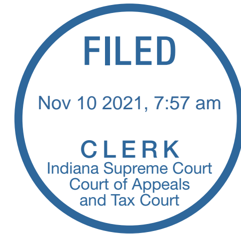

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IN THE COURT OF APPEALS OF INDIANA

Lydia A. Duncan and Donald E. Frederick,
Appellants-Petitioners,

v.

John J. Yocum, Jr.,
Appellee-Respondent.

November 10, 2021

Court of Appeals Case No. 20A-GU-2299

Appeal from the Gibson Circuit Court

The Honorable Jeffrey F. Meade, Judge

Trial Court Cause No. 26C01-2009-GU-1024

Mathias, Judge.

[1] Lydia A. Duncan and Donald E. Frederick ("the Appellants") appeal the Gibson Circuit Court's order dismissing their petition to establish guardianship over John Yocum, Jr. ("John") and awarding attorney fees. The Appellants raise three issues on appeal, which we restate as:

I. Whether the trial court erred when it concluded that John was not an incapacitated person as defined by Indiana Code section 29-3-1-7.5;

II. Whether John had the contractual capacity to execute a power of attorney in December 2019; and,

III. Whether the trial court erred when it awarded John attorney fees pursuant to Indiana Code section 34-52-1-1.

[2] Concluding that the guardianship petition was properly dismissed, but the trial court erred when it awarded attorney fees to John, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Facts and Procedural History

[3] John was a ninety-five-year old man who lived alone in a single family residence in Vincennes, Indiana. John had no known relatives. He lived in the same home for almost ninety years. John had trouble hearing and had poor eyesight. He also had moderate dementia. But John took care of his daily needs and his house was well-maintained.

[4] In August 2018, John was injured when he fell in his home. He was unable to get up and was not found for two to three days. John was hospitalized for several days. Lydia Duncan ("Lydia"), a family friend, agreed to live with and care for John in his home when he was released from the hospital and inpatient rehabilitation. But her agreement was conditioned on John granting Lydia his power of attorney. On September 5, 2018, John executed a power of attorney, naming Lydia as his attorney-in-fact and his neighbor David Lancaster

("David") as his successor attorney-in-fact. Lydia provided twenty-four hour care for John for approximately six weeks.

[5] In October 2018, John drafted a new will and a new power of attorney. He retained Lydia as his attorney-in-fact and as his health care representative, but he named his friend Donald Fredrick ("Donald") as his successor attorney-in-fact and successor health care representative. Lydia and Donald also agreed to serve as trustees of John's charitable trust.

[6] John was a frugal man and had accumulated significant assets. John managed his own investments. Under the 2018 Will, John transferred the bulk of his estate to the Charitable Trust upon his death. But John also established an educational trust for Lydia's daughter, who was also his goddaughter, willed his house to Lydia, and made several small bequests to other individuals in his neighborhood.

[7] While Lydia had authority to act as John's attorney-in-fact, she liquidated two of John's CDs in the amount of $250,000. She deposited $100,000 of the proceedings into a new checking account and listed herself and John as co-owners of the account.

[8] Lydia continued to assist John through December 2019. Lydia took John to appointments, cooked for him on occasion, and ran errands for him. On December 3, 2019, Lydia agreed to take John to an eye doctor appointment, but when she arrived at his home, John told her that the doctor had canceled the appointment. Lydia called the doctor's office and was told that John had

canceled the appointment. An argument ensued after Lydia accused John of lying to her.

[9] The next day, Lydia returned to John's home and the argument continued. She began to look through John's personal documents that were laid out on his dining room table. John told her to stop looking at his documents several times. When she refused, John took ahold of Lydia's shoulder and pushed her away from the table. Lydia fell to the floor and accused John of kicking her. Lydia reported the incident to the police but no criminal charges were filed. Unbeknownst to John, Lydia recorded the incident. She also recorded John on several other occasions without his knowledge.

[10] On December 8, 2019, John revoked Lydia's power as attorney-in-fact and named his neighbor David as his attorney-in-fact. In February 2020, John executed a new will leaving his estate to his church.

[11] On December 20, 2019, Lydia and Donald filed a verified petition for appointment of guardian over John in Knox Circuit Court. In support of their petition, the Appellants attached as "Exhibit A" a letter from John's physician opining that John required 24-hour care. Appellants' Conf. App. Vol II, p. 35. But the letter was dated December 10, 2018, over a year before the Appellants filed the petition for guardianship in this case.

[12] In Count II, Lydia and Donald requested a declaratory judgment determining that the power of attorney John had granted to David was void and unenforceable because John lacked the requisite capacity to execute the power

of attorney. Lydia and Donald later amended their petition to include Count III, a request to declare John's 2020 will invalid due to fraud, duress, or undue influence. Lydia and Donald also requested an order compelling John to appear for a Trial Rule 35 examination.

[13] John objected to the Appellants' petition and declaratory action and their request to have him examined pursuant to Trial Rule 35. John challenged the Appellants' allegations that he was incapacitated and needed a guardian, but he also responded that, if he did need a guardian, he would not want either Lydia or Donald to serve in that capacity because he does not trust them. *Id.* at 82–83. John also objected to the Appellants' claim that he lacked the requisite capacity to revoke his prior power of attorney.

[14] The proceedings were delayed for several reasons including discovery disputes and two changes of judge. The case was eventually transferred to Gibson Circuit Court. Before the trial court issued a ruling on the Appellants' request for a Trial Rule 35 examination, the Appellants selected Dr. Tracy Gunter to examine John, paid her retainer fee, and scheduled an appointment. John continued to object to the need for a Trial Rule 35 examination. In May 2020, the trial court issued an order compelling John to appear for examination with Dr. Gunter, and John was examined on May 7, 2020. Dr. Gunter concluded that John was incapacitated.

