in the best interests of the protected person or the protected person's property, spouse, or family; . . .

(b) In a hearing upon a petition filed under subsection (a), the court shall determine whether the planned disposition, renunciation, disclaimer, release, or exercise is consistent with the apparent intention of the protected person, which determination shall be made on the basis of evidence as to the declarations, practices, or conduct of the protected person or, in the absence of that type of evidence, upon the court's determination as to what a reasonable and prudent person would do under the same or similar circumstances as are shown by the evidence presented to the court. . . .<sup>37</sup>

Recently the Indiana Court of Appeals affirmed *Guardianship of E.N.*, 853 N.E.2d 960 (Ind.App. 2006), *transfer granted* (Ind.2007), where the trial court approved an estate plan which transferred all of the ward's assets into a new trust. In essence the trial court resolved which of the ward's wills was effective, and approved an estate plan that ultimately

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(Ind.App. 1989) (ward alone could elect against spouse's Will); *Lasher v. Gerlach*, 23 N.E.2d 296 (Ind.App. 1939); *Teegarden v. Lewis*, 40 N.E. 1047 (Ind. 1985).

benefited some of his children who had “repaired” their relationship with him. The case held that a court has discretion that is not bound by the ward’s last will. The statute allows consideration of the ward’s declarations, practices, and conduct, which is much broader than just looking at the Will.<sup>38</sup>

The annuity in this case was owned by St. Paul Fire & Marine, which designated Susan and Deborah as beneficiaries after talking with Kenneth. *App.*292-297. Had Appellants raised any argument about Susan and Deborah’s designation as beneficiaries during Kenneth’s lifetime, he could have testified about it. By waiting until after Kenneth’s death, Appellants prevented the court from holding a hearing where Kenneth could testify in support of his wishes. The law condemns this practice.<sup>39</sup>

When the guardianship court approved a settlement agreement on April 17, 2002, it also approved an estate plan for Kenneth because of the nature of the annuities which funded the agreement. Appellants did not object. This Court should not permit them to change their mind years later.

Despite being under guardianship, Kenneth was free to sign a new Will giving everything to his sisters rather than his daughters. Kenneth could have cut out his daughters completely. Yet he chose to maintain his current Will giving estate property to his daughters and chose to give what remained of an annuity (non-probate property) to his sisters (after Court approval). If Kenneth had the legal authority to sign a new Will giving his co-guardians (and sisters) everything, Appellants should not argue he lacked the lesser ability to give them

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<sup>38</sup> See *Boone County v. Andrews*, 446 N.E.2d 618 (Ind.App. 1983).

<sup>39</sup> The doctrine of invited error, grounded in estoppel, prevents a party from taking advantage of an error that he or she commits, invites, or which is the natural consequence of his

something.

**Current Indiana Code Section 29-3-8-5 should apply**

Since Kenneth's death, the Indiana legislature amended section 29-3-8-5 to reject what the Appellants argue in this case. The statute prior to July 1, 2005 read that a sale, transaction, or encumbrance was void. Now it reads void, "unless approved by the court." The amendment has retroactive effect because it codified current practice, and involved a procedural issue.

Courts have wide discretion to apply changes in statutes retroactively, especially where the change addresses procedural or remedial matters.<sup>40</sup> The amendment in 2005 codified current practice. For example, a bank serving as guardian does not engage in a void sale by investing the ward's funds in the bank's certificates of deposit. Courts have routinely held hearings and approved guardian fees and attorney fees. There is a compelling reason to apply the amendment retroactively – namely supporting the integrity of and reliance on court orders. With no retroactive effect, Appellants' argument would subject thousands of minor's compromises to collateral attacks.

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or her own neglect or misconduct. *Witte v. Mundy*, 820 N.E.2d 128, 133 (Ind. 2005).

<sup>40</sup> *Gosnell v. Indiana Soft Water*, 503 N.E.2d 879, 880 (Ind.1987).

**THE TRIAL COURT PROPERLY REFUSED TO ENFORCE A PURPORTED FAMILY AGREEMENT**

**Motion to dismiss untimely appeal of purported family agreement**<sup>41</sup>

The attorney for Appellants drafted a written document which bore at the top the estate caption. *App.165*. As co-personal representatives, they filed a petition to enforce the family agreement in the civil action rather than the estate action. *Id.161*.

