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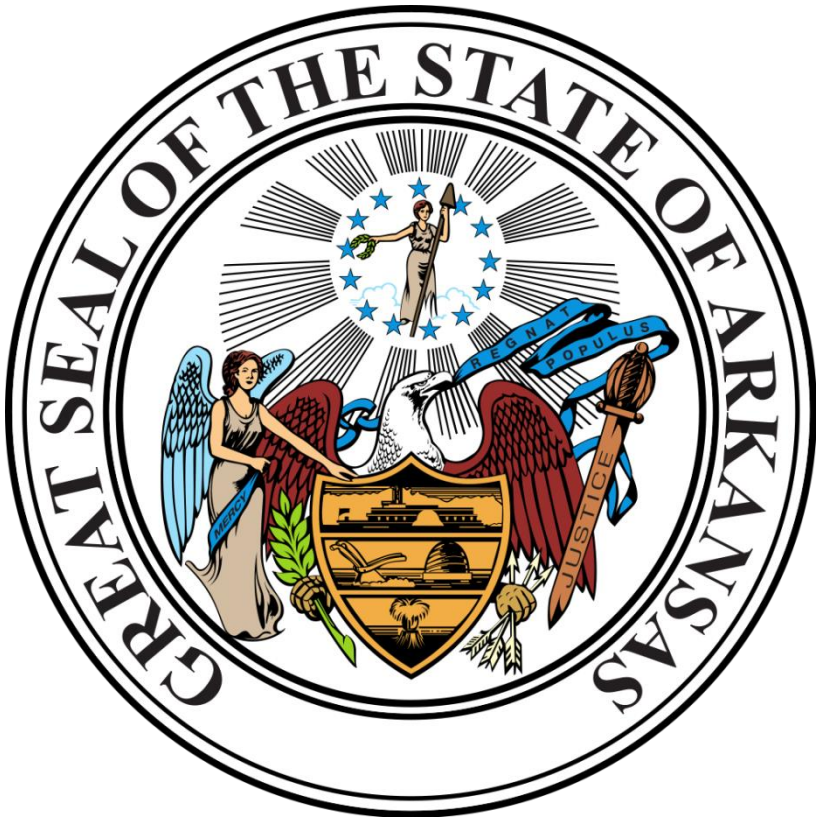
Arkansas Circuit Courts

Judges' Benchbook

Probate Division



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I. Wills

Administration

Venue & Jurisdiction

The venue for the probate of a will and for administration shall be:

> (1) In the county in this state where the decedent resided at the time of his or her death;
>
> (2) If the decedent did not reside in this state, then in the county wherein is situated the greater part, in value, of the property of the decedent located in this state;
>
> (3) If the decedent had no residence or property in this state, but died in this state, then in the county in which he or she died; and
>
> (4) If the decedent had no residence or property in this state and died outside of this state, then in any county in which a cause of action may be maintained by his or her personal representative.
>
> Ark. Code Ann. § 28-40-102.

The statute also says that "[t]he proceedings shall be deemed commenced by the filing of a petition, the issuance of letters, and the qualification of a personal representative." But this provision has been repealed by implication by Steward v. Statler, 371 Ark. 351, 266 S.W.3d 710 (2007) as a result of subsequent amendment to the wrongful death/survival statute codified in Ark. Code Ann. § 28-48-102, which provided that letters of administration were no longer necessary to empower a person appointed to act for an estate as long as there was an order appointing the administrator, as there was an invincible repugnancy between the two statutes, and the earlier statute therefor had to yield to the later enactment.

If proceedings are commenced in more than one (1) county, they shall be stayed except in the county where first commenced until final determination of venue by the circuit court of the county where first commenced.

If the proper venue is finally determined to be in another county, the court, after making and retaining a true copy of the entire file, shall transmit the original to the proper county.

If it appears to the court at any time before the order of final distribution that the proceeding was commenced in the wrong county or that it would be for the best interest of the estate, then the court, in its discretion, may order the proceeding transferred to another circuit court, which shall proceed to complete the administration proceeding as if it originally commenced there.

Ark. Code Ann. § 28-40-102.

See also Lawrence v. Sullivan, 90 Ark. App. 206, 205 S.W.3d 168 (2005)(venue statute mandates that probate action be where decedent "resided"; here, decedent was arguably domiciled in a county other than where he resided, but venue was not proper there; discussion of "residence" and "domicile");

Statute of Limitations

A will must be submitted to the probate court within 5 years of the decedent's death.

An administration must also be granted within 5 years of the decedent's death.

Ark. Code Ann. § 28-40-103.

See Delafield v. Lewis, 299 Ark. 50, 770 S.W.2d 659 (1989)(any limitation period is initiated by the death of a decedent rather than any accrued cause of action; Act which removed period of limitations applicable to probating will of nonresident did not apply to will of nonresident who died prior to time Act went into effect, notwithstanding that Act went into effect within limitation period required by old law).

No Will Effectual Until Probated

No will shall be effectual for the purpose of proving title to or the right to the possession of any real or personal property disposed of by the will until it has been admitted to probate.

Ark. Code Ann. § 28-40-104.

Attested Wills

An attested will shall be proved as follows:

(1) By the testimony of at least two (2) attesting witnesses, if living at known addresses within the continental United States and capable of testifying; or

(2) If only one (1) or neither of the attesting witnesses is living at a known address within the continental United States and capable of testifying, or if, after the exercise of reasonable diligence, the proponent of the will is unable to procure the testimony of two (2) attesting witnesses, in either event the will may be established by the testimony of at least two (2) credible disinterested witnesses.

The witnesses shall prove the handwriting of the testator and such other facts and circumstances, including the handwriting of the attesting witnesses whose testimony is not available, as would be sufficient to prove a controverted issue in equity, together with the testimony of any attesting witness whose testimony is procurable with the exercise of due diligence.

Ark. Code Ann. § 28-40-117.

See Dillard v. Nix, 345 Ark. 215, 45 S.W.3d 359 (2001)(testimony of two attesting witnesses regarding procedure followed in attesting will and that they would not have signed will unless they had seen testator sign document was sufficient to prove validity of will, even though witnesses could not specifically recall circumstances surrounding testator's signing of will and codicil);

Matter of Estate of Sharp, 306 Ark. 268, 810 S.W.2d 952 (1991)(proof of will statute provides that at least two attesting witnesses, if competent and available, are required to prove signature of testator; purported will was erroneously admitted to probate where only one disinterested witness testified that testator signed instrument);

Walburn v. Law, 77 Ark. App. 211, 72 S.W.3d 543 (2002)(the testimony of the attorney who drafted a will, but who was not named as a beneficiary in the will, can satisfy the statutory "credible disinterested witness" testimony requirement, for purposes of proving the will).

Will Subsequently Presented for Probate

Where one petition for probate has been filed but not heard, and a second will surfaces, both petitions are heard together to determine which one will be admitted to probate or whether the decedent will be deemed to have died intestate.

A second petition may also be filed and heard even after a will has been admitted or after letters of administration have been granted.

No will shall be admitted unless it is presented to the court before the court orders or approves final distribution of the estate.

Ark. Code Ann. § 28-40-116.

Notice of Hearing

If the petition for probate or for the appointment of a general personal representative is opposed, or if a demand for notice has been filed under the provisions of § 28-40-108, the court shall, and in all other cases the court may, fix a time and place for a hearing on the petition.

Notice of the hearing shall be given by one (1) or more of the methods set out in § 28-1-112 to each heir and devisee whose name and address is given, including notice other than by publication to each person who has filed demand for notice.

The notice required by this section shall be in substantially the form given in the statute.

Ark. Code Ann. § 28-40-110.

See Snowden v. Riggins, 70 Ark. App. 1, 13 S.W.3d 598 (2000)(wife and mother did not receive adequate notice of their counsel's withdrawal prior to appointment hearing, and thus, order appointing decedent's mother as administratrix should have been set aside);

Kimrey v. Booth, 285 Ark. 18, 685 S.W.2d 139 (1985)(where decedents' son and one decedent's father were only possible heirs, notice of estate proceedings was not required to be given to parties who had no direct interest in decedents' estates); and

Walters v. Lewis, 276 Ark. 286, 634 S.W.2d 129 (1982)(personal representative of estate breached her duty of trust and was guilty of fraud by failing to notify decedent's wife and child of the death, in failing to disclose the fact of the appointment of the personal representative, and in failing to advise the widow and her child when the estate was closed).

Validity of a Will

Age

Any person of sound mind eighteen (18) years of age or older may make a will. Ark. Code Ann. § 28-25-101.

Sanity

Complete sanity in medical sense is not required if power to think rationally existed at time will was made. Noland v. Noland, 330 Ark. 660, 956 S.W.2d 173 (1997).

The test for “testamentary capacity” is whether the testatrix at the time the will was executed had a fair comprehension of the nature and extent of her property and to whom she was giving it. Green v. Holland, 9 Ark. App. 233, 657 S.W.2d 572 (1983).

Witnesses

Any person, eighteen (18) years of age or older, competent to be witness generally in this state may act as attesting witness to a will.

No will is invalidated because attested by an interested witness, but an interested witness, unless the will is also attested by two (2) qualified disinterested witnesses, shall forfeit so much of the provision therein made for him or her as in the aggregate exceeds in value, as of the date of the testator's death, what he or she would have received had the testator died intestate.

No attesting witness is interested unless the will gives to him or her some beneficial interest by way of devise.

An attesting witness, even though interested, may be compelled to testify with respect to the will.

Ark. Code Ann. § 28-25-102.

See also Norton v. Hinson, 337 Ark. 487, 989 S.W.2d 535 (1999)(will was invalid where one of the witnesses was less than 18 years old when she signed it; probate code clearly provided for attesting witnesses to be at least 18 years of age or older, leaving no room for judicial interpretation or substantial compliance);

Rockafellow v. Rockafellow, 192 Ark. 563, 93 S.W.2d 321 (1936)(where one of the necessary subscribing or attesting witnesses to a will is a beneficiary, such subscribing witness may become competent by voluntarily releasing his bequest); and

Burns v. Adamson, 313 Ark. 281, 854 S.W.2d 723 (1993)(will was not properly executed in compliance with statutory requirements of attestation where first witness signed her name to will before testator signed, and second witness was absent, and where first witness was not present to see testator sign will or acknowledge it, or to see second witness sign will);

Execution

The execution of a will, other than holographic, must be by the signature of the testator and of at least two (2) witnesses.

The testator shall declare to the attesting witnesses that the instrument is his or her will and either:

(A) Himself or herself sign;

(B) Acknowledge his or her signature already made;

(C) Sign by mark, his or her name being written near it and witnessed by a person who writes his or her own name as witness to the signature; or

(D)At his or her discretion and in his or her presence have someone else sign his or her name for him or her.

The person so signing shall write his or her own name and state that he or she signed the testator's name at the request of the testator.

The signature must be at the end of the instrument; and

The act must be done in the presence of two (2) or more attesting witnesses.

The attesting witnesses must sign at the request and in the presence of the testator.

Ark. Code Ann. § 28-25-103.

See Fischer v. Kinzalow, 88 Ark. App. 307, 198 S.W.3d 555 (2004)(where there is no indication of fraud, deception, undue influence, or imposition, reviewing court avoids strict technical construction of statutory requirements in order to give effect to the testator's wishes);

Fischer v. Kinzalow, 88 Ark. App. 307, 198 S.W.3d 555 (2004)(it is not required that a testator recite precisely the words “this is my will,” although that is the preferred practice);

Patrick v. Rankin, 256 Ark. 310, 506 S.W.2d 853 (1974)(will which was signed by totally blind testator with assistance from individual who was sole beneficiary of will and which was witnessed by two witnesses was valid);

Clark v. Nat'l Bank of Commerce of Pine Bluff, 304 Ark. 352, 802 S.W.2d 452 (1991)(nontestamentary, nondispositive language appearing below signature of maker of will does not invalidate instrument);

Foster v. Foster, 2010 Ark. App. 594, 377 S.W.3d 497 (2010)(testatrix's granddaughter failed to preserve for appellate review claim that testatrix failed to prove that she executed her will in accordance with statutory requirement, where granddaughter did not raise the argument at trial or obtain a ruling on it);

Conner v. Donahoo, 85 Ark. App. 43, 145 S.W.3d 395 (2004)(will that was signed by attesting witness in room adjoining testator's bedroom where testator executed will was attested to “in the presence of the testator”; witness was originally in bedroom with testator when testator executed will, and was taken to adjoining room after requesting, in testator's presence, to sit down while signing); and

Matter of Estate of Sharp, 306 Ark. 268, 810 S.W.2d 952 (1991)(purported will was erroneously admitted to probate where only one disinterested witness testified that testator signed instrument).

Foreign Execution

A foreign will, one executed outside this state, shall have the same force in Arkansas as if executed in Arkansas:

(1) pursuant to the Probate Code, A.C.A. § 28-25-101 through 104; or

(2) in manner prescribed by the law of the place of its execution; or

(3) in a manner prescribed by the law of the testator's domicile.

Ark. Code Ann. § 28-25-103

Revocation

A will or any part thereof is revoked:

(1) By a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(2) By being burned, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking it by the testator or by another person in the testator's presence and by the testator's direction.

If, after making a will, the testator is divorced or the marriage of the testator is annulled, all provisions in the will in favor of the testator's spouse so divorced are revoked. With these exceptions, no will or any part thereof shall be revoked by any change in the circumstances, condition, or marital status of the testator, subject, however, to the provisions of § 28-39-401.

When there has been a partial revocation, reattestation of the remainder of the will shall not be required.

Ark. Code Ann. § 28-25-109.