[15] A bench trial commenced on September 1, 2020. On September 29, 2020, the trial court issued the following pertinent findings of fact and conclusions thereon:

> 1. John J. Yocum Jr. ("John") was born on December 4, 1925 and is presently 94 years old.
>
> 2. John resides alone at 326 North 3rd Street in Vincennes Indiana in his family home where he has lived since he was a child. . .
>
> 3. John attended Vincennes University, served in the U.S. Army in Europe towards the end of World War II, upon discharge he returned to Vincennes University to finish his education, and after graduation he worked until retirement as the office manager for an automobile dealership and then a truck dealership located in Vincennes.
>
> 4. John has maintained a significant stock investment portfolio, which he works upon each afternoon. He receives numerous dividend checks each quarter, which he deposits and uses to purchase additional stock. Presently he owns approximately 55,000 shares of Blue-Chip Stocks. John is a long-term investor who prefers stocks that pay a dividend. He has two (2) brokers he uses to track dividend payments and purchase stocks that John selects.
>
> 5. John attends to all of his daily needs. He cleans his house, prepares his food, washes his cloths, and maintains his personal hygiene.
>
> 6. Prior to the trial of this matter, John participated in approximately 11 hours of discovery deposition as a witness, which the court finds to be quite an endurance for any party, let alone someone 94 years of age.
>
> 7. During the trial of this matter, John presented each day neatly dressed, with the assistance of a hearing device. He followed the trial's progress and he participated in consultation with his counsel. He also testified as a witness, during which time he gave logical and coherent answers to the questions asked of him and

demonstrated that he strongly wants to be left alone to make his own choices in life and to his property.

8. John testified that he remembers meeting Lydia A. Duncan (“Lydia”) while he was the volunteer bookkeeper and she was hired as the secretary at St. Francis X[]avier Catholic Church (a.k.a The Old Cathedral).

9. James David Lancaster (“David”) and John have been friends for more than 20 years.

10. David lives on the same block where John lives.

11. David is a fireman for the City of Vincennes[.]

12. John fell while in his home in August of 2018, which resulted in his hospitalization at Good Samaritan Hospital.

13. On September 5, 2018, Lydia volunteered to take care of John so that he could live in his home upon being released from the hospital.

14. Lydia insisted as a condition to her care that she be named John’s attorney-in-fact.

15. Local attorney Bruce Kirchoff prepared a Power of Attorney (POA) by which John appointed Lydia and David as his attorney-in-fact and successor attorney-in-fact on September 5, 2018. This POA was executed while John was still in Good Samaritan Hospital.

16. Less than a month later, Lydia facilitated new estate planning documents to be drafted by Jeff Kolb (“Kolb documents”) through her personal attorney and friend, Yvette Kirchoff, who was Jeff’s partner at the time. The Court takes judicial notice of the fact that Bruce Kirchoff and Yvette Kirchoff are not known to be affiliated attorneys.

17. Lydia has one child, a daughter named Allyssa M. Duncan. At Lydia’s request, John became Allyssa’s Godfather several years earlier. John has not seen or communicated with Allyssa for quite some time.

18. On September 12, 2018 (just 21 days prior to the commencement of John's execution of the series of Kolb estate planning documents), Lydia stated to RN Leah Delisle, "that patient (John) has become more confused since discharge from rehab. Concerned about dementia and personal safety." There is no evidence attorney Kolb was so informed of Lydia's concerns.

19. Also, on September 12, 2018 (just 21 days prior to the commencement of John's execution of the series of Kolb estate planning documents), "John's caregiver called Makayla Montgomery at Dr. Ringenberg's office stating that John has been very confused and angry. Needing to know if he can get a mental exam. Please give Lydia a call back at []." There is no evidence attorney Kolb was so informed of Lydia's concerns.

20. John signed a Last Will and Testament on October 3, 2018. Paragraph 1.3 of this Will gave John's home to Lydia along with all furniture and household goods if she survived John.

21. Also in John's October 3, 2018 Will, paragraph 1.4, he left $50,000.00 to an educational trust for the benefit of Lydia's daughter Allyssa, and named Lydia as the Trustee.

22. On October 3, 2018, Lydia was John's attorney-in-fact pursuant to the Bruce Kirchoff drafted Power of Attorney, which created a fiduciary/confidential relationship at law between Lydia and John.

23. On October 3, 2018, John executed the John J. Yocum Family Charitable Trust in which he identified numerous charities as the object of his generosity, to be overseen by Lydia, Donald and Richard Faulkner as Trustees. Pursuant to paragraph 2.2 of the Charitable Trust, successor Trustees shall be filled by the remaining Trustees. Pursuant to paragraph 3 of the Charitable Trust, the Trust was to include the residue of John's estate, which is considerable. Pursuant to paragraph 4 of the Charitable Trust, the Trust is irrevocable. Pursuant to paragraph 5 of the Charitable Trust, the Trustees were given the power to determine the charities to receive distributions and the amount to be received. Pursuant to paragraph 7.1 of the Charitable Trust, the Trustees were entitled to a reasonable fee for services to the Trust and to be paid back for expenses. Pursuant to paragraph 7.5 of the Charitable Trust, the majority vote of the Trustees

controls. Pursuant to paragraph 8.6 of the Charitable Trust, the Trustees are not required to render periodic accountings to the court whether required by statu[t]e or otherwise.