On November 2, 2006 the court denied the motion to enforce the family agreement. *App.9*. Appellants did not file a motion to correct error or a notice of appeal within thirty days. Rather they waited until after the court dismissed the civil action to notice the appeal.

The court's denial of the motion to enforce a purported family agreement was a final, appealable order. In *Krick v. Farmers and Merchants Bank*, 279 N.E.2d 254 (Ind.App. 1972), the court held that the settlement of a will contest involved a final order. The court mentioned other matters that resulted in final orders: will contests, claims of creditors, actions for possession of real estate, and intermeddling orders.<sup>42</sup> Litigants cannot wait until the end of every case to appeal from a final determination of the rights of parties in certain "ancillary

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<sup>41</sup> Prior to filing their appellee brief, Susan and Deborah filed two motions to dismiss. The first concerned a deficiency in the notice of appeal. The second involved trial rule 12(B)(8), that Appellants had asked the guardianship court to exercise jurisdiction over the annuity issues on appeal. Although the motions panel denied the motions, the writing panel may revisit prior rulings. *Guardianship of Hickman*, 811 N.E.2d 843, n.5 (Ind.App. 2004).

<sup>42</sup> 279 N.E.2d at 258.

proceedings”.<sup>43</sup>

The court in *Newman v. Hadfield*, 369 N.E.2d 427 (Ind.App. 1977), held that the above rule did not apply to an heir’s decision to appeal the issue of the court’s approval of personal representative and attorney fees because of a change in trial rule 54(B). However, the Supreme Court of Indiana narrowly construed *Newman* in the case of *Estate of Garwood*, 400 N.E.2d 758 (Ind. 1980), where the trial court approved a family agreement selling certain real estate to one of the co-executors. A concurring opinion in the Indiana Court of Appeals stated as follows:

However, the trial court did not make the determination of “no just reason for delay” pursuant to T.R. 54(B), and the issue then arises whether this court must dismiss the case because it does not fit into the categories of 1) a final judgment; 2) a judgment “finalized” sufficiently under T.R. 54(B); or 3) an interlocutory order. Although the case is clearly dismissible because it cannot be so classified, the more important issue is whether this court should remand the case to the trial court for a determination of the finality issue in accordance with T.R. 54(B), thereby perhaps allowing a determination on the merits. ... See also *Estate of Newman*, (1977) Ind.App., 369 N.E.2d 427, where this court held that a party in an estate proceeding has available the provisions of T.R. 54(B) should that party seek to appeal a trial court's order granting attorney fees in the course of the proceedings.<sup>44</sup>

Referring to this language, the Supreme Court of Indiana reversed,<sup>45</sup> and cited several prior precedents with approval, though they predated a change in trial rule 54(B).<sup>46</sup>

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<sup>43</sup> 279 N.E.2d at 259. See *Meyer v. Anderson Banking*, 177 N.E.2d 662 (Ind. 1961) (removal of co-executor is a final appealable order); *Geib v. Estate of Geib*, 395 N.E.2d 336 (Ind.App. 1979) (denial of motion to remove executor is a final appealable order); *Helm v. Odle*, 157 N.E.2d 584 (Ind.App. 1959) (refusal to remove executor a final appealable order).

<sup>44</sup> 382 N.E.2d 1020 at 1023.

<sup>45</sup> 400 N.E.2d at 761.

<sup>46</sup> *Richard v. Crown Point Community School Corporation*, 269 N.E.2d 5 (Ind. 1971)

In this case Appellants seek to enforce a purported family agreement, attempting to change prior settlement agreements approved years earlier by the guardianship court and the workers compensation board. The new family agreement, as they call it, was captioned in the estate; yet they tried to enforce it in the civil action. They could have filed a completely new lawsuit for breach of contract. Why they moved to enforce the agreement in the civil action is not in the record.

No matter the caption, the title of the pleading, nor where they filed a motion to enforce, Appellants had an evidentiary hearing on the merits as to whether or not a valid, family agreement existed. The law might allow them to cherry pick where they want to file it. The law does not allow them to delay when they need to appeal it.

The trial court denied the motion to enforce a family agreement on November 2, 2006. Appellants did not file a notice of appeal until March 28, 2007. Simply put, this Court does not have subject matter jurisdiction to decide the matter.

Dismissing is especially appropriate given the tactics in this case. Rather than timely appeal the trial court's decision and seek enforcement of a family agreement, Appellants filed a plethora of petitions in the estate and guardianship cases which required a year of numerous pretrials, evidentiary hearings, and significant expense.