See Langston v. Langston, 371 Ark. 404, 266 S.W.3d 716 (2007)(testator's holographic will in which he bequeathed entire estate to wife was revoked by operation of law when judgment of divorce was entered, regardless of testator's intent);

Dillard v. Nix, 345 Ark. 215, 45 S.W.3d 359 (2001)(at least 25 cross-throughs, interlineations, and mark-outs on face of will did not revoke will, as changes testator made to will were of no legal significance, and contestants failed to establish that testator intended to revoke her will by obliteration);

Dodson v. Walton, 268 Ark. 431, 597 S.W.2d 814 (1980)(where change in will through obliteration of devisee's name was not attested, and the obliteration changed the will, the attempt to obliterate the name of the devisee was void, and the devisee's name had to be restored to the will as originally intended);

Machen v. Machen, 2011 Ark. 531, 385 S.W.3d 278 (2011)(testator was not proper party to family-settlement agreement modifying his will; testator's recourse, had he wished to change or revoke his will, was to do so in accordance with testamentary formalities as required by statute); and

Wells v. Estate of Wells, 325 Ark. 16, 922 S.W.2d 715 (1996)(execution of inter-vivos trust could not revoke prior will).

Revival

A will, or part thereof, that has been revoked or found invalid, cannot be revived except by:

(1) re-execution of the will; or

(2) by reference or incorporation in a subsequently executed will.

Ark. Code Ann. § 28-25-110.

See Larrick v. Larrick, 271 Ark. 120, 607 S.W.2d 92 (Ct. App. 1980)(probate judge erred as matter of law in applying doctrine of dependent relative revocation on finding that testator intentionally destroyed existing will and intended to make new will but died from sudden attack before he made new will, there being no proof to overcome or rebut presumption of intention to revoke existing will); and

Matheny v. Heirs of Oldfield, 72 Ark. App. 46, 32 S.W.3d 491 (2000)(will that has been revoked can be revived only by re-execution or by execution of another will in which the revoked will is incorporated by reference; testimony of attorney and her employees was sufficient to establish that will attorney drafted was executed more than a month after another will was executed, and thus, this later will revoked prior will; it was never revived or re-executed so the decedent died intestate).

Affidavit of Attesting Witness

Any attesting witness to a will may make and sign an affidavit before any officer authorized to administer oaths in this state or in any other state stating such facts as he or she would be required to testify to in an uncontested probate proceeding concerning the will.

The attesting witness may make and sign the affidavit at any time, either:

(1) On his or her own initiative;

(2) At the request of the testator; or

(3) After the testator's death, at the request of the executor or of any other person interested.

The affidavit shall be written on the will, or, if that is impracticable, it shall be securely affixed to the will or to a true copy of the will by the officer administering the oath.

If the probate of the will is uncontested, the affidavit may be accepted by the circuit court with the same effect as if the testimony of the witness had been taken before the court.

Ark. Code Ann. § 28-25-106.

Incorporation by Reference

Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, securities, and property used in trade or business.

To be admissible, the writing must either be in the handwriting of the testator or be signed by him or her and must describe the items and devisees with reasonable certainty.

The writing may be:

> (A) Referred to as one to be in existence at the time of the testator's death;
>
> (B) Prepared before or after the execution of the will;
>
> (C) Altered by the testator after its preparation; and
>
> (D) A writing which has no significance apart from its effect upon the dispositions made by the will.

Ark. Code Ann. § 28-25-107.

If a will, duly executed and witnessed according to statutory requirements, incorporates into itself by reference any document or paper not so executed and witnessed, whether such paper referred to is in form of a will, codicil, deed or a mere list or schedule, or other written paper or document, such paper if it was in existence at time of execution of will, and is identified by clear and satisfactory proof as paper referred to, takes effect as a part of will and is entitled to probate as such. Montgomery v. Blankenship, 217 Ark. 357, 230 S.W.2d 51 (1950)(where by residuary clause of will testatrix devised to named trustee all residue of her estate, to be added to and become a part of, and subject to all the terms and conditions of living trust created by her under date of January 27, 1944, extrinsic document referred to was clearly identified and as trust instrument was in existence when will was executed, it was incorporated into will by reference).

See also Gifford v. Estate of Gifford, 305 Ark. 46, 805 S.W.2d 71 (1991)(mother's will incorporated by reference handwritten note that was in existence as of date of will, that was signed by mother, and that was attached to will, even if handwritten note had not been specifically identified in will);

Deal v. Huddleston, 288 Ark. 96, 702 S.W.2d 404 (1986)(memoranda made by testatrix after execution of will stating her wishes regarding trustees' disposition of testatrix' personal property would be effective, if signed, subject to certain restrictions); and

Jones v. Ellison, 70 Ark. App. 162, 15 S.W.3d 710 (2000)(record supported admission as part of testatrix's will a handwritten note found in her jewelry box stating, “I want [legatee] to have these items and (testatrix's dog],” despite claim that such finding failed to give effect to portion of will in which testatrix reserved right to make disposition of her tangible property by “attaching or associating” statement with her will; note was enclosed in jewelry box with specific items that could be identified, it listed legatee of those items, and it was dated and signed in handwriting of testatrix).

Life Insurance Policy or Annuity Contract Proceeds- 2021 Legislation

A testamentary change to a designated or named beneficiary of a life insurance policy or annuity contract is ineffective if the change is not made according to the terms of the life insurance policy or annuity contract.

Ark. Code Ann. § 28-25-111

Construction

Jurisdiction to Construe

The court in which a will is probated or to which the administration proceeding may have been transferred shall have jurisdiction to construe it at any time during the administration.

The construction may be made on the petition of the personal representative or of any other person interested in the will, or if a construction of the will is necessary to the determination of an issue properly before the court, the court may construe the will in connection with the determination of the issue.

When a petition for the construction of a will is filed, notice of the hearing shall be given to persons interested in the construction of the will.

Ark. Code Ann. § 28-26-101.

Extrinsic evidence may be received on issue of testator's intent, but only where terms of will are ambiguous. Burnett v. First Commercial Trust Co., 327 Ark. 430, 939 S.W.2d 827 (1997).

See also Dunklin v. Ramsay, 328 Ark. 263, 944 S.W.2d 76 (1997)(coexecutor of decedent's estate lacked standing to oppose action of majority of executors and could not petition for construction of will in his capacity of fiduciary).

Intention of Testator

The cardinal principle in the interpretation of wills is that the testatrix's intent governs. The testatrix's intent is to be gathered from the four corners of the instrument and by giving meaning to the provisions in their entirety, if possible. When construing a testamentary document to arrive at the testatrix's intention, one does not look at the intention that existed in the testatrix's mind at the time of the execution, but that which is expressed by the language of the instrument. In the absence of fraud or deception in the execution of a will, strict technical construction of the statutory requirements is avoided in order to give effect to the testatrix's wishes. Jones v. Ellison, 70 Ark. App. 162, 15 S.W.3d 710 (2000).

After-Acquired Property

Property acquired by the testator after the making of the testator's will shall pass as if title to the property was vested in the testator at the time of making the will, unless the contrary intention manifestly appears in the will.

Ark. Code Ann. § 28-26-102.

See Ellis v. Estate of Ellis, 315 Ark. 475, 868 S.W.2d 83 (1994)(settlement proceeds from personal injury action acquired after death of plaintiff belong to his estate, not to his widow as marital property);

Bradshaw v. Pennington, 225 Ark. 410, 283 S.W.2d 351 (1955)(where testator executed six holographic writings, and five of the writings gave to named relatives all realty and personalty "as written below," and on each writing there was a list of realty and personalty which was not duplicated as to any items in the other writings, and the sixth writing gave to testator's nephews and nieces, who had not been provided for, all of the rest of testator's property and contained a list of realty and personalty not referred to in the other five writings, the sixth writing could not be construed as leaving to the nephews and nieces referred to therein the after-acquired property of testator, and testator would be deemed to have died intestate as to after-acquired property); and

Slavik v. Estate of Slavik, 46 Ark. App. 74, 880 S.W.2d 524 (1994)(life insurance proceeds passed outside the will, not to co-executors for benefit of estate).

Failure of a Testamentary Provision & Lapse

Unless a contrary intent is indicated by the terms of the will, the following rules shall apply:

If a devise other than a residuary devise fails for any reason, it becomes a part of the residue; and

If the residue is devised to two (2) or more persons and the share of one (1) of the residuary devisees fails for any reason, his or her share passes to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue; and

Whenever property is devised to a child, natural or adopted, or other descendant of the testator, either by specific provision or as a member of a class, and the devisee shall die in the lifetime of the testator, leaving a child, natural or adopted, or other descendant who survives the testator, the devise shall not lapse, but the property shall vest in the surviving child or other descendant of the devisee, as if the devisee had survived the testator and died intestate.

Ark. Code Ann. § 28-26-104.

Arkansas law provides that, when a bequest to a residuary legatee lapses, his interest passes to the other residuary legatees in proportion to their interests. Carpenter v. Miller, 71 Ark. App. 5, 9, 26 S.W.3d 135, 138 (2000).

See Nowak v. Etchieson, 241 Ark. 328, 408 S.W.2d 476 (1966)(under will leaving residue of estate to two nieces of testatrix, only one of whom survived testatrix, where gift by codicil failed because not properly executed, property named in codicil passed by residuary clause and surviving niece received one-half of such property as a tenant in common and other one-half passed by intestacy); and

Matter of Estate of Harp, 316 Ark. 761, 875 S.W.2d 490 (1994)(will validly disposed of testator's entire estate, despite containing two residuary clauses which appeared to conflict, where language and organization of will supported finding that first residuary clause was specific residuary clause of any remaining real estate not already devised in two preceding paragraphs of will, and that second residuary clause was general residuary clause disposing of personal property or other property not already disposed of by prior provisions of will).

Partial Intestacy

If part but not all of the estate of a decedent is validly disposed of by will, the part not disposed of by will shall be distributed as provided by law with respect to the estates of intestates.

Ark. Code Ann. § 28-26-103.

See Harrison v. Harrison, 82 Ark. App. 521, 120 S.W.3d 144 (2003)(clause in will excluding testator's children from inheriting under will did not control distribution of intestate property, where will did not contain residuary clause disposing of remaining assets of estate in event wife survived testator);

Cook v. Estate of Seeman, 314 Ark. 1, 858 S.W.2d 114 (1993)(exclusionary clause in will lacking residuary clause did not control intestate property held by testatrix; although will excluded testatrix' grandchildren from estate, it did not alter their entitlement under laws of intestate succession);

Ademption

Rodgers v. Rodgers, 2012 Ark. 200, 406 S.W.3d 422 (2012)(if the property that is the subject of a specific devise is sold by an attorney in fact at a time when the testator is incompetent, and the testator does not regain testamentary capacity before his or her death, an ademption of the specific devise does not take place as to the unexpended, identifiable proceeds of the sale).

Inter Vivos Gifts

A valid inter vivos gift is effective when the following requirements are proven by clear and convincing evidence:

(1) the donor was of sound mind;

(2) an actual delivery of the property took place;

(3) the donor clearly intended to make an immediate, present, and final gift;

(4) the donor unconditionally released all future dominion and control over the property; and

(5) the donee accepted the gift.

O'Fallon v. O'Fallon ex rel. Ngar, 341 Ark. 138, 14 S.W.3d 506 (2000)(record supported finding that father made valid inter vivos gift of automobile to his son, even though father retained title to automobile; mother testified that father told her he "was going to buy" car for son and that father later told her that he "had bought" car for son, loan officer with credit union at which father applied for loan to purchase automobile testified that father stated that he was buying it for his son, son was minor at time of alleged gift and thus could not acquire title, and evidence indicated that father gave son and mother keys, but did not retain set for himself). Side note: hearsay was allowed in this case- the decedent's statements to others regarding his intention with the car.

Holographic Wills

Definition

When the entire body of the will and the signature shall be written in the proper handwriting of the testator, the will may be established by the evidence of at least three (3) credible disinterested witnesses to the handwriting and signature of the testator, notwithstanding there may be no attesting witnesses to the will.

Ark. Code Ann. § 28-25-104.

See Minton v. Minton, 2010 Ark. App. 310, 374 S.W.3d 818 (2010)(testator's nephew and nephew wife's candid admission that they were completely unfamiliar with testator's printing made them not "credible" witnesses within meaning of statute providing that holographic will shall be proved by three credible, disinterested witnesses);

Edmundson v. Estate of Fountain, 358 Ark. 302, 189 S.W.3d 427 (2004)(document drafted by decedent, which was titled "Last Will," contained no words of testamentary intent, and thus extrinsic evidence was not admissible to prove the necessary intent, during proceeding to admit decedent's purported holographic will to probate; the document only listed

decedent's children with certain property listed under each name, it did not contain any language indicating that decedent intended to leave her children the property listed under their names, the title of the document was insufficient to establish testamentary intent, and where testamentary intent could not be discerned form the face of the document, extrinsic evidence could not be admitted); and

Lost or Destroyed Wills

Jurisdiction

Whenever any will shall be lost, or destroyed by accident or design, the circuit court shall have the same power to take proof of the execution of the will and to establish the same, as in cases of lost deeds.

Ark. Code Ann. § 28-40-301.

No will of any testator shall be allowed to be proved as a lost or destroyed will unless:

(1) The provisions are clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness; and

(2) The will is:

(A) Proved to have been in existence at the time of the death of the testator; or

(B) Shown to have been fraudulently destroyed in the lifetime of the testator.

Ark. Code Ann. § 28-40-302.

Proponent of a lost will must prove two things: first, he must prove the will's execution and its contents by strong, cogent, and convincing evidence, and second, he must prove that the will was still in existence at the time of the testator's death, i.e., had not been revoked by the testator, or that it was fraudulently destroyed during the testator's lifetime.

The law presumes that an original will that cannot be found after a testator's death has been revoked; this presumption may be overcome, however, if the proponent of the lost will proves, by a preponderance of the evidence, that the will was not revoked during the testator's lifetime.