24. On October 8, 2018 (just 33 days after the execution of the Bruce Kirchoff drafted POA on September 5, 2018), John executed a new Kolb[-]drafted Power of Attorney appointing Lydia and Donald as his attorney-in-fact and successor attorney-in-fact as well as health care representative and successor health care representative. The only substantive difference between these two POA's is the substitution of Donald for David as successor attorney-in-fact.

25. On October 8, 2018 (just 33 days after the execution of the Bruce Kirchoff drafted POA containing health care powers provisions on September 5, 2018), John executed a Kolb[-]drafted Health Care Representative Appointment. The only substantive difference between the September 5, 2018 POA and the October 8, 2018 Health Care Representative Appointment was the substitution of Donald for David as successor health care representative.

26. On October 23, 2018, John executed a Quitclaim Deed conveying a remainder interest in his Illinois farm[land] to the irrevocable Charitable Trust.

27. On December 17, 2018, Lydia called Lauren Pemberton and said "she felt like Dr. Ringenberg needed to declare him [John] incompetent."

28. No evidence was offered to the Court that at any time between August of 2018 and . . . May of 2020 that any of John's healthcare providers found John to be incompetent.

29. On December 3, 2019, John and Lydia had a disagreement about who cancel[ed] John's scheduled eye exam and Lydia call[ed] John a liar, to which John took offense.

30. The next day, on December 4, 2019, Lydia accused John of battering her at John's residence. During the alleged confrontation, Lydia was searching through John's papers while John was telling her to stop. John admits placing his hand upon Lydia's shoulder, but [he] denies pushing her down and kicking her. Throughout this encounter, Lydia was filming the events on

her iPod. Based on the evidence and after having observed both John and Lydia testify, the trial court is convinced this was a "set-up" by Lydia.

31. On December 5, 2019, Lydia and Donald attempted to have John arrested, involuntarily committed, and detained in the hospital, but the warrant for arrest was never endorsed by a Knox County Judge, or any judge.

32. Lydia testified that she frequently filmed interactions with John. She stated the reason she did so was for her protection and for John's protection. Lydia testified that John's attorney at the time, Jeff Kolb, was aware of her filming of John and that Jeff Kolb did not object.

33. On December 8, 2019, John appointed David as his attorney-in-fact and health care representative and specifically revoked Lydia's power of attorney.

34. The Petitioners, Lydia and Donald, filed their Verified Petition for Appointment of Guardian and Declaratory Action on December 20, 2019.

35. John filed his Objection to Petitioners' Verified Petition on January 18, 2020, and this protracted litigation ensued. Their only allegation as to standing to bring this cause of action is their appointment on October 8, 2018[,] as John's attorney-in-fact and successor attorney-in-fact that were identified as desired persons for appointment as John's guardian, if ever required.

36. Lydia never resigned as John's attorney-in-fact; thus, Donald does not have standing in this matter because his only designation was as a successor to Lydia.

37. Lydia has no standing in this matter as John's Power of Attorney executed on December 8, 2019 naming David as his attorney-in-fact specifically revoked Lydia's service as John's attorney-in-fact.

38. John executed a new Last Will and Testament on February 8, 2020.

39. Lydia effectively converted John's automobile by installing a steering wheel lock device, which John testified prevented him from potentially selling the automobile on two (2) occasions.

40. At the close of evidence, the trial court verbally ordered Lydia on the record to immediately remove the steering wheel lock device.

41. Lydia, while she was acting as John's attorney-in-fact, put her name on at least one of John's bank accounts as a co-owner, effectively converting those funds if John passed away.

42. Lydia has no familial relationship to John.

43. Donald has no familial relationship to John.

44. Petitioners testified that combined they have spent approximately $100,000.00 in an attempt to become John's guardians.

45. John revoked the October 8, 2018 POA when he signed his current POA on December 8, 2019.

46. Dr. Gunter testified that she reviewed Dr. John Pidgeon's report, which stated that John scored a 29 out of 30 on the Mini Mental Status Exam, and that Dr. Pidgeon rated John's neurological examination as "excellent."

47. Dr. Gunter testified that John has testamentary capacity.

48. John testified that he will redo his estate plan after this litigation is complete.

49. John testified repeatedly that he does not want a guardian, and specifically, he testified that he does not want the Petitioners to be his guardians.

50. John testified that he does not trust the Petitioners.

51. John testified that he does not want to have any contact with or from the Petitioners.

52. John testified that if the Court does find it necessary to appoint a guardian, that John wants the guardian to be David.

> 53. Petitioners testified they would resign as Trustees of the John J. Yocum Charitable Trust. The trial court suggests they keep their word and do so.
>
> 54. The Court finds that the evidence does not support the claim that John meets the definition of "Incapacitated Person" contained in I.C. § 29-3-1-7.5.
>
> 55. Lydia alleged during her testimony that John is under undue influence from others, including his legal counsel, in this matter; however, the Court finds there to be no evidence to support such an assertion.
>
> 56. The Court finds that it is not "necessary" at this time to appoint a guardian, guardian ad litem, limited guardian, standby guardian, or to enter protective orders for John.
>
> 57. The Court finds that it is not "absolutely essential" at this time to appoint a guardian, limited guardian, guardian ad litem, limited guardian, standby guardian, or to enter protective orders for John.
>
> 58. The Court finds that Lydia and Donald are not qualified persons suitable to serve as John's guardians due to the evidence of their adversarial histories and evidence of Lydia's past breach of her fiduciary relationship with John.
>
> 59. The Court finds that Lydia has a conflict of interest in being John's guardian due to her battery complaint against John.
>
> 60. The Court finds that it is not in John's best interest as to his person and property that Lydia and Donald be appointed as his guardians. The relationship between them has degenerated and is now combative.

