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Indiana Law Blog Newsletter

Thank you for subscribing to the ILB Newsletter. Invite your friends and colleagues to sign up to receive this free weekly newsletter, emailed every Monday morning. The issues are intended to bridge the gap between the former **Indiana Law Blog** and its anticipated replacement (more about which will be coming later). Because it is a weekly, the **ILB Newsletter** (unlike the blog) will not be able to bring you the news *as it happens*. But it will highlight news you may have missed, and provide some depth on news you may have had questions about. Because it is a newsletter, length will be limited to what I believe the normal reader can tolerate. (BTW, feedback and suggestions are encouraged - send to ilb.newsletter@indianalawblog.com.)

An issue with the 2017 Supreme Court decision in Underwood v. Bunger?

In *Underwood v. Bunger*, a 10-page, 5-0 Supreme Court opinion dated March 6, 2017, Justice Slaughter wrote:

> Indiana has a longstanding legal presumption, recognized by statute and at common law, that spouses owning real property hold their interests as tenants by the entirety. This presumption, which is rebuttable upon a showing the parties intended another form of ownership, applies even if the couple owns the property with one or more additional parties. We hold this presumption is rebutted on the record before us. The deed conveying the property specifies that the three grantees, two of whom are married, shall take the property "all as Tenants-in-Common". We reverse and remand with instructions. * * *
>
> Under established Indiana law, a conveyance of real property to spouses presumptively creates an estate by the entireties. The presumption can be overcome if the instrument of conveyance reflects an intention to create some other form of concurrent ownership. Over the years, this common-law rule has been re-enacted by statute on several occasions, including most recently in 2002. This latest statute *[IC 32-17-3-1(d), as added by PL 2-2002, SEC. 2]*, which applies here, likewise presumes that spouses hold interests in realty as tenants by the entirety. The only noteworthy change to the current statute is that it relaxes the showing required to overcome the legal presumption of an entireties estate. We conclude the Deed's granting clause defeats the

> presumption by expressing an intention to create a tenancy in common among all three grantees—Underwood, Husband, and Wife. * * *
>
> D. The 2002 statute relaxed the showing required to overcome the presumption. * * * The legislature's omission of the word "manifestly" from the statute indicates a weakening of the showing needed to defeat the presumption. The 2002 version of the statute—the current version—had been in effect for 25 days when the Grantor in this case issued the Deed on July 25, 2002. Thus, we analyze the Deed under the current statute. * * *
>
> The Deed overcomes the statutory and common-law presumption in favor of a tenancy by the entirety between spouses by specifying that the three grantees own the property "all as Tenants-in-Common". We reverse the trial court's contrary judgment and remand for further proceedings consistent with this opinion.

Some background. PL 2-2002 (SEA 57) added the section at issue, IC 32-17-3-1, to the Indiana Code during the 2002 session. Here is the legislative archive for SEA 57-2002. The bill's digest:

> Title 32 recodification. Recodifies Title 32 concerning property to reorganize and restate the law *without substantive change*. Makes amendments to Indiana Code provisions outside Title 32 to conform to the Title 32 recodification. Repeals current Title 32 provisions. *[ILB emphasis]*

IC 32-16-1-5, enacted as part of the 2002 recodification of Title 32, provides:

> The principle of statutory construction that a court must apply the literal meaning of an act if the literal meaning of the act is unambiguous does not apply to the recodification act of the 2002 regular session of the general assembly to the extent that the recodification act of the 2002 regular session of the general assembly is not substantively identical to the prior property law.

The Supreme Court's ruling in March is that SEA 57 did make a substantive change. The Supreme Court's opinion states on p. 6: "The 2002 statute relaxed the showing required to overcome the presumption." On p.7 : "The legislature's omission of the word 'manifestly' from the statute indicates a weakening of the showing needed to defeat the presumption." (IC 32-16-1-5 is not referenced in the opinion.)