**Appellants did not comply with the Adjudicative Compromise Statute**

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(summary judgment order declaring title to land and its description involved a “separate and distinct issue” which required immediate appeal); *Zumpfe v. Piccadilly Realty*, 13 N.E.2d 715 (Ind. 1938) (final order requiring an appeal “determines the rights of the parties in the suit, or a distinct and definite branch of it”). Accord *Harkrider v. Lafayette National*, 613 N.E.2d 36, 41 (Ind.App. 1993) (plaintiff had to appeal within thirty days of court's approval of final accounting, not after the court's order approving the supplemental report and discharge).

Any family agreement involving estates must comply with the Adjudicative Compromise Statute detailed in the probate code.<sup>47</sup> Indiana Code Section 29-1-9-1 states:

The compromise of any contest or controversy as to: ... (c) the rights or interests in the estate of the decedent of any person, whether claiming under a will or as heir, ... or (e) the administration of the estate of any decedent ... shall, if made in accordance with the provisions of this article, be lawful and binding upon all the parties thereto ....

The purported family agreement on its face shows it applies:

WHEREAS, a controversy has developed regarding the Estate of Kenneth L. Sellers in relation to the rights and interests in the Estate of Kenneth L. Sellers; ...

WHEREAS this Agreement in being entered into in accordance with Indiana Code § 29-1-9-1 et seq;

[2] It is further understood that this assignment or disclaimer is subject to court approval as necessary.

[3] Such monies/funds shall inure to the benefit of Amy Schlichter, Emily Sellers, or the Estate of Kenneth L. Sellers as directed by Amy Schlichter or Emily Sellers in their representative capacity.

[4] Payment of the One Hundred Thousand Dollars (\$100,000.00) is conditioned upon the Estate of Kenneth L. Sellers being made whole in accordance with the terms set out in this Agreement.

[8] Susan Shepard and Deborah Yohe further agree that neither they nor anyone acting on their behalf shall make any claim against the Estate ...

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<sup>47</sup> The guardianship code contains a similar adjudicative compromise statute which permits court approval upon a finding “that the compromise will be in the best interest of the protected person.” *I.C. §29-3-9-7(a)*. While the probate code requires court approval of any compromises under *I.C. §29-1-9-3*, the guardianship code allows the guardian to compromise without court authority – or seek such authority so as to avoid later objections to an accounting. *I.C. §29-3-9-7(a)* (“...the court, on petition of the guardian, may enter an order authorizing the compromise ...”).

[In Item 9 all parties release all others for any claims arising out of the settlement,] “the Estate Administration, or in relation to the distribution of the Estate of Kenneth L. Sellers.

[13] Parties further agree that this Agreement constitutes a full, final, and complete compromise of any controversies arising out of the distribution and determination of the Estate of Kenneth L. Sellers.

[The signature lines of the purported agreement show that Appellants are signing] individually and in her representative capacity as the Personal Representative of the Estate of Kenneth L. Sellers.<sup>48</sup> *App.165-168.*

Indiana Code Section 29-1-9-2(a) states:

The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons having interests or claims which will or may be affected by the compromise, except those who may be living but whose present existence or whereabouts is unknown and cannot after diligent search be ascertained.

This statute required all interested persons to sign any purported settlement.<sup>49</sup> To be effective, Amy, Emily, Susan, and Deborah had to sign it. None of them did.<sup>50</sup> None of the parties signed the purported agreement before a notary, which the document also required. *App.168-170.*

Appellants argue that Indiana Code Section 29-1-9-2 is permissive, not mandatory, because section (b) begins with the language “Any interested person may then

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<sup>48</sup> Likewise, the signature lines for Susan and Deborah required them to sign “individually and in her representative capacity as the Co-Guardian for the Estate of Kenneth L. Sellers.” *App.168-169.*

<sup>49</sup> *See Krick v. Farmers & Merchants Bank*, 279 N.E.2d 254 (Ind.App. 1972) (failure to comply with the Adjudicative Compromise Statute creates a voidable agreement); *Vernon v. Acton*, 732 N.E.2d 805 (Ind. 2000) (court cannot enforce settlement agreement where the mediation rules require a writing signed by the parties).