Appellants' Conf. App. Vol. II, pp. 17-23. Ultimately, the trial court concluded that John was not an incapacitated person because he was "able to manage his property and provide self-care." *Id*. at 24.

[16] John also requested attorney fees and a hearing was held on October 16, 2020. On that date, Lydia and Donald resigned as trustees of John's Charitable Trust. Approximately one month after the hearing, the trial court issued findings of fact and conclusions of law awarding attorney fees to John. Specifically, the court found:

> 1. The Court found in its September 29, 2020 Order that "[o]n December 8, 2019, John appointed David [Lancaster] as his attorney-in-fact and health care representative and specifically revoked Lydia's [Duncan] power of attorney."
>
> 2. The Court found that Petitioners do not have standing to bring this guardianship action.
>
> 3. The Court found that "Petitioners testified that combined they have spent approximately $100,000.00 in an attempt to become John's guardians."
>
> 4. The Court found that "Dr. [Tracy] Gunter testified that John has testamentary capacity."
>
> 5. Indiana Code § 29-3-5-1(a) states: "Any person may file a petition for the appointment of a person to serve as guardian for an **Incapacitated person** or minor under this chapter or to have a protective order issued under IC 29-3-4." (emphasis added).
>
> 6. The plain reading of I.C. § 29-3-5-1(a) is that in order to file a petition to appoint a guardian, the person over which a guardian is sought must be incapacitated or a minor.
>
> 7. The Court found that John is not an "Incapacitated Person" under I.C. § 29-3-1-7.5.
>
> 8. The Court found that it was not "necessary" or "absolutely essential" to appoint a guardian at this time.

> 9. The Court found that "Lydia and Donald [Frederick] are not qualified persons suitable to serve as John's guardians due to the evidence of their adversarial histories and evidence of Lydia's past breach of her fiduciary relationship with John."
>
> 10. The Court found that "Lydia has a conflict of interest in being John's guardian due to her battery complaint against John," and the Court was convinced the battery was a "set-up" by Lydia.
>
> 11. The Court found that "Petitioners have failed to carry their burden of proof in this matter."
>
> 12. Due to Petitioners' lack of standing, this guardianship action was groundless from the date of filing.
>
> 13. Due to Petitioners' lack of standing, this guardianship action was frivolous from the date of filing.
>
> 14. Due to Petitioners' lack of standing, this guardianship action was unreasonable from the date of filing.
>
> 15. Due to Lydia's battery "set-up" video, conflict of interest, and breach of her fiduciary duty to John, this guardianship action was litigated in bad faith from the date of filing.
>
> 16. John has incurred attorneys' fees and costs from December 20, 2019 through October 15, 2020 in the amount of $70,689.40.
>
> 17. The Court finds that Petitioners are **jointly and severally** liable to John for $71,689.40 in attorneys' fees and costs.
>
> 18. Because Petitioners brought a guardianship action that was frivolous, unreasonable, groundless, and/or litigated the action in bad faith from the date of filing, the Court finds under I.C. § 34-52-1-1 that Petitioners shall pay John $71,689.40.

Id. at 28-29.

[17] The Appellants appeal the trial court's order denying their petition for guardianship and the order awarding attorney fees to John.[1]

Standard of Review

[18] The trial court is vested with discretion in making determinations as to the guardianship of an incapacitated person. *In re Guardianship of Atkins*, 868 N.E.2d 878 (Ind. Ct. App. 2007) (citing Ind. Code § 29-3-2-4 (2001)), *trans. denied*. Therefore, we review the trial court's judgment for an abuse of discretion. *In re Guardianship of M.N.S.*, 23 N.E.3d 759 (Ind. Ct. App. 2014). In determining whether the trial court abused its discretion, we review the court's findings and conclusions, and we may not set aside the findings or judgment unless they are clearly erroneous. *Id*. We will not reweigh the evidence nor will we reassess the credibility of witnesses; instead, we will consider the evidence most favorable to the judgment with all reasonable inferences drawn in favor of the judgment. *Id*. We review questions of law *de novo* and owe no deference to the trial court's legal conclusions. *In re Guardianship of Phillips*, 926 N.E.2d 1103 (Ind. Ct. App. 2010).[2]

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[1] Sadly, John passed away on August 5, 2021. James David Lancaster, named a co-personal representative in John's Last Will and Testament, was substituted as a party in this appeal pursuant to Appellate Rule 17(B).

[2] The Appellants argue that the trial court's findings warrant extra scrutiny because they were adopted "virtually wholesale" by the trial court. *See In re Marriage of Nickels*, 834 N.E.2d 1091, 1096 (Ind. Ct. App. 2005) (observing that appellate courts have less confidence in the trial court's findings when the trial court adopts a party's findings verbatim). The trial court did not issue findings that were a verbatim reproduction of John's proposed findings. Therefore, it is evident that the trial court thoughtfully reflected on its findings before issuing its final order.

John Is Not An Incapacitated Person

[19] Indiana law allows for the appointment of a guardian to act in the best interest of a person who is unable to care for himself or for his property. *See* Ind. Code chs. 29-3-1 to -13. The Appellants argue that the trial court erred when it concluded that John is not incapacitated as defined in the guardianship code.