Abdin v. Abdin, 94 Ark. App. 12, 223 S.W.3d 60 (2006)(proponent of lost will failed to prove that lost will was executed by decedent, and thus lost will would not be probated; despite testimony of proponent and other witnesses that signature on will was that of decedent, witnesses familiar with decedent's signature and frail health testified that signature was too small and neat to have been written by decedent, witnesses testified that decedent distrusted proponent and that proponent had requested money from decedent on his deathbed, certified

document examiner could not identify decedent as the signer of the will, decedent's attorney, who had discussed tax implications of the estate with decedent, did not believe decedent would draft a new will without his knowledge, and will was inconsistent with decedent's great affection for his daughters, who were not provided for in lost will).

The burden to establish the execution and contents of a lost will is on party claiming under it.

Until it is shown that a will has been duly executed there can be no establishment of a lost will.

Porter v. Sheffield, 212 Ark. 1015, 208 S.W.2d 999 (1948)(proceeding to establish alleged lost will; the parties did not meet their burden).

Gilbert v. Gilbert, 47 Ark. App. 37, 883 S.W.2d 859 (1994)(since proceedings were to restore lost will incident to administration of an estate, jurisdiction was proper in probate court).

See also Kennedy v. Ferguson, 679 F.3d 998 (8th Cir. 2012)(under Arkansas law, a copy of a will may be entered into probate for the purpose of controlling the ultimate distribution of an estate, but only if it is accompanied by sufficient additional evidence to prove that the testator did not, in fact, destroy the original version of the will reflected in the copy); and

Wharton v. Moss, 267 Ark. 723, 594 S.W.2d 856 (Ct. App. 1979)(although evidence was sufficient to prove that will was executed by testator, there was insufficient evidence to rebut presumption that will in possession of or accessible to testator was revoked by testator where will could not be produced at his death).

Record of Decree

A lost or destroyed will, upon being established by a court decree, requires the decree to be filed with the clerk, after which letters of probate or administration may be issued.

Ark. Code Ann. § 28-40-303.

Restraint of Administrator

If a lost or destroyed will action is pending, an administrator may be stayed from any act or proceedings pending a determination to establish the lost or destroyed will.

Ark. Code Ann. § 28-40-304.

Petition for Probate

Who May Petition

An interested person may petition the court of the proper county:

(1) For the admission of the will to probate, although it may not be in his or her possession or may be lost, destroyed, or outside the state;

(2) For the appointment of executor if one is nominated in the will;

(3) For the appointment of an administrator if no executor is nominated in the will or if the person so named is disqualified or unsuitable, or refuses to serve, or if there is no will.

A petition for probate may be combined with a petition for the appointment of an executor or administrator. A person interested in either the probate of the will or the appointment of a personal representative may petition for both.

Ark. Code Ann. § 28-40-107.

See also Lucas v. Wilson, 2011 Ark. App. 584, 385 S.W.3d 891 (2011)(petitioner whose mother-in-law was married to intestate was not creditor of intestate's estate, based on potential claim for services petitioner allegedly rendered to intestate, and thus, she was not "interested person" with standing to petition for appointment as administrator of intestate's estate; petitioner did not file claim against estate, she did not have service contract with intestate, and she provided no evidence that services provided were of extraordinary character, and thus, presumption was that services she rendered arose from familial relationship with intestate, and not because she expected any form of payment)

Burch v. Griffe, 342 Ark. 615, 29 S.W.3d 726 (2000)(decedent's sister found unsuitable to serve as executrix because she was serving simultaneously as executrix of decedent's late wife's estate).

Content of Petition

A petition for probate of a will or for the original appointment of a general personal representative, or for both, shall state:

(1) The name, age, residence, and date and place of death of the decedent;

(2) The names, ages, relationships to the decedent, and residence addresses of the heirs and devisees, if any, so far as they are known or can with reasonable diligence be ascertained;

(3) The probable value, stated separately, of the real and of the personal property;

(4) If the decedent did not reside in the state at the time of his or her death, a general description of the property situated in each county in this state and the value thereof;

(5) If the venue is based upon § 28-40-102(a)(4), the facts establishing the venue;

(6) If the decedent died testate and the will is not filed, the contents of the will, either by attaching a copy of it to the petition or, if the will is lost, destroyed, or suppressed, by including a statement of the provisions of the will so far as known;

(7) The names and residence addresses of the persons, if any, nominated as executors; and

(8) If the appointment of a personal representative is sought, the name and residence address of the person for whom letters are prayed, his or her relationship to the decedent, or other facts, if any, which entitle the person to appointment.

Ark. Code Ann. § 28-40-107.

Notice & Service

Notice shall be given to interested persons or their attorneys of record if any, in probate or administration proceedings only when and as specifically provided by the code or ordered by the court.

If no notice is required by code, court may require such notice as it deems desirable.

Ark. Code Ann. § 28-1-112.

See Shelton v. Keathley, 367 Ark. 568, 242 S.W.3d 223 (2006)(decedent's illegitimate child who has never been declared legitimate is not an "interested person" within the Probate Code who was required to receive notice).

Unless notice is waived or a mode of service is specified by the court, service may be by:

(a) personal service on a party or designated agent of a corporate party at least 10 days before the hearing; or

(b) leaving a copy at the party's usual place of abode with a family member over 15 years old at least 10 days before the hearing; or

(c) registered or certified mail, return receipt requested, signed by the addressee only, and deposited in U.S. Post Office at least 15 days before the hearing; or

(d) publishing once a week for two consecutive weeks in a general circulation newspaper at least 15 days before the hearing, and service by ordinary mail;

(e) any combination of two or more of the above; or

(f) any method permitted by the Rules of Civil Procedure.

Ark. Code Ann. § 28-1-112(b).

Unless otherwise provided by statute or court order, notice shall be:

(a) in writing or print;

(b) prepared by the party with the burden of giving notice;

(c) signed by the clerk of the court or the attorney for the party required to give notice.

Ark. Code Ann. § 28-1-112(c)(1).

Proof of service, except for by publication, shall be made by filing:

(a) a copy of the notice with the clerk with a sworn statement by the person who served notice naming:

  (i) the person(s) upon whom it was served;

  (ii) the time, place, and manner of service.

(b) and registered mail return receipts if applicable.

Ark. Code Ann. § 28-1-112(f).

Except as otherwise specifically provided, incompetents shall be served by service upon:

(a) the guardian of the estate or of the person, if any, according to the nature of the proceedings, and the guardian of the person, if any, if the proceedings affect the control or custody of his or her person; or

(b) the incompetent, if there is no guardian, except if the incompetent is:

  (i) under 14 years old, then service is on a parent;

  (ii) confined in a mental hospital or institution, then service is on the superintendent of the hospital; or

  (iii) mentally incompetent but not confined to a hospital, then service is on the spouse or near relative who is in control of the incompetent.

(c) When the interests of the guardian are adverse to those of the incompetent, service shall be upon the incompetent.

Ark. Code Ann. § 28-1-112(d).

Waiver of Notice

Notice shall be waived:

(1) if the person submits to the jurisdiction of the court;

(2) upon execution of a written waiver by an interested person or his or her attorney if such person is:

(a) legally competent;

(b) guardian of the estate of an incompetent on behalf of the ward, if there is no conflict of interest;

(c) an incompetent in his own behalf when his interests are adverse to the guardian's, or if there is no guardian;

(d) the custodial parent of a child under 14 years old, or a minor in his own behalf who is at least 14 years old;

(e) a guardian ad litem of an incompetent;

(f) a trustee in behalf of a beneficiary; or

(g) a consul or representative of a foreign government on behalf of a resident of such country.

Ark. Code Ann. § 28-1-113.

See Smart v. Biggs, 26 Ark. App. 141, 760 S.W.2d 882 (1988)(the personal waiver of the successor guardian, made in her own behalf when she was not a party to the action and before she was appointed successor guardian, did not bar her challenging an order on behalf of her ward).

Requests for Notice

Demand for notice may be made by an interested person before the will is admitted to probate or before a general personal representative is appointed.

A demand for notice must contain:

(1) a statement of the interest of the person filing it; and

(2) address of the person, or his or her attorney's address.

After filing the demand, no will shall be admitted to probate and no personal representative shall be appointed until the notice is given pursuant to A.C.A. § 28-40-110.

At any time after issuance of letters, any interested person may serve upon the personal representative and file with the clerk:

(1) a written admission or proof of service; and

(2) a written request for notice by ordinary mail of the time and place of all hearings of the settlements of accounts, on final distribution, and on any matters in which notice is required by law, rule of the court, or by order of the court.

(3) Unless the court orders otherwise, any interested person who files such request is entitled to notice of such hearings.

Ark. Code Ann. § 28-40-108.

Hearing on Petition Without Notice

Upon filing the petition for probate or for the appointment of a general personal representative, if no demand for notice has been filed as provided in § 28-40-108, and if such a petition is not opposed by an interested person, the court in its discretion may hear it immediately or at such time and place as it may direct without requiring notice.

Ark. Code Ann. § 28-40-109.

Taking Against a Will

Surviving Spouse

A surviving spouse may elect to take against the deceased spouse's will if the spouse has been married to the decedent continuously for more than one year.

The provision above is limited to:

(1) the surviving wife shall receive dower as if her deceased husband had died intestate, which is in addition to her homestead rights and statutory allowances;

(2) the surviving husband shall receive a curtesy interest as if his deceased wife had died intestate, which is in addition to his homestead rights and statutory allowances;

(3) The surviving spouse receives any residue if the decedent is not survived by lineal or collateral heirs or their descendants and after payment of all statutory allowances, taxes, debts, and satisfaction of all testamentary gifts and bequests.

Ark. Code Ann. § 28-39-401.

There is public policy that surviving spouse of testator has the right to elect to take against the deceased spouse's will.

Surviving spouse's elective interest in the decedent's estate vests immediately upon the decedent's death, but it can vest only in property which the decedent owned at the time of death.

Gregory v. Estate of Gregory, 315 Ark. 187, 866 S.W.2d 379 (1993).

The purpose of the election statute, which entitles the surviving spouse to take against the will if the surviving spouse “has been married to the [testator] continuously” for one year, was to put an end to all controversies as to dower rights.

> Shaw v. Shaw, 337 Ark. 530, 989 S.W.2d 919 (1999)(wife could not take against the will when she and decedent had been married for only 13 days, despite the fact that they had been married previously to each other three different times, each marriage ending in divorce).

Surviving spouse's right to take elective share against will is inviolate, even if decision to take against will rebuffs testator's wishes.

> Hamilton v. Hamilton, 317 Ark. 572, 879 S.W.2d 416 (1994)(fact that testator and surviving spouse were estranged at time of testator's death and that divorce action was pending did not effect spouse's right to elect against will as death had effect of terminating divorce action; parties were thus still married when testator died).

Where a spouse dies testate, surviving spouse must exercise option to take against the will in his or her lifetime otherwise the right is forfeited because it is personal and does not survive the surviving spouse.

> Estate of Dahlmann v. Estate of Dahlmann, 282 Ark. 296, 668 S.W.2d 520 (1984)(right of wife, who was left nothing in husband's will and who failed to elect to take against his will during her lifetime, to claim dower did not survive her death).

Within one month after a married person's will is admitted to probate, the clerk shall mail notice to decedent's spouse advising the time within which a written election must be filed in order to take against the will.

Ark. Code Ann. § 28-39-402.

The right of election to take against a will is personal to the surviving spouse and is not transferable or survivable.

Ark. Code Ann. § 28-39-405.

The election must be made:

(1) at any time before or within one month after the expiration of the date for filing claims against the decedent's estate unless extended by litigation, Ark. Code Ann. § 28-39-403; and

(2) in writing, signed, and acknowledged, and filed with the probate clerk in substantially the form set out in this section. Ark. Code Ann. § 28-39-404.

An election of a surviving spouse is binding, but may be revoked if:

(a) made timely within the period for making an election as set out in A.C.A. §28-39-403; and

(b) before any distribution based on the election; or

(c) thereafter for cause that would justify rescission of a deed.

Ark. Code Ann. § 28-39-406.

See Townson v. Townson, 221 Ark. 610, 254 S.W.2d 952 (1953)(just as a widow may statutorily revoke her decision to take against the will, so may she revoke her decision to take under the will and to decide, instead, to take against the will).

Children Taking Against a Will

Children or issue of a testator born to or adopted may elect to take against the decedent's will and receive an intestate share of the estate, provided:

(1) the child was born or adopted after the will of testator had been made and after-born or adopted children were not mentioned or provided for in the will; or

(2) at the time of execution of the will by testator, there were living children or issue of a deceased child of testator not mentioned or provided for in the will; these are called “pretermitted” children and are subject to intestate interests remedies.

Ark. Code Ann. § 28-39-407.

The purpose of the after-born child and pretermitted-child statute is not to interfere with the right of a person to dispose of his property according to his own will, but to avoid the inadvertent or unintentional omission of children (or issue of a deceased child) unless an intent to disinherit is expressed in the will; thus, where the testator fails to mention children or provide for them as member of a class, it will be presumed that the omission was unintentional, no contrary intent appearing in the will itself.

Dotson v. Dotson, 2009 Ark. App. 819, 372 S.W.3d 398 (2009)(so strong is the presumption that a father would not intentionally omit to provide for all his

children, that in case the name of one or more of the children is left out of the will, by statute it is held to be an unintentional oversight, and the law brings them within the provisions of the will, and makes them joint heirs in the inheritance).