Impact of the Court's ruling in Underwood? This issue is the focus of a 5-page LSA staff memo distributed to the members of the Indiana Code Revision Commission on Sept. 25 that begins:

> In *Underwood v. Bunger*, 70 NE 3d 338 (Ind. 2017), the Indiana Supreme Court relied upon a statutory change made as part of the 2002 recodification of Title 32 as evidence of the legislature's intent to make a substantive change to that statute. While the change may have been substantive, the court's opinion is contrary to other Supreme Court precedent (from at least two previous cases), which holds that statutory changes made as part of a recodification should be construed to make no substantive change, even when the plain language of the statute would otherwise suggest a significant substantive change.

The memo concludes with the request: "Staff would like to ask for guidance from the Commission on how to proceed with this issue." The Commision's response is not available at this time. Minutes of the meeting have not yet been posted and although the Code Revision Commission generally streams its meetings, unlike other interim committees it does not archive them.

Governments turn tables by suing public records requesters

You may have seen the long Sept. 17th AP story by Ryan J. Foley that began:

> IOWA CITY, Iowa (AP) — An Oregon parent wanted details about school employees getting paid to stay home. A retired educator sought data about student performance in Louisiana. And college journalists in Kentucky requested documents about the investigations of employees accused of sexual misconduct.
>
> Instead, they got something else: sued by the agencies they had asked for public records.
>
> Government bodies are increasingly turning the tables on citizens who seek public records that might be embarrassing or legally sensitive. Instead of granting or denying their requests, a growing number of school districts, municipalities and state agencies have filed lawsuits against people making the requests — taxpayers, government watchdogs and journalists who must then pursue the records in court at their own expense.
>
> The lawsuits generally ask judges to rule that the records being sought do not have to be divulged. They name the requesters as defendants but do not seek damage awards. Still, the recent trend has alarmed freedom-of-information advocates, who say it's becoming a new way for governments to hide information, delay disclosure and intimidate critics.

ILB asked Indiana's Public Access Counselor, Luke Britt, his impressions.

> I've seen that report and it is troubling - sounds vindictive - but I wonder if these are states that don't have a public access counselor or similar office. Public agencies will often file requests for a declaratory opinion with me in a similar manner before taking actions on a requests. I'll then advise them on an appropriate course of action (that may very well be denial). It can be an effective way of heading off an unnecessary complaint. Most of the time, however, I'm advising them ex parte how to fulfill a request and I'm not sure that's something those litigants in other states would want to hear.

Britt added: "This is a little known or reported fact, but approximately 55% of all my requests for assistance come from public agencies and officials. That's about 2700 inquiries a year. And I still don't think it's utilized enough by government representatives."

The lawsuits described in the AP story appear similar to SLAPP (strategic lawsuit against public participation) suits, intended to intimidate citizens who exercise their public rights. Indiana's anti-SLAPP statute (IC 34-7-7) gives citizens a "Defense in Civil Actions Against Persons Who Act in Furtherance of the Person's Right of Petition or Free Speech Under the Constitution of the United States or the Constitution of the State of Indiana in Connection With a Public Issue." Here is more on the Indiana anti-SLAPP law, via the Digital Media Law Project.

The blockchain. What is it and why does it matter?

Blockchain technology, distributed databases or ledgers, is everywhere in the news. Yes, Bitcoin uses it, but so now does IBM and WalMart.

Lifehacker has a basic intro to blockchains. A sample:

> [A] blockchain is a distributed database, otherwise known as a distributed ledger. To make things really simple and relatable, let's call that ledger a 'record book' instead. Furthermore, let's talk in terms of it being 'shared' instead of distributed. For even greater context, think about a 'block' as a 'line item' in that shared record book.
>
> So, for the purposes of this article, we're going to call blockchain a **shared record** book. Each addition to this record book is a new **line item**.

A must read article, from the September issue of Governing, is titled *"The Next Big Technology to Transform Government: It's called blockchain. Some say it will have a bigger impact than the internet."*

A comprehensive article from MIT Management, May 25, 2017: *"Blockchain Explained, An*

MIT expert on why distributed ledgers and cryptocurrencies have the potential to affect every industry," begins: "Like the internet in its early years, blockchain technology is hard to understand and predict, but could become ubiquitous in the exchange of digital and physical goods, information, and online platforms."