[20] In relevant part, "incapacitated person" means a person who is unable:

> (A) to manage in whole or in part the individual's property;
>
> (B) to provide self-care; or
>
> (C) both;
>
> because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity[.]

Ind. Code § 29-3-1-7.5(2).

[21] The trial court "shall appoint a guardian" if the court finds that the subject of the guardianship proceeding is incapacitated and that "the appointment of a

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The Appellants also claim that finding numbers 2, 5, 6, 7, 8, 11, and 46 are not supported by the evidence. Certain challenged findings are immaterial to the issues raised in this appeal and will not be addressed separately in this appeal. For example, we agree that there is no evidence to support the findings that David Lancaster is a partner in a coin shop or the $66,200 assessed value of John's home. But these findings are irrelevant to John's alleged incapacity and the court's award of attorney fees. The Appellants' challenges to findings 6 and 7 are requests to reweigh the evidence, which we will not do. Finding 46 accurately reflects Dr. Gunter's testimony at trial, except that Dr. Gunter did not testify that "Dr. Pidgeon rated John's neurological examination as 'excellent.'" *See* Appellant's Conf. App. Vol. II, p. 22; Tr. p. 109. But Dr. Pidgeon's opinion was included in Dr. Gunter's report, which was admitted at the hearing. *See* Ex. Vol. 4, p. 45.

guardian is necessary as a means of providing care and supervision of the physical person or property of the incapacitated person[.]" Ind. Code § 29-3-5-3. However, if the court concludes that it is not in the incapacitated person's best interests to appoint a guardian, the court may dismiss the proceedings. *Id.*

[22] It is undisputed that ninety-five-year-old John suffered from dementia, hearing loss, poor eyesight, and was unable to drive. However, John lived alone for several years, except for the weeks Lydia lived with him to provide care while John was recovering from injuries suffered in 2018 as the result of a fall. John's hygiene was good, his home was clean, and he more than adequately managed his financial affairs. There was evidence to support the court's findings that John was not malnourished and did not suffer from any medical conditions for which he did not receive treatment.[3] John had a primary care physician whom he saw regularly. John needed assistance with transportation, but he had friends and neighbors who were willing to assist him as needed. In February 2020, John was examined by a neurologist who reported an "'excellent' neurological examination with hearing loss as the only deficit." Ex. Vol. 4, p. 45. Dr. Gunter agreed that John did not require skilled care for daily living. Tr. Vol. II, p. 64. John lived alone and took care of his daily needs for over a year preceding the hearing in this case.

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[3] John utilized hearing amplifiers and glasses to assist with his poor hearing and vision. John's refusal to purchase hearing aids or to undergo cataract surgery does not lead us to conclude that he is incapacitated.

[23] Dr. Gunter concluded that John was incapacitated, but the trial court considered Dr. Gunter's opinion and weighed it against the evidence presented to establish that John was not incapacitated. And the trial court personally observed John during the two-day hearing held in this case, which personal observations the court expressly found supported a finding that he was not incapacitated. We will not reweigh the evidence on appeal, and there is evidence to support the trial court's finding that John is not an incapacitated person.[4]

[24] The Appellants also failed to establish that the appointment of a guardian is necessary as a means of providing care and supervision of John's physical person or property. *See* I.C. § 29-3-5-3. After he recovered from his 2018 injuries, John lived alone for over a year without incident. He took care of his daily needs such as bathing, laundry, and meals. Dr. Gunter described John as "neatly dressed and groomed[.]" Conf. Ex. Vol. IV, p. 38. John obtained help from his friends and neighbors as necessary. Tr. Vol. III, pp. 124, 126, 130. John also socialized with his neighbors on an almost daily basis. *Id*. at 126.

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[4] The Appellants attempt to analogize the facts in this case to those in *In re Guardianship of Morris*, 56 N.E.3d 719, 721 (Ind. Ct. App. 2016), but the incapacitated individual in that case required around the clock care. The Appellants also claim that the trial court clearly erred when it found that John takes care of all of his daily needs because he needs assistance with transportation and preparing meals. But John made arrangements for friends and neighbors to help him as needed. It was reasonable for the trial court to find that John was therefore taking care of all of his daily needs.

[25] John's financial advisor described him as a "competent investor."[5] Tr. Vol. III, p. 105. John understood the nature of his investments and the value of his portfolio. Tr. Vol. II, p. 234. We can reasonably assume that John paid his bills in a timely manner as there was no evidence to the contrary. The evidence also established that John's home was clean and sufficiently maintained for his needs and he effectively managed his significant financial investments.

[26] For these reasons, the Appellants failed to establish that John is unable to care for himself or his property; therefore, appointment of a guardian was not necessary.[6]

John's Contractual Capacity

[27] The Appellants also contend that the trial court erred when it failed to issue findings of fact and conclusions of law on their claim that John lacked the requisite capacity to execute a new power of attorney in December 2019 and that his 2020 Will was the product of fraud or undue influence. The Appellants

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[5] In finding number 4, the trial court relied on John's financial advisor's testimony that John is a competent investor. The Appellants claim that there is no evidence to support this finding because they objected to the testimony. But the trial court overruled the objection. Tr. Vol. II, p. 105. Likewise, the trial court did not err when it relied on Exhibit D, John's financial statement, because the Appellants' objection to its admission was overruled. *Id.* at 108-09.

[6] Assuming for the sake of argument that John was incapacitated, and his incapacity warranted appointing a guardian, it is more than reasonable to assume that the trial court would not have named Lydia or Donald as John's guardian. John testified that he did not trust Lydia or Donald and the ongoing conflict between the Appellants and John was more than evident in the record before us.

also argue that John lacked the requisite contractual capacity to execute the December 2019 power of attorney.