See Holland v. Willis, 293 Ark. 518, 739 S.W.2d 529 (1987)(grandchildren of testator were pretermitted heirs, pursuant to statute and case law, and thus were entitled to share in testator's estate, where neither grandchildren nor their father, who died before execution of will, were mentioned or provided for in the will; statute upheld as constitutional);

Kidwell v. Rhew, 371 Ark. 490, 268 S.W.3d 309 (2007)(the pretermitted-heir statute, which referred only to the execution of a will, did not apply to revocable inter vivos trust, even by analogy and, thus, settlor's heir who was not trust beneficiary could not receive an intestate share of estate; settlor left only a trust, not a will, which were different things entirely);

Bryant v. Thrower, 239 Ark. 783, 394 S.W.2d 488 (1965)(birth or adoption creates permanent relationship while relationship in loco parentis is temporary; and statute on pretermitted children is not broad enough to cover child to whom testator only stood in loco parentis);

Craig v. Carrigo, 353 Ark. 761, 121 S.W.3d 154 (2003)(when a will fails to mention or provide for a child, that omission operates in favor of the pretermitted child, without regard to the real intention of the testator; absent any specific declaration in holographic will that testator intended to omit children, pretermitted children were entitled to inherit as if testator had died intestate);

Alexander ex rel. Alexander v. Estate of Alexander, 351 Ark. 359, 93 S.W.3d 688 (2002)(testator's uses of the term “issue” in section of will referring to issue of testator's son and daughter, and in section that defined terms in will, were insufficient under permitted-child statute to suggest that testator contemplated grandson, who was the issue of testator's predeceased child);

Estate of Cisco v. Cisco, 288 Ark. 552, 707 S.W.2d 769 (1986)(as general rule, testator's use of word which describes class of persons is considered to be sufficient identification of claimant to preclude application of pretermitted heir statute, which permits pretermitted heir to take against will);

Duensing v. Duensing, 112 Ark. 362, 165 S.W. 956 (1914)(a devise to Frederick William, one of the sons of the testator, held to be intended for a son named William Frederick, and therefore to mention the latter, so that the will was valid as to him); and

King v. King, 273 Ark. 55, 616 S.W.2d 483 (1981)(rhree grandchildren of testator, who died subsequent to the grandchildrens' father, who expressly disinherited six of his seven surviving children, and who made no mention of the three grandchildren, in his will, were entitled, as pretermitted heirs, only to a one twenty-fourth interest in his estate, as had

there been no will, they would have inherited such interest under governing intestate succession statutes).

Claims Against the Estate

Allowance of Claims

To be entitled to payment, a claimant must file the claim and have the court's approval, except for claims for expenses of administration and/or reasonable funeral expenses and reasonable expenses incident to the last illness, not to exceed $3,000 in the aggregate and no more than $300 per expense.

The burden is on the personal representative, at the request of an interested person, to establish the validity of any claim paid under “a” above, and an objection must be made within the time for filing exceptions to a settlement and not thereafter.

Ark. Code Ann. § 28-50-105.

See Taylor v. Woods, 102 Ark. App. 92, 282 S.W.3d 285 (2008)(executor of estate who made claim against estate for legal services performed on behalf of testator before testator's death was required to return, with interest, amounts in excess of $10,000 fee, where executor had paid his own claim without prior court approval).

Classification

Claims shall be classified as one of the following, and if the assets are insufficient to pay all claims, they shall be paid in the following order:

(1) Costs and expenses of administration;

(2) Reasonable funeral, medical and other expenses related to the last illness, and wages of employees of the deceased;

(3) Liability for any state tax debt, decedent’s or his estate’s as a result of his death;

(4) Other claims allowed.

No preference is given the payment of any claim over another within the same class, and a claim due and payable is not given preference over claims not due.

Ark. Code Ann. § 28-50-106.

See also Ark. Code Ann. § 20-76-436(recovery of benefits from recipients’ estates);

Acklin v. Riddell, 42 Ark. App. 230, 856 S.W.2d 322 (1993)(estate was insolvent, and trial court correctly ordered assets of estate sold to pay claims and expenses of administration); and

Warren v. Tuminello, 49 Ark. App. 126, 898 S.W.2d 60 (1995)(fee award for services rendered to an estate is primarily a matter within discretion of probate judge).

Time for Filing Claims

All claims except expenses of administration and claims of the U.S.A. not barrable by a statute of nonclaim shall be filed within 6 months after the date of the first publication of notice to creditors, including claims for injury or death caused by the negligence of the decedent.

Ark. Code Ann. § 28-50-101(a).

Distribution & Discharge

Conclusiveness of Final Order

The order of final distribution shall be a conclusive determination as to the persons who are the successors in interest to that part of decedent's estate passing through the hands of the personal representative and as to the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the order.

The order shall not affect the rights of third parties acquired from or through a distributee, as against the distributee.

Only affirmative action by probate court can officially close an estate.

Ark. Code Ann. § 28-53-105.

See also Skaggs v. Cullipher, 57 Ark. App. 50, 941 S.W.2d 443 (1997)(statute does not provide for a closing of an estate by operation of law; only an affirmative action by the court can close an estate).

Exoneration of Encumbered Property

Secured debts shall be discharged out of the general assets of the estate, subject to the right of a decedent to provide otherwise by will.

Nothing precludes a secured creditor from having recourse to his security for satisfaction of a debt.

Ark. Code Ann. § 28-53-113.

See also Balfanz v. Estate of Balfanz, 31 Ark. App. 71, 787 S.W.2d 699 (1990)(section applies only in cases in which secured debts may be discharged out of the general assets of the estate, defined as unpledged personal property of the estate); and

Bruns v. Lotz, 254 Ark. 701, 496 S.W.2d 376 (1973)(widow, whose husband's estate was solvent and who elected to share in estate under laws of descent and distribution rather than under the will, was entitled to full dower in real estate, which was acquired by husband prior to the marriage, and to have mortgage debt on such real estate discharged out of general assets of estate).

More than one representative

Where there are two or more executors, powers may be exercised only by joint action of the two, or by a majority of them, unless the will provides otherwise.

Ark. Code Ann. § 28-48-104.

See also Dunklin v. Ramsay, 328 Ark. 263, 944 S.W.2d 76 (1997)(plain language of section mandates that when there are more than two executors, their powers may be exercised only by joint action of the majority of them); and

Monk v. Griffin, 92 Ark. App. 320, 213 S.W.3d 651 (2005)(co-executrix was required to reimburse second co-executrix, her sister, one-half of all funds co-executrix spent on farm following their mother's death; title to farm had vested in co-executrix immediately after mother's death, mother's will did not indicate that title to farm would not vest immediately, and there was no showing that it was necessary for co-executrix to expend funds on farm to preserve the property or protect the rights and interests of persons having interests therein).

Discharge of Personal Representative

The court shall discharge the personal representative and his surety when satisfactory evidence is filed that final order of distribution has been complied with.

Satisfactory evidence may consist of receipts or canceled checks, or where titled property is concerned, a copy of document transferring title to distributee.

Order of discharge is final except upon a petition being filed within three years of entry thereof, the order may be set aside for fraud in the settlement of the account of the personal representative.

Ark. Code Ann. § 28-53-118.

Reopening Administration

Any interested person may petition to reopen an estate for any proper cause.

No claim already barred can be asserted in the reopened administration.

Ark. Code Ann. § 28-53-119.

See Bullock v. Barnes, 366 Ark. 444, 236 S.W.3d 498 (2006)(error to grant petition to reopen probate of aunt's estate as niece failed to file petition within 90-day limitation of ARCP 60(a) or to provide "other cause" such as fraud or lack of notice).

Devise of Property

Devise of Encumbered Property

A valid charge or encumbrance upon any property shall not revoke any provision of a previously executed will relating to the same property; however, the devisee shall take the property subject to the charge or encumbrance, the discharge of which will be governed by the provisions of A.C.A. § 28-53-113.

Ark. Code Ann. § 28-26-105.

Contracts Affecting the Devise of Property

A valid agreement made by a testator to convey property devised in a will previously made shall not revoke the previous devise, but the property shall pass by the will subject to the same remedies on the agreement against the devisee as might have been enforced against the decedent if he had survived.

Ark. Code Ann. § 28-24-101.

To establish contract to make a will, proof must be clear, satisfactory, and convincing.

Merrell v. Smith, 228 Ark. 167, 306 S.W.2d 700 (1957)(in suit for specific performance of oral agreement pursuant to which deceased co-owner's heirs had conveyed their interest to surviving co-owner, the consideration being that if the lands were not sold title would revert to grantors at grantee's death but if lands were sold remainder of proceeds at grantee's death would become grantors' property, evidence was insufficient to establish oral contract).

See also Avance v. Richards, 331 Ark. 32, 959 S.W.2d 396 (1998)(contract for reciprocal wills need not be expressed in wills, but may arise by implication from circumstances which make it clear that parties had such wills in mind and that they both agreed to terms of testamentary disposition made therein);

Jones v. Abraham, 341 Ark. 66, 15 S.W.3d 310 (2000)(a promise to make a will, where no consideration is shown, will not be enforced);

McCargo v. Steele, 160 F. Supp. 7 (W.D. Ark. 1958)(under Arkansas law, a contract to make a will Will be specifically enforced where the promisee has fully performed his obligations);

Mabry v. McAfee, 301 Ark. 268, 783 S.W.2d 356 (1990)(law has traditionally demanded relatively high standard of proof of intent to make irrevocable, reciprocal wills; generally, while agreement to make irrevocable, reciprocal wills can be inferred from relevant circumstances, fact that parties have contemporaneously executed separate wills, reciprocal in terms, is not sufficient in itself to establish binding contract to make such wills);

Hodges v. Cannon, 68 Ark. App. 170, 5 S.W.3d 89 (1999)(a contract to make a will is valid when the evidence offered to establish the contract is clear, cogent, satisfactory, and convincing; this evidence must be so strong as to be substantially beyond a reasonable doubt; finding that there was no valid contract to make testator's niece a beneficiary of testator's will was supported by lack of statement of material provisions of such a contract in testator's revoked will, under which niece was sole beneficiary, or in testator's current will, under which niece was not a beneficiary);

Watts v. Mahon, 223 Ark. 136, 264 S.W.2d 623 (1954)(in action for partition of deceased's property, in possession of sister and niece who had lived with deceased for over twenty years and who contributed toward expenses on home including insurance, taxes and improvements, evidence sustained finding that deceased intended that sister and niece should become owners upon his death, and that he agreed orally to transfer or devise property to them);

Purser v. Kerr, 21 Ark. App. 233, 730 S.W.2d 917 (1987)(evidence was insufficient to establish that parties negotiated express contract to make a will, notwithstanding purported beneficiary's claim that she acted as purported testator's wife and worked in his business without pay, and that promise was made that she would be cared for; despite purported beneficiary's claim, no witness was able to testify that express promise to make a will had been made); and

Mabry v. McAfee, 301 Ark. 268, 783 S.W.2d 356 (1990)(court was not bound by testimony of will contestant's witnesses that decedent husband and wife had binding agreement not to change their wills; contestant and witnesses called in her behalf were all related by blood or marriage, and their testimony did not have that degree of disinterest which would render it obligatory on fact finder).

Contesting a Will

Generally

An interested person may contest the probate of a will, or any part of the will by:

(1) stating in writing the grounds for objection; and

(2) filing the objection in the court.

The objection must be filed within one of the following time periods:

(1) if the ground is discovery of another will, the objection must be filed before the final distribution has been ordered and within the time pursuant to A.C.A. § 28-40-103; or

(2) if the contest is on any other ground, then the objection must be filed either:

(a) at or before the time of hearing on the petition for probate, if that person has been given notice other than by publication; or

(b) within 3 months after the date of the first publication of the notice of the notice of the admission of the will to probate; or

(c) within 3 months after the first publication of notice of the probate or within 45 days after a copy of the notice was served upon him whichever is later; or

(d) within 3 years after the admission of the will to probate if not barred by any of the above provisions.

If contest is of a foreign will admitted into Arkansas probate, the same time frame applies as to a resident, or 45 days after the court order of the domiciliary state setting aside the probate within that State.

Ark. Code Ann. § 28-40-113.

There is no right to contest will, except as provided by statute. Coleman v. Coleman, 257 Ark. 404, 520 S.W.2d 239 (1974)(second will, which was offered for probate more than five years after testator's death, was barred by statute of limitations, despite contention that it was offered as a counterclaim).

See also West. v. Williams, 355 Ark. 148, 133 S.W.3d 388 (2003)(petition of testator's children contesting will was untimely filed, and thus should have been dismissed, in probate proceeding; statute governing contesting probate of will required that grounds for objection to will had to be filed at or prior to time of hearing on petition for probate, which children failed to do, and fact that children appeared at hearing and stated their intent to file will contest did not satisfy statutory filing requirements, overruling, Judkins v. Hoover, 351 Ark. 552, 95 S.W.3d 768); and

Barrera v. Vanpelt, 332 Ark. 482, 965 S.W.2d 780 (1998)(will contestant was an “interested person,” for purposes of statute giving interested persons standing to contest probate of a will, and thus, contestant had standing to challenge her father's will that divided his estate equally between contestant and her three sisters, but disinherited her brother, given that

contestant was apparently a devisee and legatee of father's will, and would have qualified as a statutory heir in the event the will were set aside).

Notice of Contest

If a statement for grounds for objection to admitting the will to probate is filed before admitting it to probate and the notice provided for in A.C.A. § 28-40-110 is given, no further notice is required, unless ordered by court.

If the notice provided for in A.C.A. § 28-40-110 has not be given, then notice shall be given according to A.C.A. § 28-40-110, and shall further state that the will is being contested.

If the will is already admitted into probate and then the objection is filed timely, then notice shall:

(1) be given to each heir, devisee, executor, personal representative, or any person the court directs if the will is admitted within the time periods set out in A.C.A. § 28-40-113; and

(2) state the will is contested and give the time and place of the hearing set by the court.

All persons notified pursuant to A.C.A. § 28-40-110 or by this section shall be deemed parties to the proceeding for all purposes.

Ark. Code Ann. § 28-40-114.

Grounds for Contest

A party challenging the validity of a will must typically prove by a preponderance of the evidence that the testator lacked the requisite mental capacity or that the testator was the victim of undue influence when the will was executed.