<sup>50</sup> Attorneys cannot sign for interested persons under the Adjudicative Compromise Statute. Appellants here would allow attorneys only to sign an agreement even where it includes a full release of these attorneys from all prior and current liability.

submit the agreement to the court for its approval ...”. *Brief*, pp.25-26. The word “*may*” does not refer to the requirement of court approval. The language “Any interested person may” gives any one of several interested persons standing to submit the agreement to the court for approval. If the statute read “Any interested person *shall* ...” it would not make sense. In any event, the requirement for court approval is contained in Indiana Code Section 29-1-9-3, which Appellants ignore completely in their brief.

Indiana Code Section 29-1-9-3 states:

Upon due notice, in the manner directed by the court, to all interested persons in being, ... and to the personal representative of the estate ... which would be affected by the compromise, the court shall, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries is just and reasonable, make an order approving the agreement and directing the fiduciaries and guardians ad litem to execute such agreement. Upon the making of such order and the execution of the agreement, all further disposition of the estate shall be in accordance with the terms of the agreement.

Indiana Code Section 29-1-9-3 permits the court discretion to approve of a settlement only after due notice to all interested persons, a finding that the controversy is in good faith, and that the effect of the agreement is just and reasonable.

Appellants never filed a petition with the probate court or the guardianship court to approve the purported family agreement before seeking to enforce it in the civil case. No court has made a finding that the purported family agreement resolves a “good faith” dispute, or that the purported family agreement is “just and reasonable”. Appellants improperly sought enforcement of an agreement that, even if signed, was never approved by the court.

Without complying with the Adjudicative Compromise Statute, individual heirs lack authority to agree to the distribution of a ward’s property under guardianship or a testator’s property in an estate. Until the court holds a hearing on the approval of any purported

settlement, any interested person is free to change his or her mind. Fiduciaries lack any authority to sign without a court order. Simply put, Appellants could not move the court to enforce a family agreement that the court never approved in the first place.

**Susan and Deborah never agreed to settle anything**

On December 8, 2005 Mr. Guenin sent an offer by facsimile to Mr. Valentine. *App.171*. The initial mess involves a determination of who these two attorneys represented. In the guardianship case Mr. Guenin represented Susan and Deborah as of October 6, 2000.<sup>51</sup> *Aee.103*. Mr. Guenin represented them when they received the paperwork involving the annuity agreement. *App.294, transcript p.90, ll.6-13*. He withdrew as attorney for Deborah but not Susan on February 19, 2003. Yet concerning the purported family settlement, Mr. Guenin represented Appellants. As to Mr. Valentine, on March 22, 2002 he represented the ward, Kenneth Sellers. *Aee.104; App.294*.

Deborah testified that Mr. Valentine did not represent her with respect to the family agreement and did not have authority to bind her to an agreement. *App.295 transcript p.91, ll.22-25*. Unless clearly erroneous this prevents any attempt by Appellants to enforce an agreement based upon an email from Mr. Valentine.<sup>52</sup>

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<sup>51</sup> In drafting the purported family agreement, Mr. Guenin included language that Susan and Deborah would release him as their prior attorney. *App.245*.

<sup>52</sup> Appellants as much as admit in their appellant brief that this issue is dispositive: “The issue might be arguable if co-guardians had not given settlement authority to Mr. Valentine, but they did. Indeed, the undisputed evidence presented at the hearing established that co-guardians had given express authority to Mr. Valentine to accept the settlement.” *Brief, pp.18-19*. Appellants did not cite to the record to make such outlandish statements because the transcript of Deborah’s testimony states the opposite. Question by Mr. Shirley: “Did you ever at any time make any representation to Mr. Guenin, to Amy Schlichter, or Emily Sellers Reid that Mike Valentine had any authority to sign a settlement agreement on your behalf?” Answer by Deborah: “No.”. *App.295 transcript p.91, ll.22-25*.

The case of Koval v. Simon, 693 N.E.2d 1299 (Ind. 1988), prevents an attorney from binding any client to a settlement unless the client (not the attorney) told the other parties that they could rely on his apparent authority to sign an agreement.

Neither Susan nor Deborah communicated with Mr. Guenin about any issue of settlement. Neither of them gave Mr. Guenin cause to believe Mr. Valentine represented them. App.227 (“Mr. Shirley: “did you ever have any discussions with [Susan or Deborah] that Mike Valentine represented them? Mr. Guenin: No.” transcript p.23, ll.14-18).