[28] In Counts II and III of their petition, the Appellants requested that the trial court declare John's December 2019 power of attorney and his 2020 Will null and void and alleged that John lacked the requisite capacity to execute those documents. In the pleading, the Appellants alleged that John was incapacitated for the same reasons alleged in Count I, their petition for guardianship. The trial court thoroughly addressed the Appellants' claim that John was incapacitated in its findings of fact and conclusions of law. For this reason, we do not agree with the Appellants' claim that the trial court failed to make specific findings of fact addressing the claims set forth in Counts II and III of their petition.[7]

[29] Turning to John's contractual capacity,[8] initially we observe that the mental capacity required to enter into a contract "is whether the person was able to understand in a reasonable manner the nature and effect of his act" on the date of the agreement. *Wilcox Mfg. Group, Inc. v. Mktg. Servs. of Ind., Inc.*, 832 N.E.2d

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[7] The Appellants also argue that because John did not file a responsive pleading to their amended petition, he admitted the allegations contained therein. John filed a responsive pleading to the Appellants' original petition and although he did not file an additional responsive pleading to the amended petition, John's objections remained consistent throughout these proceedings. And contrary to the Appellants' claim, John did not fail to contest the allegations during the hearing. There was significant testimony and evidence concerning John's ability to understand the scope of the power of attorney, whether the 2020 Will reflected his wishes for the distribution of his estate, and whether he remembered executing the wills and powers of attorney at issue in this case.

[8] The Appellants concede that John has testamentary capacity. *See* Appellants' Br. at 37.

559, 562, 563 (Ind. Ct. App. 2005). In order to avoid a contract, the party must not only have been of unsound mind, but also must have had no reasonable understanding of the contract's terms due to his instability. *Id.*

[30] John understood the purpose and necessity of appointing a power of attorney and that he could revoke the power of attorney at any time. Conf. Ex. Vol. p. 51. We agree that John only had a limited understanding of his attorney-in-fact's power to act on his behalf. *Id*. at 52; Tr. Vol II, pp. 187–88, 230–32. And John could not specifically remember executing the documents granting David Lancaster his power of attorney, but he was able to identify the document, he understood what the document was, and that he signed it. *Id*. at 229–30; Tr. Vol. III p. 12. That John did not have a complete understanding of the power of attorney's ability to make decisions on his behalf, does not mean that he lacked contractual capacity.

[31] Regarding his will, Dr. Gunter testified that John understood the purpose of a will and that he "could outline some things that were important to him." Tr. Vol. II, p. 72. Consistent with John's testimony at the hearing, John told Dr. Gunter that he recently had executed a new will that was not consistent with his final wishes but that "he had been advised that it would be helpful to him to get through the litigation before he wrote another will."[9] *Id*.; *see also* Tr. Vol. II, pp.

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[9] It is alarming that John's will, executed in February 2020, did not reflect his wishes for the final distribution of his estate when he met with Dr. Gunter in May 2020, and at the September 2020 hearing. And we hope that John's final will appropriately distributed John's estate in accordance with his wishes. However, the

190, 211, 215-18. Moreover, the fact that John was diagnosed with dementia does not mean that John lacked contractual capacity. Although John could not recall executing the documents at issue, he understood the documents and their purpose, recognized his signature, and wanted David to act as his power of attorney.

[32] For all of these reasons, the Appellants did not establish that John lacked the contractual capacity necessary to revoke his prior power of attorney and execute the December 2019 power of attorney.

Attorney Fees

[33] Indiana follows the "American Rule," whereby parties are required to pay their own attorney fees absent an agreement between the parties, statutory authority, or other rule to the contrary. *Town of Georgetown v. Edwards Community Inc.*, 885 N.E.2d 722, 726 (Ind. Ct. App. 2008). The trial court ordered the Appellants to pay John's attorney fees pursuant to Indiana Code section 34-52-1-1.[10]

Appellants did not present evidence that would have established that the February 2020 Will did not align with John's testamentary intent due to fraud, undue influence, and/or mistake of fact. John was aware of the contents of his will and agreed with his attorneys to wait until the guardianship petition was adjudicated before completing his final will and testament. For this reason, it is not necessary to remand this case for additional findings on this issue.

[10] If the trial court had granted the Appellants' guardianship petition, their attorney fees would have been paid from the guardianship estate. *See* Ind. Code § 29-3-9-9 ("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.)

Also, the Appellants argue that Indiana Code section 34-52-1-1 does not apply because John is not a prevailing party. While John is not a prevailing party in the traditional sense, i.e., a judgment was not awarded in his favor, he objected to the Appellants' petition to establish a guardianship and he prevailed when the trial court dismissed the petition.

[34] "Appellate review of the trial court's award of attorney fees pursuant to Indiana Code section 34-52-1-1 proceeds in three steps." *Smyth v. Hester*, 901 N.E.2d 25, 33 (Ind. Ct. App. 2009), *trans. denied*. First, we review the trial court's findings of fact under a clearly erroneous standard, and next, we review de novo the trial court's legal conclusions. *Id.* "Finally, the statute 'vests discretion in the trial court to award fees on finding one or more of the acts described in subsection (b).'" *Id.* (quoting *Mitchell v. Mitchell*, 695 N.E.2d 920, 925 (Ind. 1998)). Therefore, the final step of our appellate review is "to review the trial court's decision to award fees and the amount thereof under an abuse of discretion standard." *Id.* at 33-34 (quoting *Davidson v. Boone County*, 745 N.E.2d 895, 899-90 (Ind. Ct. App. 2001)).