The questions of testamentary capacity and undue influence are so interwoven in any case where these questions are raised that the court necessarily considers them together.

The relevant inquiry in a will contest is not the mental capacity of the testator before or after a challenged will is signed, but rather the level of capacity at the time the will was signed.

With regard to a claim of undue influence, the influence which the law condemns is not the legitimate influence which springs from natural affection, but the malign influence which results from fear, coercion or any other cause that deprives the testator of his free agency in the disposition of his property.

Pyle v. Sayers, 344 Ark. 354, 39 S.W.3d 774 (2001)(evidence in will contest was sufficient to establish that testatrix was competent to execute will and that will was

not product of undue influence; various witnesses testified that proponent had lived with testatrix since he was eight and was close to her, that testatrix referred to proponent as her son, and that testatrix knew what she wanted and that she was "very clear in those regards," and witness to will testified that she was satisfied of testatrix's competency when will was signed).

In the case of a beneficiary of a will who procures the making of the will, a rebuttable presumption of undue influence arises, which places on the beneficiary the burden of going forward with evidence that would permit a rational fact-finder to conclude, beyond a reasonable doubt, that the will was not the product of insufficient mental capacity or undue influence.

Hodges v. Cannon, 68 Ark. App. 170, 5 S.W.3d 89 (1999)(finding that beneficiaries of testator's current will did not procure testator's will by exercise of undue influence and that testator had sufficient mental capacity to make valid will at time he executed current will was supported by evidence).

It is not enough that a confidential relationship exist in order to void a testamentary instrument as the product of undue influence; there must be a malign influence resulting from fear, coercion, or any other cause which deprives the testator of his free agency in disposing of his property.

Medlock v. Mitchell, 95 Ark. App. 132, 234 S.W.3d 901 (2006)
(Confidential relationship existed between testator and his second wife, who also held testator's power of attorney, that triggered presumption of **undue influence** by wife in amended will and trust that effectively excluded testator's children by first wife as beneficiaries; apart from fact of marriage, testator had been diagnosed with terminal illness just prior to modification of original will and trust, and testator executed broad, durable power of attorney in favor of second wife; she did not rebut the presumption).

See also Hooten v. Jensen, 94 Ark. App. 130, 227 S.W.3d 431 (2006)(evidence was insufficient to invalidate business transactions conducted by father the month before he died on the basis of undue influence or mental incapacity, even though father suffered strokes and had language difficulties; neurologist testified that father was able to manage his own affairs and was not more susceptible than a normal person to undue influence, father's wife stated that he handled negotiations for vehicle purchase, and business people father dealt with stated that he was alert and that he knew what he was doing);

In re Estate of Garrett, 81 Ark. App. 212, 100 S.W.3d 72 (2003)(beneficiaries procured making of will and, thus, were obligated to rebut presumption of undue influence by proving beyond a reasonable doubt that testator executed will while possessed with testamentary capacity and freedom of will, where one beneficiary, at other beneficiary's prompting, met with attorney to discuss preparing a will and trust for testator, and attorney prepared such

documents based on information provided by beneficiary; they overcame the presumption); and

Carpenter v. Horace Mann Life Ins. Co., 21 Ark. App. 112, 730 S.W.2d 502 (1987)(finding that leader of religious sect unduly influenced testator to name him beneficiary of her will and life policies was supported by evidence that sect leader was very skillful manipulator of emotionally immature, needy, dependent women, and that there was systematic alienation of testator from her husband, son, parents, and siblings, resulting in leader's virtual enslavement of testator through manipulation of her mind and emotions).

Rights of Persons Acquiring Interest Prior to a Filed Objection

The purchaser or lender shall take title free of rights of any interested person in the estate and incurs no personal liability to the estate or to any interested person whether or not the distribution was proper or supported by court order, if deed or security instrument is made before the filing of objection to a will.

An instrument properly recorded with state documentary fee noted shall be prima facie evidence that the transfer was made for value.

Ark. Code Ann. § 28-40-115.

Family Settlement Agreements

These agreements are favored by the law where no fraud or imposition is practiced.

> Pfaff v. Clements, 213 Ark. 852, 213 S.W.2d 356 (1948)(agreement between wife of deceased heir and other heirs that such wife be granted the one-third of estate of ancestor that deceased heir would have received had he lived, in return for which wife agreed to guarantee all funeral expenses of deceased heir, was enforceable as a family settlement in absence of fraud, imposition or overreaching).

Courts will construe family settlement agreements by seeking the real intent of the parties as revealed in agreement.

> Green v. McAuley, 59 Ark. App. 114, 953 S.W.2d 66 (1997)(family settlement agreement among siblings, whereby one sister released and discharged father's estate from all claims, demands, and actions of any kind relating to estate, except as specifically provided, barred that sister's petition for appointment as successor co-executrix of father's estate).

In the absence of fraud or mistake, the court must strictly adhere to the terms of the agreement.

> Gannaway v. Godwin, 256 Ark. 834, 511 S.W.2d 171 (1974)(receipts executed by original heirs clearly denoted intention to release estate from all claims relating to

personal property and that respondents failed to meet burden of showing that such releases were obtained by fraud, misrepresentation, or mistake of fact).

Executors & Administrators

Authority

Order appointing administrator empowers him/her to act for the estate, and any act carried out under authority of the order is valid.

Letters of administration are not necessary to empower one to act for the estate, but are only for the purpose of notifying third parties that the appointment of an administrator has been made.

Ark. Code Ann. § 28-48-102.

Duties

An executor of an estate occupies a fiduciary position and must exercise the utmost good faith in all transactions affecting the estate and may not advance his own personal interest at the expense of the heirs.

Guess v. Going, 62 Ark. App. 19, 966 S.W.2d 930 (1998)(conflict of interest made executrix unsuitable, warranting her removal).

The administrator is a “trustee of conduit,” holding the assets in trust for the beneficiaries.

Douglas v. Holbert, 335 Ark. 305, 983 S.W.2d 392 (1998)(probate court had subject-matter jurisdiction to appoint husband as special administrator to litigate wrongful-death and life-insurance actions, to approve settlement of wrongful-death claim, and to apportion and distribute proceeds).

The administrator has the duty to marshal assets of estate entrusted to her care by competent court. United Bldg. & Loan Ass'n v. Garrett, 64 F. Supp. 460 (W.D. Ark. 1946).

Removal

When the personal representative becomes mentally incompetent, disqualified, unsuitable, or incapable of discharging his or her trust, has mismanaged the estate, has failed to perform any duty imposed by law or by any lawful order of the court, or has ceased to be a resident of the state without filing the authorization of an agent to accept service as provided by § 28-48-101(b)(6), then the court may remove him or her.

The court on its own motion may, or on the petition of an interested person shall, order the personal representative to appear and show cause why he or she should not be removed.

The removal of a personal representative after letters have been duly issued to him or her does not invalidate his or her official acts performed prior to removal.

Ark. Code Ann. § 28-48-105.

An administrator of an estate may be removed when the personal representative becomes unsuitable or has failed to perform any duty imposed by law.

> Guess v. Going, 62 Ark. App. 19, 966 S.W.2d 930 (1998)(conflict of interest made executrix unsuitable, warranting her removal).

The denial or granting of a petition to remove an executor or administrator, other than a special administrator, is an appealable order. Harwood v. Monroe, 65 Ark. App. 57, 59, 984 S.W.2d 93, 94 (1999).

The order appointing a special administrator shall not be appealable. Ark. Code Ann. § 28-48-103.

See Snowden v. Riggins, 70 Ark. App. 1, 13 S.W.3d 598 (2000)(alleged wife of decedent and mother of decedent's alleged son were potential heirs, and thus, were "interested persons" who were entitled to seek removal of decedent's mother as administratrix, where decedent died intestate);

Brown v. Nat'l Health Care of Pocahontas, Inc., 102 Ark. App. 148, 283 S.W.3d 224 (2008)(special administrator's term expired so that she had no standing to file complaint on behalf of the estate);

Pickens v. Black, 316 Ark. 499, 872 S.W.2d 405 (1994)(children were not "interested persons" entitled to appeal order denying petition to remove executor of estate);

Ashley v. Ashley, 2012 Ark. App. 236, 405 S.W.3d 419 (2012)(animosity between the personal representatives and widow did not require removal of the representatives); and

Robinson v. Winston, 64 Ark. App. 170, 984 S.W.2d 38 (1998)(probate court had subject matter jurisdiction to consider whether to remove widow as administratrix on court's own motion, and evidence was sufficient to show that widow was unsuitable to continue as administratrix of husband's estate).

II. Intestate Succession

Definitions

"Dying intestate" means dying without a valid last will and testament. A person so dying is referred to in this subchapter as an "intestate", and it is recognized that a person may die wholly or partially intestate.

"Descendants" means a person's children, grandchildren, and all others who are in a direct line of descent from him or her. In other words, the term "descendants" refers to lineal descendants and excludes an intestate's ascendants or collateral relatives. The term "descendants" also includes adopted children and their descendants.

Ark. Code Ann. § 28-9-202.

The terms "heir" and "heirs" are intended to designate the person or persons who succeed by inheritance to the ownership of real or personal property in respect to which a person dies intestate.

Ark. Code Ann. § 28-9-203.

In General

Any part of an estate not effectively disposed of by his will shall pass to his heirs.

Real estate passes immediately to the heirs upon the death of the intestate.

Personal property passes to the personal representative for distribution to the heirs.

Ark. Code Ann. § 28-9-203. t

Distribution

Property may be distributed to heirs in one of two ways:

"Per capita" distribution occurs when all the members of the class who inherit are related to the intestate in equal degree (such as all children, all grandchildren, all nieces and nephews, etc.), and they will inherit in equal shares. Ark. Code Ann. § 28-9-204.

"Per stirpes" distribution occurs when an intestate is predeceased by a person or persons who would have been entitled to inherit from the intestate had that person survived the intestate. The intestate's estate is divided into as many equal shares as there are surviving heirs in the nearest degree of kinship to the intestate; and, predeceased persons in the same degree of kinship who predeceased the intestate leaving descendants who survived the decedent. Each surviving heir takes per capita and the descendants of the predeceased person divide equally the per capita share that would have been their predeceased person's share. Ark. Code Ann. § 28-9-205.

If members of the inheriting class are related to the intestate in unequal degree, those in the nearer degree will take per capita, or in their own right; those in the more remote degree will take per stirpes, or through representation. Ark. Code Ann. § 28-9-204.

Interests Transmissible by Inheritance

Heirs may inherit every right, title, and interest not terminated by the intestate's death in real or personal property owned by an intestate at the time of the intestate's death and not disposed of by will.

The rights of heirs will be subject to:

(1) The dower or curtesy of the intestate's surviving spouse;

(2) The homestead rights of the surviving spouse and children of the intestate, including the quarantine rights of the surviving spouse;

(3) All statutory rights and allowances to the surviving spouse and minor children;

(4) Any rights of a surviving spouse in respect to income tax refunds made pursuant to a joint federal income tax return; and

(5) An administration of the estate, if any.

The intestate's entire right to any and all reversionary and remainder interests, rights of reentry or forfeiture for condition broken, executory interest, and possibilities of reverter shall be transmissible by inheritance, subject to the conditions set out above.

Ark. Code Ann. § 28-9-206.

Heirs as Tenants in Common

When real or personal property is transmitted by inheritance to two (2) or more persons, they will take the same as tenants in common. However, when personal property is distributed in separate units by a personal representative, each distributee will hold his or her distributed part in severalty.

Ark. Code Ann. § 28-9-207.

No Gender Preference

A male is not preferred over a female in the matter of inheritance.

Ark. Code Ann. § 28-9-208.

Legitimacy of Child

For purposes of intestate succession, a child is presumed to be legitimate if:

The parents have lived together and, before the birth of the child, participated in a marriage ceremony in apparent compliance with the law, even though the attempted marriage is void;

The child is born or conceived during a marriage;

After the birth of the child, the father marries the mother and recognizes the child to be his;

The child is conceived following artificial insemination of a married woman with the consent of her husband. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

An illegitimate child or his descendants may inherit in the same manner as a legitimate child from the child's mother or her blood kindred.

A child may inherit from his father or from his father's blood kindred provided a claim is asserted against the estate of the father within 180 days of the father's death and at least one of the following conditions is satisfied:

A court has established the paternity of the child or has determined the legitimacy of the child pursuant to A.C.A. § 28-9-209(a), (b), or (c);

The man has made a written acknowledgment that he is the father of the child;

The man's name appears with his written consent on the birth certificate of the child;

The mother and father marry prior to the birth of the child;

The mother and putative father attempted to marry prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid;

The putative father is obligated to support the child under a written voluntary promise or by court order.

Property of an illegitimate person passes according to the usual rules of intestate succession to his mother and his kindred of her blood and to his father and his kindred of his father's blood, provided paternity has been established in accordance with Ark. Code Ann. § 28-9-209(d).

Nothing contained in Ark. Code Ann. § 28-9-209 shall extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship.

Ark. Code Ann. § 28-9-209.

Posthumous Heirs

Posthumous descendants of the intestate conceived before his or her death but born thereafter shall inherit in the same manner as if born in the lifetime of the intestate.

However, no right of inheritance shall accrue to any person other than a lineal descendant of the intestate, unless such a person has been born at the time of the intestate's death.

Ark. Code Ann. § 28-9-210.

Alienage

No person is disqualified to inherit, or transmit by inheritance, real or personal property because he or she is or has been an alien.

An alien may inherit, or transmit by inheritance, as freely as a citizen of this state, subject to the same laws of intestate succession which are applicable to citizens of this state.

The term “alien” as used in this section refers to a person who is not a citizen of the United States.

Ark. Code Ann. § 28-9-211.