Finally, neither Susan nor Deborah saw the purported family agreement prior to Appellants’ petition to enforce it. App.296 transcript p.92, ll.4-7.

**The appellants never accepted any counter-offer**

In response to the facsimile from Mr. Guenin, on December 9, 2005 Mr. Valentine sent an email in response that uses the word “accept” but lists several different terms – which did not include their signing the agreement by December 10, 2005. App.172. A variation on the offer, or counter-offer, is a repudiation of the original one. As stated in Gregory v. Duck, 459 N.E.2d 46, 51 (Ind.App. 1984):

In order for a contract to exist, there must be an offer and an acceptance of the offer which meets the terms of the offer in every respect. Kokomo Veterans, Inc. v. Schick, supra. An acceptance which varies the terms of an offer is a rejection and operates as a counter-offer which may be accepted by the original offeror. Uniroyal, Inc. v. Chambers Gasket and Mfg. Co. (2d Dist.1978) 177 Ind.App. 508, 380 N.E.2d 571. A binding agreement also requires a meeting of the minds or mutual assent. Indiana Bell Telephone Co. Inc. v. Mygrant (3d Dist.1982) Ind.App., 441 N.E.2d 481. Where the expression of two parties purported to be acts of offer and acceptance are materially different in meaning or if the expressions fail to show agreement on essential terms, there is no mutual assent and thus no contract. Goethals v. DeVos (3d Dist.1977) 174 Ind.App. 143, 366 N.E.2d 673. Furthermore, a mere request for an offer is not an offer, and an agreement to make an agreement is not enforceable unless all the conditions of the contemplated agreement are specified. Helvey v. O’Neill (2d Dist.1972) 153

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Ind.App. 635, 288 N.E.2d 553, 560.

The appellants never accepted the counteroffer. So no deal.

**Signatures were required and Susan and Deborah never signed**

Mr. Guenin's offer by facsimile to Mr. Valentine specifically required Susan and Deborah to sign it by noon on December 10, 2005. *App.171*. They did not sign anything. Appellants never signed the agreement. *App.235*.

Appellants made signatures a requirement before having a binding agreement.<sup>53</sup> Signatures were very important to Appellants. Mr. Guenin's facsimile required signatures by a certain time. Although the Adjudicative Compromise Statute does not require a notary, the purported agreement even required signatures to be notarized. As stated in Indiana v. Daily Express, 465 N.E.2d 764, 767 (Ind.App. 1984):

The validity of a contract is not dependent upon the signature of the parties, unless such is made a condition of the agreement. 6 I.L.E. Contracts Sec. 53 (1958); see Parrish v. Terre Haute Savings Bank, (1982) Ind.App., 431 N.E.2d 132; Seco Chemicals, Inc. v. Stewart, (1976) 169 Ind.App. 624, 349 N.E.2d 733.

In Hess v. Lackey, 132 N.E. 257 (Ind. 1921), seven of eight children signed an agreement to distribute part of their inheritance to omitted grandchildren. The trial court denied enforcement and the Indiana Supreme Court affirmed, holding that a written contract obviously drawn to be signed by all parties binds none of them unless everyone signs.<sup>54</sup>

Even if the Adjudicative Compromise Statute did not apply, the court could not find an enforceable family agreement. As in Vernon v. Acton, 732 N.E.2d 805 (Ind. 2000), signatures would have ensured enforceability, and produced a clear understanding that parties

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<sup>53</sup> International v. D & R, 670 N.E.2d 1305, 1312 (Ind.App. 1996) (the parties can make signatures a requirement for a contract to be valid).

<sup>54</sup> Accord, McCauley v. Schatzley, 88 N.E. 972 (Ind.App. 1909) (at a minimum contract to

are less likely to dispute or challenge, rather than one leading to further uncertainty and conflict. In this case the purported family agreement was an attempt to change who would receive death benefits of an insurance annuity. No insurance company would ever allow this without seeing Susan and Deborah's signatures. *App.272 transcript p.68, ll.6-13.*

**CONCLUSION**

The Indiana Court of Appeals should DISMISS the appeal of the trial court's ruling on the motion to dismiss as moot, and dismiss the untimely appeal of the trial court's refusal to enforce a purported family agreement for lack of jurisdiction. In all other respects the Court should AFFIRM.

Respectfully submitted,

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Curtis E. Shirley, #15845-49

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be binding must be signed by at least one of the parties).