[35] Indiana Code section 34-52-1-1 allows

> a court "[i]n any civil action" to award attorney's fees "as part of the cost to the prevailing party" if another party "(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; (2) continued to litigate the action or defense after the party's claim or defense became frivolous, unreasonable, or groundless; or (3) litigated the action in bad faith." I.C. § 34-52-1-1(b). The statute balances an attorney's duty to zealously advocate with the goal of deterring unnecessary and unjustified litigation. The General Recovery Rule is strictly construed because it "is in derogation of the American Rule observed under the common law."

River Ridge Dev. Auth. v. Outfront Media, LLC, 146 N.E.3d 906, 913 (Ind. 2020) (cleaned up).

[36] A frivolous claim is one taken primarily for the purpose of harassment, if the attorney is unable to make a good faith and rational argument on the merits of the action. *Branham Corp. v. Newland Res.*, LLC, 17 N.E.3d 979, 992 n.12 (Ind. Ct. App. 2014). A claim is "unreasonable" if, based on the totality of the circumstances, including the law and the facts known at the time of filing, no reasonable attorney would consider that the claim was worthy of litigation. *Id*. A claim is "groundless" if there are no facts to support the legal claim presented by the losing party. *Id*. "Bad faith is demonstrated where the party presenting the claim is affirmatively operating with furtive design or ill will." *GEICO Gen. Ins. Co. v. Coyne*, 7 N.E.3d 300, 305 (Ind. Ct. App. 2014), *trans. denied*. A claim is not groundless or frivolous merely because the party loses on the merits. *Smyth v. Hester*, 901 N.E.2d 25, 33 (Ind. Ct. App. 2009), *trans. denied*.

[37] The trial court found that the Appellants lacked standing to file a petition to establish a guardianship over John, and therefore, their claim was frivolous, unreasonable, and groundless. We disagree. First, we observe that John did not argue lack of standing until the hearing was held on the attorney fee request. Moreover, Indiana Code section 29-3-5-1 provides that "**any person** may file a petition for the appointment of a person to serve as guardian for an incapacitated person . . . under this chapter[.]" (Emphasis added.)

[38] John also argues that the Appellants lacked standing to challenge the validity of the December 2019 power of attorney and John's 2020 Will. However, again, John failed to raise the issue of standing until the attorney fee hearing, and the validity of the power of attorney John executed in December 2019, naming

David as his attorney-in-fact, was relevant to the guardianship proceedings. *See In re Morris*, 56 N.E.3d at 724 (quoting *In re Guardianship of L.R.*, 908 N.E.2d 360, 365 (Ind. Ct. App. 2009) (explaining that "if an incapacitated person's attorney in fact is different than the person's guardian, the attorney in fact remains in control unless the trial court" holds a hearing and orders the guardian to revoke the power of attorney); *see also* Ind. Code § 30-5-3-4. Finally, in John's 2018 Will, both Lydia and Donald were named as trustees of a charitable trust to be funded at John's death, but John's 2020 Will defunded the trust. Lydia was also trustee of an educational trust established for her daughter, which was also defunded by John's 2020 Will. For all of these reasons, the trial court erred when it found that the Appellants lacked standing to pursue their claims.

[39] The Appellants contend that their petition to establish guardianship was not frivolous, unreasonable, or groundless because Dr. Gunter concluded that John was incapacitated.[11] But the trial court did not rely on its finding that John was not incapacitated when it awarded attorney fees. The court relied solely on its erroneous finding that the Appellants lacked standing. Consequently, we

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[11] In March 2020, John filed his motion for attorney fees pursuant to Indiana Code section 34-52-1-1. In support of his motion, John noted that neurologist Dr. Pidgeon concluded in February 2020 that John did not have any significant cognitive impairment and his mental exam was normal for a man his age. Appellant's Conf. App. Vol. II pp. 149-50. And it is undisputed that John lived alone in his own home, albeit with assistance from friends and neighbors, in the months before the Appellants filed their guardianship petition. For these reasons, John claimed that the Appellants continued litigation of their petition was frivolous, unreasonable, and groundless. But the Appellants presented evidence from which the trial court could have found that John was incapacitated. Therefore, the continued litigation of John's alleged incapacity was not frivolous, unreasonable, or groundless. Had the trial court found that John needed a guardian, the court could have appointed David, and not Lydia or Donald.

conclude that the trial court erred when it awarded John attorney fees because the Appellants' petition was not frivolous, groundless, and unreasonable.

[40] The trial court also found that the Appellants litigated their claim in bad faith. "[I]n order to constitute bad faith under [Indiana Code section 34-52-1-1], the conduct must be 'vexatious and oppressive in the extreme.'" *Neu v. Gibson*, 968 N.E.2d 262, 279 (Ind. Ct. App. 2012) (quoting *St. Joseph's College v. Morrison, Inc.*, 158 Ind.App. 272, 302 N.E.2d 865, 871 (1973)), *trans. denied*. The standard is strict because an attorney fee award under the bad faith exception is punitive. *Id*. And section 34-52-1-1 requires that the "action must be litigated in bad faith, which means that only conduct in the course of the litigation is relevant to the question of attorney's fees." *Techna-Fit, Inc. v. Fluid Transfer Products, Inc.*, 45 N.E.3d 399, 418 (Ind. Ct. App. 2015).