Degrees of Consanguinity

In computing the degrees of relationship between any two relatives who are not related in a direct line of ascent or descent, start with the common ancestor of the relatives and count downwards. The degree in which they are related to each other is whatever degree they or the more remote of them is distant from the common ancestor.

In computing the degrees of relationship between any two relatives who are related in a direct line of ascent or descent, start with one of the persons and count up or down to the other person.

Two or more children of a common parent are related in the first degree, because from the common parent to each of the children is counted only one degree;

A person and his or her nephew are related in the second degree. The common ancestor is the grandparent of the nephew, who is two degrees removed from the nephew (the more distant of the two);

A person and his or her second cousin are related in the third degree, for both are three degrees removed from their great-grandparent who is their common ancestor.

Ark. Code Ann. § 28-9-212.

Half-Blood Relatives

An intestate's kinsmen of the half blood will inherit the intestate's real or personal property to the same extent as if they were the intestate's kinsmen of the whole blood.

Ark. Code Ann. § 28-9-213.

Tables of Descents

The intestate's heritable estate, subject to Ark. Code Ann. § 28-9-206, shall pass as follows:

To the intestate's children and descendants of each child of the intestate who may have predeceased the intestate.

If there are no descendants, to the intestate's surviving spouse. If the intestate and surviving spouse were married less than 3 years, the surviving spouse will take 50% of the estate.

If there is no surviving descendant or spouse, to the intestate's surviving parents, sharing equally, or to the sole surviving parent.

If the intestate is survived by no descendant but is survived by a spouse to whom he was married less than 3 years, the portion of the estate that does not pass to the surviving spouse shall pass to the intestate's surviving parents, sharing equally, or to the sole surviving parent.

If the intestate is survived by no descendant or parent, then all of his estate shall pass to his brothers and sisters and the descendants of any brothers and sisters of the intestate who may have predeceased the intestate.

If the intestate is survived by no descendant, spouse, parent or siblings, then all of the estate shall pass to the surviving grandparents, uncles and aunts of the intestate:

(a) each taking the same share;

(b) no distinction between maternal and paternal sides.

If the intestate is survived by no descendant, spouse, parent, sibling, grandparents, uncles and aunts, then his estate shall pass to his surviving great grandparents and great uncles and great aunts.

If heirs capable of inheriting the entire estate cannot be found within the inheriting classes, the intestate's property shall pass according to Ark. Code Ann. § 28-9-215.

Ark. Code Ann. § 28-9-214.

Devolution When No Heir Can Be Found

If an heir to the heritable estate, or some portion thereof, cannot be found under § 28-9-214, then the portion of the heritable estate as does not pass under § 28-9-214 will pass as follows:

(1) First, to the surviving spouse of the intestate even though they had been married less than three (3) years;

(2) Second, if there is no such surviving spouse, to the heirs, determined as of the date of the intestate's death in accordance with § 28-9-214, of the intestate's deceased spouse, meaning the spouse to whom the intestate was last married if there had been more than one (1) marriage.

However, in case a marriage was terminated by divorce rather than by death, the heirs of the divorced spouse shall not inherit; and

(3) Third, if there is no person capable of inheriting under subdivision (1) or (2) of this section, the estate shall escheat to the county wherein the decedent resided at death.

Ark. Code Ann. § 28-9-215.

Advancements

If a person dies intestate as to all his estate, property that he gave in his lifetime to an heir shall be treated as an advancement against the heir's share of the estate, if the intestate declared in writing or if the heir acknowledged in writing that the transfer was an advancement.

The property advanced shall be valued as of the time the heir came into possession of the property or at the time of the decedent's death, whichever occurs first.

If the recipient of the property does not survive the intestate, the property shall not be taken into account when computing the share of the recipient's descendants.

Ark. Code Ann. § 28-9-216.

Debts to Decedents

A debt owed by an heir to the decedent shall not be charged against the intestate share of any person except the debtor.

If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the share of the debtor's descendants.

Ark. Code Ann. § 28-9-217.

Doctrine of First Purchaser Abolished

The common law rule of the doctrine of first purchaser is abolished under Arkansas law.

The common law rule provided that in the case of successive inheritances of land, the intestate's property would descend only to his heirs who were of the blood of the next preceding ancestor in the line of successive descents who acquired title by purchase.

Ark. Code Ann. § 28-9-218.

Distinction Between Ancestral Estates & New Acquisitions Abolished

For the purposes of intestate succession, the distinction between "ancestral estate" and "new acquisitions" in respect to real estate owned by an intestate is abolished.

The devolution of real estate and personal property which the intestate acquired by gift, devise or descent shall be controlled by the same rules that apply to the devolution of property acquired by the intestate in any other manner.

Ark. Code Ann. § 28-9-219.

Doctrine of Worthier Title Abolished

In an otherwise effective testamentary conveyance, when any property is limited to the heirs or next of kin of the conveyor, or to persons who on the death of the conveyor are some or all of his heirs, the conveyees acquire the property by purchase and not by descent.

In an otherwise effective conveyance, when any property is limited inter vivos to the heirs or next of kin of the conveyor and that conveyance creates one or more prior interests in favor of persons in existence, such conveyance operates in favor of such heirs by purchase and not by descent.

Ark. Code Ann. § 28-9-220.

Child conceived after death of parent- 2021 Legislation

A child of a decedent who is conceived and born after the death of the decedent shall be deemed the legitimate child of the decedent for the purposes of intestate succession if:

Either of the following apply:

(A) The decedent consented in a record to the use of his or her genetic material to posthumously conceive a child by assisted reproduction; or

(B) The intent of the decedent to conceive a child by assisted reproduction after the death of the decedent is established by clear and convincing evidence; and

The embryo of the posthumously conceived child is in utero no later than twenty-four (24) months after the death of the decedent.

Within six (6) months of the death of a decedent, a person designated by the decedent to control the decedent's genetic material shall provide written notice advising the personal representative with the authority to control the distribution of the decedent's estate of the availability of the decedent's genetic material for possible use.

Failure to provide the notice required under subdivision (b)(1) of this section in a timely manner shall absolve a personal representative with the authority to control the distribution of the decedent's estate from liability for distributing the decedent's estate as otherwise authorized by law after the six-month period to provide the notice lapses.

If a personal representative with the authority to control the distribution of the decedent's estate receives the notice required under subdivision (b)(1) of this section before the six-month period to provide the notice lapses, the fiduciary shall retain any remaining assets of the decedent's estate to which a posthumous child of the decedent may have a valid claim until three (3) years after the death of the decedent.

Unless otherwise agreed by a decedent and his or her spouse, the consent of the decedent to posthumous conception with his or her spouse shall be automatically revoked upon the divorce of the decedent and his or her spouse.

Ark. Code Ann. § 28-9-221.

III. Trusts & Fiduciaries

Trusts

General Definitions

"Trust instrument" means an instrument executed by the settlor that contains terms of the trust, including any amendments thereto.

"Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

"Spendthrift provision" means a term of a trust which restrains both voluntary and involuntary transfer of a beneficiary's interest.

"Settlor" means a person, including a testator, who creates, or contributes property to, a trust.

"Revocable", as applied to a trust, means revocable by the settlor without the consent of the trustee or a person holding an adverse interest.

"Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance.

"Beneficiary" means a person that:

(A) has a present or future beneficial interest in a trust, vested or contingent; or

(B) in a capacity other than that of trustee, holds a power of appointment over trust property.

Ark. Code Ann. § 28-73-103.

"Trust" means a trust, or similar legal device, established other than by will by an individual or an individual's spouse under which the individual may be a beneficiary of all or part of the payments from the trust, and the distribution of such payments is determined by one (1) or more trustees or other fiduciaries who are permitted to exercise any discretion with respect to the distribution to the individual, and shall include trusts, conservatorships, and estates created pursuant to the administration of a guardianship.

Ark. Code Ann. § 28-69-102.

Types of Trusts

Express Trusts are those created by the direct and positive acts of the parties, manifested by some instrument in writing, whether by deed, will or otherwise.

See Cox v. Wasson, 187 Ark. 452, 60 S.W.2d 566 (1933)(definition of express trust; deposit slip executed by bank not express trust);

Welch v. Cooper, 11 Ark. App. 263, 670 S.W.2d 454 (1984)(an express trust can never be implied or arise by operation of law and can be proved only by some instrument in writing signed by the party enabled by law to declare the trust); and

Murry v. Hale, 203 F. Supp. 583 (E.D. Ark. 1962)(under Arkansas law, whether given transaction amounts to creation of trust depends primarily upon manifested intent of parties; a loan is not a trust; relationship between trustee and beneficiary is fiduciary, whereas relationship between debtor and creditor is not).

Implied Trusts are those deducible from the transaction as a matter of clear intention but not found in the words of the parties; or which are superinduced upon the transaction by operation of law or as a matter of equity, independent of the particular intention of the parties.

See Edwards v. Edwards, 311 Ark. 339, 843 S.W.2d 846 (1992)(that the term "implied trust" encompasses both constructive trusts and various types of resulting trusts; discussing the difference between constructive and resulting trusts).

Resulting Trusts can be created if purchase money is paid by another at the time of or previous to purchase, and must be a part of the transaction. Equity imposes a resulting trust in favor of persons entitled to beneficial interest against one who secures title by intentional false oral promise, or absent fraud, the intent appears that beneficial interest is not to go with legal title.

See Walker v. Hooker, 282 Ark. 61, 667 S.W.2d 637 (1984)(resulting trust arises not out of an agreement but out of the circumstances surrounding the transaction which indicate that the beneficial interest is not to go with the legal title; presumption that the purchase and registration of legal title in names of purchaser's family members demonstrated intention by purchaser to make gifts to the family members may be rebutted by evidence that the purchaser did not intend for the transferees to have beneficial interest in the property).

Constructive Trusts are imposed by equity in favor of those entitled to the beneficial interest against one who secures legal title by means of intentional false verbal promise, who held same for a certain specified purpose and, having thus obtained title, he retains and claims the property as absolutely his own.

See Malone v. Hines, 36 Ark. App. 254, 822 S.W.2d 394 (1992)(imposition of constructive trust upon cattle and proceeds from sale of cattle was warranted where farm manager sold cattle without farm owner's knowledge or consent);

Betts v. Betts, 326 Ark. 544, 932 S.W.2d 336 (1996)(conflicting evidence concerning decedent's intent that land be divided among six of his 12 children supported the imposition of a constructive trust);

Tripp v. C.L. Miller, 82 Ark. App. 236, 105 S.W.3d 804 (2003)(evidence was insufficient to impose a constructive trust on mortgagor's real property in favor of domestic partner);

Wrightsell v. Johnson, 77 Ark. App. 79, 72 S.W.3d 114 (2002)(to impose a constructive trust, there must be full, clear, and convincing evidence leaving no doubt with respect to the necessary facts, and the burden is especially great when a title to real estate is sought to be overturned by parol evidence); and

Coleman v. Coleman, 59 Ark. App. 196, 955 S.W.2d 713 (1997)(after one son claimed ownership of deceased father's bank accounts, automobile, and house, remaining siblings filed petition seeking imposition of constructive trust, alleging that son had gained his purported ownership of property through deception and coercion; the court held that: (1) father ratified decision to place his son's name on his joint bank accounts after he regained mental competency, and (2) transactions involving house and automobile were not product of son's undue influence).

Trust ex maleficio is created or declared whenever legal title to property is obtained through actual fraud, misrepresentation, taking advantage, duress, undue influence, or use of similar means, which render it unconscionable for the holder of legal title to retain the beneficial interest.

See Davidson v. Edwards, 168 Ark. 306, 270 S.W. 94, 95 (1925)(the misrepresentation which will create a trust ex maleficio must be made before or at the time the legal title is acquired by the promisor); and

Andres v. Andres, 1 Ark. App. 75, 613 S.W.2d 404 (1981)(where actual fraud is practiced in acquiring legal title, the arising trust is referred to as a "trust ex maleficio.").

Trusts in personal property may be created and established by parol evidence. This is true of other trusts, except trusts in realty or express trusts, which require evidence other than parol. Evidence must be clear and convincing.

Oliver v. Oliver, 182 Ark. 1025, 34 S.W.2d 226 (1931).

See also Hawkins v. Scanlon, 212 Ark. 180, 206 S.W.2d 179 (1947)(parol evidence was sufficient to require a conclusion that, even if furniture in apartment building passed to sister with deeds from two brothers each conveying their one-fourth interest, such transfer of furniture was subject to an express oral trust in favor of brothers);

A **public trust** may be created as an express trust in real or personal property, or both, with the state or any governmental or municipal subdivision thereof as the beneficiary, for the purpose of aiding or furthering any proper function(s) of the beneficiary then authorized. Only funds from trust sources shall be utilized in execution of the trust. Ark. Code Ann. § 28-72-201.

No public trust shall become effective until the beneficial interest therein shall have been accepted by a beneficiary. Ark. Code Ann. § 28-72-202.

The instrument creating the trust may provide for the appointment, succession, powers, duties, term, and compensation of the trustee and may be for the term of the duration of any beneficiary or for a shorter term. Ark. Code Ann. § 28-72-203.

The officers or any other governmental or municipal authorities having the custody, management, or control of any property of any beneficiary of such a trust, at the time of, or after, creation of the trust, may lease any such property as shall be needful in the execution of the trust to the trustee or trustees to implement the performance of the trust purposes for the benefit of the beneficiary. Ark. Code Ann. § 28-72-204.

The instrument creating any public trust may be amended, or the trust may be terminated, by agreement of the trustee, or, if there is more than one (1) trustee, then of all of the trustees. Ark. Code Ann. § 28-72-205.

No trustee of such a trust, or any beneficiary thereof, shall be charged with any liability whatsoever by reason of any act or omission committed or suffered in the performance of the purposes of the trust. Ark. Code Ann. § 28-72-206.