Blockchain technology and the law. Start here for a look at the near future:

> The Internet of Agreements™ is the bridge between the internet and the deals, contracts, rules and regulations that support our lives. As the web has accelerated the spread of ideas, and e-commerce has changed how we buy and sell, IOA will give us new ways to specify, manage, and execute agreements between people, businesses and governments. Built with blockchains, smart contracts and AI, IOA offers a vision for global supply chains and logistics, facilitating trade that is free, fair and frictionless.

See DLA PIPER, *"Blockchain: background, challenges and legal issues,"* and for an EU perspective, *"Blockchains and Personal Data Protection Regulations Explained."*

Today is the "First Monday in October" - class actions argument today; gerrymandering tomorrow

See this story from Bloomberg headed *"Here Are the Biggest Cases Coming Up at the Supreme Court This Term."* And David G. Savage of the LA Times has a story that begins:

> Supreme Court opens its term next week focused on whether to shield conservative Christians from gay rights laws and whether to rein in the partisan gerrymandering that Republicans have used in recent years to tighten their grip on power in Congress and state legislatures.

From NPR's Nina Totenberg, *"Supreme Court To Open A Whirlwind Term,"* a nice overview of the big cases so far - and she adds "the justices are only halfway to filling up their docket." See also the Slate podcasts detailed below in the *"Mentioned this Week"* section. And as always, keep current each morning via SCOTUSblog.com and How Appealing.

Oral arguments before the Indiana Supreme Court this week of October 1, 2017

Thursday, Oct. 5:

- **9:00 AM - *Peter Dvorak v. State of Indiana*** (53A01-1604-CR-00923) (Monroe) The State charged Peter Dvorak with two felonies—offer or sale of an unregistered security and acting as an unregistered agent. Dvorak moved to dismiss, contending the charges were barred by the statute of limitations. The State disagreed, arguing the statute of limitations was tolled because Dvorak acted to conceal the alleged crimes. The Monroe Circuit Court denied Dvorak's motion to dismiss. Dvorak appealed, and the Court of Appeals reversed. Dvorak v. State, 78 N.E.3d 25 (Ind. Ct. App. 2017). The State has petitioned the Supreme Court to accept jurisdiction over the appeal.

- **9:45 AM - *Roy Ward v. Robert Carter, Jr., et al.*** (46S03-1709-PL-00569) (LaPorte) Roy Ward, a death row inmate, alleged that the heads of the Indiana Department of Correction and Indiana State Prison violated the Administrative Rules and Procedures Act (ARPA) by internally adopting a new method for lethally injecting inmates. The LaPorte Circuit Court granted the State's motion to dismiss the complaint, but the Court of Appeals reversed and remanded, holding that the State was required to promulgate its lethal injection policy as a rule under ARPA. Ward v. Carter, 79 N.E.3d 383 (Ind. Ct. App. 2017), vacated. The Supreme Court has granted the State's petition to transfer the case and has assumed jurisdiction over the appeal.

The briefs and lower court opinions may be accessed via the links above. Webcasts of the Supreme Court's oral arguments are available here.

Recommended this week

- *AMICUS with Dahlia Lithwick.* This is a weekly **Slate** podcast during the SCOTUS term - the Sept. 16th podcast is on gerrymandering. You can also listen to all of last term's podcasts, including this 2016 wrapup. The newest podcast looks at big cases for this term

- *Some People Learn to Code in Their 60s, 70s or 80s.* A good **NY Times** article from Sept. 22nd!

- *Creating your own templates in Microsoft Word*. This tip from the **NY Times** begins: "If you have not found a template that suits your needs, you can modify one and save it. You can also look in the online template library on Microsoft's site at templates.office.com, or you can create your own template from scratch."

- *Meet the Font Detectives Who Ferret Out Fakery*. **Wired** 2012. "Detecting fraud via fonts isn't as sexy as sleuthing art forgery; it often involves tedious measurements with digital calipers, examinations under loupes and microscopes, charts that track

the slight differences between two versions of the Times Roman face, or evidence that a particular form of office printer didn't exist at the document's dated execution."