[41] The trial court found bad faith because the Appellants had adversarial histories with John, Lydia previously had breached her fiduciary duty to John, and Lydia alleged that John had battered her shortly before the guardianship petition was filed. Lydia reported the alleged battery to the police but no charges were filed. All of the conduct cited by the trial court with regard to bad faith occurred before the petition for guardianship was filed, and the court did not find that the Appellants' filing of the petition itself or any conduct during the course of litigation constituted bad faith. Therefore, the trial court's conclusion that the Appellants litigated this action in bad faith is clearly erroneous.

[42] For all of these reasons, the trial court erred when it awarded attorney fees to John pursuant to Indiana Code section 34-52-1-1, and we reverse the attorney fee award.

[43] Finally, John also requests appellate attorney's fees. Pursuant to Indiana Appellate Rule 66(E), our court may award appellate attorney's fees. Our court's discretion to award Rule 66(E) appellate attorney's fees is limited to circumstances where the appeal is "permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." *Thacker v. Wentzel*, 797 N.E.2d 342, 346 (Ind. Ct. App. 2003). "[T]he sanction is not imposed to punish mere lack of merit but something more egregious." *Troyer v. Troyer*, 987 N.E.2d 1130, 1148 (Ind. Ct. App. 2013) (citation omitted), *trans. denied*. As such, our court exercises caution in awarding appellate attorney's fees because of the "potentially chilling effect the award may have upon the exercise of the right to appeal." *Holland v. Steele*, 961 N.E.2d 516, 529 (Ind. Ct. App. 2012), *trans. denied.*

[44] Our appellate courts have formally categorized claims for appellate attorney fees into "substantive" and procedural bad faith claims. *Boczar v. Meridian Street Found.*, 749 N.E.2d 87, 95 (Ind. Ct. App. 2001). To prevail on a substantive bad faith claim, the party must show that the appellant's contentions are utterly devoid of all plausibility. *Id.* Procedural bad faith, on the other hand, occurs when a party flagrantly disregards the form and content requirements of the rules of appellate procedure, omits and misstates relevant facts appearing in the record, and files briefs written in a manner calculated to require the maximum

expenditure of time both by the opposing party and the reviewing court. *Id.* Even if the appellant's conduct falls short of that which is "deliberate or by design," procedural bad faith can still be found. *Id.*

[45] John claims only substantive bad faith. Appellee's Br. at 39. However, we find none here. The Appellants presented evidence at the hearing that they also relied on to support their claims on appeal. Moreover, we were persuaded by the Appellants' argument concerning the attorney fee award in John's favor. Because the Appellants' arguments are not devoid of all plausibility, we deny John's request for appellate attorney fees.

Conclusion

[46] The trial court's finding that John was not incapacitated is supported by the evidence, and we are not persuaded that John lacked contractual capacity to execute a power of attorney. However, the trial court erred when it concluded that John was entitled to attorney fees under Indiana Code section 34-52-1-1. We therefore affirm the dismissal of the Appellants' claims but reverse the award of attorney fees.

[47] Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

[48] Weissmann, J., concurs

Tavitas, J., concurs in part and dissents in part with separate opinion.

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IN THE

COURT OF APPEALS OF INDIANA

Lydia A. Duncan and Donald E. Frederick, *Appellants-Petitioners,* v. John J. Yocum, Jr., *Appellee-Respondent*.	November 10, 2021 Court of Appeals Case No. 20A-GU-2299 Appeal from the Gibson Circuit Court The Honorable Jeffrey F. Meade, Judge Trial Court Cause No. 26C01-2009-GU-1024

Tavitas, Judge, concurring in part and dissenting in part.

[49] I respectfully concur in part and dissent in part. While I concur with the majority with respect to Issues I. and II., I dissent in part as to Issue III., pertaining to whether the trial court erred in awarding attorney fees to John, pursuant to Indiana Code section 34-52-1-1.

[50] I agree with the majority's conclusions that the Appellants possessed standing to file a guardianship petition and that the court erred in concluding otherwise. I find, however, that the trial court made additional findings that support the entry of an attorney fees award. Specifically, the trial court found:

> 15. Due to Lydia's battery "set-up" video, conflict of interest, and breach of her fiduciary duty to John, this guardianship action was litigated in bad faith from the date of filing.
>
> * * * * *
>
> 18. Because Petitioners brought a guardianship action that was frivolous, unreasonable, groundless, and/or litigated the action in bad faith from the date of filing, the Court finds under I.C. § 31-52-1-1 that Petitioners shall pay John $71,689.40 [in attorney fees].

Appellant's Conf. App. Vol. II p. 29.

[51] The record clearly reveals that the Appellants undermined and took advantage of John and initiated the guardianship for pecuniary gain. The Appellants filed their petition for guardianship fifteen days after they attempted to have John arrested and involuntarily committed, following the so-called "battery set-up[.]" *Id*. John filed his objections to the petition and named another person to serve as his attorney-in-fact. The trial court found "that Lydia and Donald are not qualified persons suitable to serve as John's guardians due to the evidence of their adversarial histories and evidence of Lydia's past breach of her fiduciary relationship with John." *Id*. at 23.

[52] The trial court did not err in awarding attorney fees regarding the Appellants' frivolous claim, which they litigated in bad faith. *See River Ridge Dev. Auth.*, 146 N.E.3d at 913 ("[Indiana Code section 34-52-1-1] allows a court '[i]n any civil action' to award attorney's fees 'as part of the cost to the prevailing party' if another party '(1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless; . . . or (3) litigated the action in bad faith.'"). Accordingly, I concur in part and dissent in part.