For all purposes of taxation under the authority of the state or any of its governmental or taxing subdivisions, the trust estate and its revenues shall have the same immunities as other property and revenues of the beneficiary or beneficiaries not so in trust. Ark. Code Ann. § 28-72-207.

See also City of Barling v. Fort Chaffee Redevelopment Auth., 347 Ark. 105, 60 S.W.3d 443 (2001)(redevelopment authority which had been formed as Arkansas public trust for redevelopment of former United States Army camp failed to preserve appellate review as to argument that city's ordinances for annexing land within redevelopment area had constituted a constructive fraud upon the public which the authority could collaterally attack, where the authority did not obtain a ruling on the issue from the trial court).

Charitable Trusts are subject to the laws of this state and the provisions of the Internal Revenue Code of the United States, unless:

(1) The trust is determined to be not subject to either by a court of competent jurisdiction; or

(2) The trustee, with consent of the trustor and with or without judicial proceedings, amends the trust instrument so as not to be subject to such regulations;

(3) None of the above shall impair the rights or powers of the courts, officers, agencies, or state government with respect to said trust.

Ark. Code Ann. § 28-72-302. *See also* Ark. Code Ann. § 26-51-201 effective February 1, 2017- residents subject to tax.

In creating a charitable trust the settlor must describe a purpose of substantial public interest. The presence or absence of words of trusteeship in the conveyance is not necessarily determinative as to the existence of an intent to establish a trust.

Kohn v. Pearson, 282 Ark. 418, 670 S.W.2d 795 (1984)(although charitable trust for local community established in conveyance of two-acre tract of land may have failed for the purpose of maintaining religious services, it had not failed for the purpose of benefiting the citizens of community, where church house was used continuously, after last use for religious meetings, as

a community center for secular meetings, and thus the res of the trust did not revert to the heirs in succession of the grantors).

The courts have the responsibility to ascertain and protect the intent of the settlor in a charitable trust, and the intention of the settlor is the paramount principle.

Powhatan Cemetery, Inc. v. Colbert, 104 Ark. App. 290, 292 S.W.3d 302 (2009)(members of cemetery association, who were trustees of ancient charitable trust established for the maintenance of the cemetery, brought action against incorporators of the cemetery, in which they sought injunctive relief and asserted that incorporators took improper control of funds donated for the upkeep of the cemetery, and improperly excluded certain members as members of the incorporated board).

See also Bosson v. Woman's Christian Nat. Library Ass'n, 216 Ark. 334, 225 S.W.2d 336 (1949)(the doctrine of "cy pres" will be applied in the execution of a charitable trust or devise, and means that when a definite function or duty is to be performed, and it cannot be done in exact conformity with scheme of person who has provided for it, it must be performed with as close approximation to that scheme as reasonably practicable to permit main purpose of donor of a charitable trust to be carried out as nearly as possible);

Bakos v. Kryder, 260 Ark. 621, 543 S.W.2d 216 (1976)(provision in will of fund to pay $100 or $200 to each child leaving a specified children's home at about age 18 did not lack charitable purpose necessary for valid charitable trust, despite contention that there was no guarantee that all the children in the home were impoverished, in light of record reflecting that most of the children were impoverished and all were in the home because of unfortunate circumstances, and in light of fact that disbursements were left in part to the discretion of the trustees); and

Cammack v. Chalmers, 284 Ark. 161, 680 S.W.2d 689 (1984)(specific purpose of charitable trust by which land was given to university was educational and cultural program of state university; thus, if board of trustees failed to demonstrate its good-faith intentions to develop property in accordance with that purpose by certain date, property would revert to heirs of donor).

Jurisdiction

The construction, interpretation, and operation of trusts are matters within the jurisdiction of the courts of equity.

Sutter v. Sutter, 345 Ark. 12, 43 S.W.3d 736 (2001)(chancery court had subject-matter jurisdiction to construe and interpret the validity of inter vivos trust).

Circuit courts shall have original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution. Ark. Code Ann. § 16-13-201.

General Principles

Trusts arise when property is conferred upon one person and accepted by him or her for the benefit of the other. A trust is a beneficial interest in property, distinct from legal possession and ownership.

(1) Legal title and possession of property are in one person called the "trustee."

(2) Equitable title and beneficial use are in the beneficiary or "cestui que trust."

(3) The doctrine of trusts rests on the principle that equity regards that as done which ought to be done.

(4) Trusts can be created inter vivos, or may be testamentary by a will.

The cardinal rule in construing a trust instrument is that the intention of the settlor must be ascertained. In construing a trust, courts apply the same rules applicable to the construction of wills. The paramount principle is that the intention of the testator or settlor governs. It is the court's task to reconcile conflicting provisions of a trust to attempt to give meaning to every provision of the trust.

> Aycock Pontiac, Inc. v. Aycock, 335 Ark. 456, 983 S.W.2d 915 (1998)(chancellor reasonably interpreted conflicting provisions of trust, relating to beneficiaries' right to principal at termination and settlor's rights of revocation and reversion, to allow for termination of trust and reversion of principal to settlor upon last beneficiary's completion of his formal education, in light of stated purpose of trust to provide for beneficiaries' education).

Trust powers may be:

> (1) Provided for by trust instrument, will, statutes, or judicial order.
>
> (2) Incorporated by reference to statutory powers in will or inter vivos trust if intent to do so is express.
>
> Ark. Code Ann. § 28-69-303.

The trustee is authorized, but not required, to divide the trust into two (2) or more separate trusts of equal or unequal value if the trustee determines that division of the trust is in the best interests of the beneficiaries or could result in a significant decrease in current or future federal income, gift, estate, or generation-skipping transfer taxes, or any other tax.

Ark. Code Ann. § 28-69-703.

Fiduciaries

Fiduciaries in General

"Fiduciary" includes a trustee under any express trust, executor, administrator, guardian, curator, or agent.

> For the purposes of § 28-69-204 "fiduciary" also includes a trustee under an implied, resulting, or constructive trust, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a public or private corporation, public officer, nominee, or any other person acting in a fiduciary capacity for any person, trust, or estate.

Ark. Code Ann. § 28-69-201.

Fiduciaries have the power to receive and deposit funds in banks, investments, common trust funds, and international or inter-American banks, by agreement with sureties or by order of court.

Ark. Code Ann. § 28-69-101; Ark. Code Ann. § 28-69-202; Ark. Code Ann. § 28-71-104.

In acquiring, investing, reinvesting, exchanging, retaining, selling, and managing property held in a fiduciary capacity, the fiduciary shall exercise the judgment and care under the circumstances then prevailing which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Ark. Code Ann. § 28-71-105.

The fiduciary will be responsible to make a general accounting to beneficiaries.

> Salem v. Lane Processing Trust, 72 Ark. App. 340, 37 S.W.3d 664 (2001)(beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress breach of trust; beneficiary was not entitled to unlimited access to trust records, where he failed to show that access was required to prevent or redress a breach of trust).

Prudent Investor Rule

Fiduciaries are subject to the prudent investor rule(s) found in § 28-73-902 et seq.

A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust.

In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

Among circumstances that a trustee shall consider in investing and managing trust assets are such of the following as are relevant to the trust or its beneficiaries:

(1) general economic conditions;

(2) the possible effect of inflation or deflation;

(3) the expected tax consequences of investment decisions or strategies;

(4) the role that each investment or course of action plays within the overall trust portfolio, which may include financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) the expected total return from income and the appreciation of capital;

(6) other resources of the beneficiaries;

(7) needs for liquidity, regularity of income, and preservation or appreciation of capital; and

(8) an asset's special relationship or special value, if any, to the purposes of the trust or to one (1) or more of the beneficiaries.

A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

A trustee may invest in any kind of property or type of investment consistent with the standards of this subchapter.

Ark. Code Ann. § 28-73-902.

A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Ark. Code Ann. § 28-73-903.

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust.

Ark. Code Ann. § 28-73-904.

Compliance with the prudent investor rule is determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Ark. Code Ann. § 28-73-905.

Missing Persons

The circuit courts of this state have jurisdiction of the estates of persons imprisoned in a foreign country and of the estates of missing persons. Ark. Code Ann. § 28-72-101.

It shall be the duty of the circuit courts to appoint some suitable person trustee of the estate of any person imprisoned in some foreign country or who may be missing and whose whereabouts are unknown, and who has a family or dependents residing in this state.

The trustee shall be appointed upon the petition of any person dependent upon the services of the missing person, or person imprisoned in a foreign country, for his or her support.

Ark. Code Ann. § 28-72-102.

Any trustee so appointed by the circuit court of this state shall have authority to collect and receive and give a receipt for all sums of money or property of any kind or character that may be due any missing person or person imprisoned in any foreign country.

Upon receipt of property of any kind or anything of value, the trustee shall immediately report to the court the amount of money or other property received by him or her as trustee.

The court shall have authority to authorize the trustee to use the funds or property in the amount and in the manner provided by an order of the court for the support and maintenance of the family or dependents of the missing person or person imprisoned in any foreign country.

Ark. Code Ann. § 28-72-103.

The trustee shall give bond in double the amount of property or money received and, upon the appearance of the missing person or person imprisoned in any foreign country, shall be required to account to and turn over to the person the balance of all funds or property not legally expended by the trustee under the order of the circuit court.

The bondsmen shall be liable for any sums or property unaccounted for by the trustee, in the same manner that bondsmen of administrators in this state are liable on their bonds.

Ark. Code Ann. § 28-72-104.

Remedies for Breach of Trust

A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

To remedy a breach of trust that has occurred or may occur, the court may:

(1) compel the trustee to perform the trustee's duties;

(2) enjoin the trustee from committing a breach of trust;

(3) compel the trustee to redress a breach of trust by paying money, restoring property, or other means;

(4) order a trustee to account;

(5) appoint a special fiduciary to take possession of the trust property and administer the trust;

(6) suspend the trustee;

(7) remove the trustee as provided in § 28-73-706;

(8) reduce or deny compensation to the trustee;

(9) subject to § 28-73-1012, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or

(10) order any other appropriate relief.

Ark. Code Ann. § 28-73-1001.

Exculpatory Clauses

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it:

(1) relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries; or

(2) was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

An exculpatory term drafted or caused to be drafted by the trustee is invalid as an abuse of a fiduciary or confidential relationship unless the trustee proves that the exculpatory term is fair under the circumstances and that its existence and contents were adequately communicated to the settlor.

Ark. Code Ann. § 28-73-1008.

Beneficiary's Consent, Release or Ratification

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

Ark. Code Ann. § 28-73-1009.

See Buchbinder v. Bank of Am., N.A., 342 Ark. 632, 30 S.W.3d 707 (2000)(knowing consent to act by trustee by a competent beneficiary will waive that beneficiary's right to later bring an action against trustee for act).

Damages for Breach

A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of:

(1) the amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred; or

(2) the profit the trustee made by reason of the breach.

Ark. Code Ann. § 28-73-1002.

Damages in Absence of Breach

A trustee is accountable to an affected beneficiary for any profit made by the trustee arising from the administration of the trust, even absent a breach of trust.

Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

Ark. Code Ann. § 28-73-1003.

Personal Liability of Trustee

Except as otherwise provided in the contract, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity.

A trustee is personally liable for torts committed in the course of administering a trust, or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation arising from ownership or control of trust property, or on a tort committed in the course of administering a trust, may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

Ark. Code Ann. § 28-73-1010.

Attorney's Fees & Costs

In a judicial proceeding involving the administration of a trust, a court, as justice and equity may require, may award costs and expenses, including reasonable attorney's fees, to any party, to be paid by another party or from the trust that is the subject of the controversy.

Ark. Code Ann. § 28-73-1004.

Statute of Limitations

A beneficiary may not commence a proceeding against a trustee for breach of trust more than one (1) year after the date the beneficiary or a representative of the beneficiary was sent a report that adequately disclosed the existence of a potential claim for breach of trust and informed the beneficiary of the time allowed for commencing a proceeding.

A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or representative knows of the potential claim or should have inquired into its existence.

If subsection (a) does not apply, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within five (5) years after the first to occur of:

(1) the removal, resignation, or death of the trustee;

(2) the termination of the beneficiary's interest in the trust; or

(3) the termination of the trust.

Ark. Code Ann. § 28-73-1005.

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Ark. Code Ann. § 28-73-1006.

Uniform Power of Attorney Act

Definitions

"Power of attorney" means a writing or other record that grants authority to an agent to act in the place of the principal, whether or not the term power of attorney is used.

"Incapacity" means inability of an individual to manage property or business affairs because the individual:

(A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or is

(B) missing; detained, including incarcerated in a penal system; or outside the United States and unable to return.

"Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, coagent, successor agent, and a person to which an agent's authority is delegated.

"Durable," with respect to a power of attorney, means not terminated by the principal's incapacity.

"Good faith" means honesty in fact.

Ark. Code Ann. § 28-68-102.

Purpose

The Uniform Power of Attorney Act is intended to be comprehensive with respect to delegation of surrogate decision making authority over an individual's property and property interests, whether for the purpose of incapacity planning or mere convenience. Given that an agent will likely exercise authority at times when the principal cannot monitor the agent's conduct, the Act specifies minimum agent duties and protections for the principal's benefit.

Uniform Law Comment to Ark. Code Ann. § 28-68-103.

General Provisions

A power of attorney created under this chapter is durable unless it expressly provides that it is terminated by the incapacity of the principal. Ark. Code Ann. § 28-68-104.

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal

acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments. Ark. Code Ann. § 28-68-105.

In a power of attorney, a principal may nominate a guardian of the principal's estate or guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the power of attorney. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

If, after a principal executes a power of attorney, a court appoints a guardian of the principal's estate or other fiduciary charged with the management of some or all of the principal's property, the agent is accountable to the fiduciary as well as to the principal. The power of attorney is not terminated and the agent's authority continues unless limited, suspended, or terminated by the court.

Ark. Code Ann. § 28-68-108.

A power of attorney is effective when executed unless the principal provides in the power of attorney that it becomes effective at a future date or upon the occurrence of a future event or contingency.

If a power of attorney becomes effective upon the occurrence of a future event or contingency, the principal, in the power of attorney, may authorize one or more persons to determine in a writing or other record that the event or contingency has occurred.

If a power of attorney becomes effective upon the principal's incapacity and the principal has not authorized a person to determine whether the principal is incapacitated, or the person authorized is unable or unwilling to make the determination, the power of attorney becomes effective upon a determination in a writing or other record by:

> (1) a physician or licensed psychologist that the principal is incapacitated within the meaning of § 28-68-102(5)(A); or
>
> (2) an attorney at law, a judge, or an appropriate governmental official that the principal is incapacitated within the meaning of § 28-68-102(5)(B).

Ark. Code Ann. § 28-68-109.

Unless the power of attorney otherwise provides, an agent is entitled to reimbursement of expenses reasonably incurred on behalf of the principal and to compensation that is reasonable under the circumstances. Ark. Code Ann. § 28-68-112.

Except as otherwise provided in the power of attorney, a person accepts appointment as an agent under a power of attorney by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance. Ark. Code Ann. § 28-68-113.

The principles of law and equity supplement the Act. Ark. Code Ann. § 28-68-121.

General Duties

Notwithstanding provisions in the power of attorney, an agent that has accepted appointment shall:

(1) act in accordance with the principal's reasonable expectations to the extent actually known by the agent and, otherwise, in the principal's best interest;

(2) act in good faith; and

(3) act only within the scope of authority granted in the power of attorney.

Except as otherwise provided in the power of attorney, an agent that has accepted appointment shall:

(1) act loyally for the principal's benefit;

(2) act so as not to create a conflict of interest that impairs the agent's ability to act impartially in the principal's best interest;

(3) act with the care, competence, and diligence ordinarily exercised by agents in similar circumstances;

(4) keep a record of all receipts, disbursements, and transactions made on behalf of the principal;

(5) cooperate with a person that has authority to make health-care decisions for the principal to carry out the principal's reasonable expectations to the extent actually known by the agent and, otherwise, act in the principal's best interest; and

(6) attempt to preserve the principal's estate plan, to the extent actually known by the agent, if preserving the plan is consistent with the principal's best interest based on all relevant factors, including:

(A) the value and nature of the principal's property;

(B) the principal's foreseeable obligations and need for maintenance;

(C) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and

(D) eligibility for a benefit, a program, or assistance under a statute or regulation.

An agent that acts in good faith is not liable to any beneficiary of the principal's estate plan for failure to preserve the plan.

An agent that acts with care, competence, and diligence for the best interest of the principal is not liable solely because the agent also benefits from the act or has an individual or conflicting interest in relation to the property or affairs of the principal.

If an agent is selected by the principal because of special skills or expertise possessed by the agent or in reliance on the agent's representation that the agent has special skills or expertise, the special skills or expertise must be considered in determining whether the agent has acted with care, competence, and diligence under the circumstances.

Absent a breach of duty to the principal, an agent is not liable if the value of the principal's property declines.

An agent that exercises authority to delegate to another person the authority granted by the principal or that engages another person on behalf of the principal is not liable for an act, error of judgment, or default of that person if the agent exercises care, competence, and diligence in selecting and monitoring the person.

Except as otherwise provided in the power of attorney, an agent is not required to disclose receipts, disbursements, or transactions conducted on behalf of the principal unless ordered by a court or requested by the principal, a guardian, a conservator, another fiduciary acting for the principal, a governmental agency having authority to protect the welfare of the principal, or, upon the death of the principal, by the personal representative or successor in interest of the principal's estate. If so requested, within 30 days the agent shall comply with the request or provide a writing or other record substantiating why additional time is needed and shall comply with the request within an additional 30 days.

Ark. Code Ann. § 28-68-114.

Effectiveness

A power of attorney executed in this state on or after January 1, 2012, is valid if its execution complies with § 28-68-105.

A power of attorney executed in this state before January 1, 2012, is valid if its execution complied with the law of this state as it existed at the time of execution.

A power of attorney executed other than in this state is valid in this state if, when the power of attorney was executed, the execution complied with:

(1) the law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to § 28-68-107; or

(2) the requirements for a military power of attorney pursuant to 10 U. S.C. Section 1044b, as it existed on January 1, 2011.

Except as otherwise provided by statute other than this chapter, a photocopy or electronically transmitted copy of an original power of attorney has the same effect as the original.

Ark. Code Ann. § 28-68-106.

The meaning and effect of a power of attorney is determined by the law of the jurisdiction indicated in the power of attorney and, in the absence of an indication of jurisdiction, by the law of the jurisdiction in which the power of attorney was executed.

Ark. Code Ann. § 28-68-107.

Termination & Revocation

A power of attorney terminates when:

(1) the principal dies;

(2) the principal becomes incapacitated, if the power of attorney is not durable;

(3) the principal revokes the power of attorney;

(4) the power of attorney provides that it terminates;

(5) the purpose of the power of attorney is accomplished; or

(6) the principal revokes the agent's authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

An agent's authority terminates when:

(1) the principal revokes the authority;

(2) the agent dies, becomes incapacitated, or resigns;

(3) an action is filed for the dissolution or annulment of the agent's marriage to the principal or their legal separation, unless the power of attorney otherwise provides; or

(4) the power of attorney terminates.

Unless the power of attorney otherwise provides, an agent's authority is exercisable until the authority terminates, notwithstanding a lapse of time since the execution of the power of attorney.

Termination of an agent's authority or of a power of attorney is not effective as to the agent or another person that, without actual knowledge of the termination, acts in good faith

under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

Incapacity of the principal of a power of attorney that is not durable does not revoke or terminate the power of attorney as to an agent or other person that, without actual knowledge of the incapacity, acts in good faith under the power of attorney. An act so performed, unless otherwise invalid or unenforceable, binds the principal and the principal's successors in interest.

The execution of a power of attorney does not revoke a power of attorney previously executed by the principal unless the subsequent power of attorney provides that the previous power of attorney is revoked or that all other powers of attorney are revoked.

Ark. Code Ann. § 28-68-110.

Coagents & Successor Agents

A principal may designate two or more persons to act as coagents. Unless the power of attorney otherwise provides, each coagent may exercise its authority independently.

A principal may designate one or more successor agents to act if an agent resigns, dies, becomes incapacitated, is not qualified to serve, or declines to serve. A principal may grant authority to designate one or more successor agents to an agent or other person designated by name, office, or function. Unless the power of attorney otherwise provides, a successor agent:

(1) has the same authority as that granted to the original agent; and

(2) may not act until all predecessor agents have resigned, died, become incapacitated, are no longer qualified to serve, or have declined to serve.

Except as otherwise provided, an agent that does not participate in or conceal a breach of fiduciary duty committed by another agent, including a predecessor agent, is not liable for the actions of the other agent.

An agent that has actual knowledge of a breach or imminent breach of fiduciary duty by another agent shall notify the principal and, if the principal is incapacitated, take any action reasonably appropriate in the circumstances to safeguard the principal's best interest. An agent that fails to notify the principal or take action as required by this subsection is liable for the reasonably foreseeable damages that could have been avoided if the agent had notified the principal or taken such action.

Ark. Code Ann. § 28-68-111.

Exoneration

A provision in a power of attorney relieving an agent of liability for breach of duty is binding on the principal and the principal's successors in interest except to the extent the provision:

(1) relieves the agent of liability for breach of duty committed dishonestly, with an improper motive, or with reckless indifference to the purposes of the power of attorney or the best interest of the principal; or

(2) was inserted as a result of an abuse of a confidential or fiduciary relationship with the principal.

Ark. Code Ann. § 28-68-115.

Standing

The following persons may petition a court to construe a power of attorney or review the agent's conduct, and grant appropriate relief:

(1) the principal or the agent;

(2) a guardian, conservator, or other fiduciary acting for the principal;

(3) a person authorized to make health-care decisions for the principal;

(4) the principal's spouse, parent, or descendant;

(5) an individual who would qualify as a presumptive heir of the principal;

(6) a person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) a governmental agency having regulatory authority to protect the welfare of the principal;

(8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) a person asked to accept the power of attorney.

Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Ark. Code Ann. § 28-68-116.

Liability

An agent that violates this chapter is liable to the principal or the principal's successors in interest for the amount required to:

(1) restore the value of the principal's property to what it would have been had the violation not occurred; and

(2) reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.

Ark. Code Ann. § 28-68-117.

Resignation

Unless the power of attorney provides a different method for an agent's resignation, an agent may resign by giving notice to the principal and, if the principal is incapacitated:

(1) to the conservator or guardian, if one has been appointed for the principal, and a coagent or successor agent; or

(2) if there is no person described in paragraph (1), to:

(A) the principal's caregiver;

(B) another person reasonably believed by the agent to have sufficient interest in the principal's welfare; or

(C) a governmental agency having authority to protect the welfare of the principal.

Ark. Code Ann. § 28-68-118.

Uniform Transfer to Minors Act

Application

Uniform Transfers to Minors Act applies after March 21, 1985, if the transfer purports to have been made under the Uniform Gifts to Minors Act; or

If the instrument used to make the transfer uses in substance the designation "as custodian under the Uniform Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state, and application is necessary to validate the transfer.

Ark. Code Ann. § 9-26-221.

Methods of Transfers

Custodial property is created under the following transfers:

A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor. Ark. Code Ann. § 9-26-204.

A personal representative or trustee may make an irrevocable transfer to a custodian for the benefit of a minor as authorized in the governing will or trust. Ark. Code Ann. § 9-26-205.

A personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor in the absence of a will or under a will or trust that does not contain an authorization to do so. A conservator may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor. Ark. Code Ann. § 9-26-206.

An obligor who holds property of or owes a liquidated debt to a minor not having a conservator may make an irrevocable transfer to a custodian for the benefit of the minor. Ark. Code Ann. § 9-26-207.

Creating Custodial Property

The Code gives specific instructions regarding how various items may become custodial property. Basically, the property must be delivered, registered, assigned or transferred to a named custodian for a named, minor beneficiary with the designation that the transfer is being made under the Arkansas Uniform Transfers to Minors Act.

Ark. Code Ann. § 9-26-209.

Irrevocability

A transfer made pursuant to the Act shall be irrevocable and the property shall be indefeasibly vested in the minor.

Ark. Code Ann. § 9-26-211.

Care & Use of Custodial Property

The custodian shall:

(1) Take control of custodial property;

(2) Record title to custodial property;

(3) Collect, hold, manage, invest custodial property;

(4) Observe standard of prudent person;

(5) Exercise special skill or expertise, if designated custodian because of such skill;

(6) Keep custodial property separate from all other property;

(7) Keep records of all transactions with respect to the custodial property;

(8) Make records available for inspection by parent, or legal representative of the minor, or by the minor if the minor has attained the age of 14 years.

Ark. Code Ann. § 9-26-212.

The custodian may invest in or pay premiums on life insurance on the life of the minor only if the minor or the minor's estate is the sole beneficiary; or the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the irrevocable beneficiary. Ark. Code Ann. § 9-26-212.

A custodian may deliver to the minor as much of the property as the custodian considers advisable (without court order). Ark. Code Ann. § 9-26-214.

On petition of an interested person of the minor, if at least 14 years of age, the court may order the custodian to deliver property to the minor. Ark. Code Ann. § 9-26-214.

Power, Expenses, Compensation, Bond

A custodian shall have all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property. Ark. Code Ann. § 9-26-213.

A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in performance of duties.

A custodian (except for one who is a transferor under Ark. Code Ann. § 9-26-204) may make an election during each calendar year to charge reasonable compensation for services performed during that year.

A custodian shall not be required to give a bond, except as provided in Ark. Code Ann. § 9-26-218(f).

Ark. Code Ann. § 9-26-215.

Exemption of Third Person from Liability

A third person in good faith may deal with a person purporting to act in the capacity of a custodian and, in the absence of knowledge, shall not be responsible for determining:

(1) The validity of the purported custodian's designation;

(2) The authority for any acts of the purported custodian;

(3) The validity of any instrument executed by the person purporting to make a transfer or by the purported custodian;

(4) The propriety of the application of any of the minor's property delivered to the purported custodian.

Ark. Code Ann. § 9-26-216.

Liability to Third Persons

A claim may be asserted against the custodial property by proceeding against the custodian in the custodial capacity if the claim is based on:

(1) a contract entered into by a custodian acting in a custodial capacity;

(2) an obligation arising from the control of custodial property; or

(3) a tort committed during the custodianship.

A custodian shall not be personally liable:

(1) On a contract properly entered into in the custodial capacity unless the custodian fails to reveal that capacity and to identify the custodianship in the contract; or

(2) For an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is personally at fault.

A minor shall not be personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault.

Ark. Code Ann. § 9-26-217.

Renunciation, Resignation, Death or Removal of Custodian

A person nominated as custodian may decline to serve;

A custodian may designate a trust company or an adult other than a transferor under Ark. Code Ann. § 9-26-204 as successor custodian; or

A custodian may resign at any time.

If a custodian dies or becomes ineligible to serve or incapacitated without having designated a successor and the minor has attained the age of 14 years, the minor may designate a successor custodian. If the minor has not attained the age of 14, Ark. Code Ann. § 9-26-218(d) specifies who may serve as successor custodian.

A transferor, an adult member of the minor's family, a guardian of the person of the minor, the conservator of the minor, or the minor, if he has attained the age of 14 years, may petition the court to remove the custodian for cause and to designate a successor custodian.

If a custodian is removed, the court shall require an accounting and order delivery of the custodial property and records to the successor custodian.

Ark. Code Ann. § 9-26-218 - 219.

Accounting by Custodian

The following persons may petition the court for an accounting by the custodian or for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property:

(1) A minor who has attained the age of 14 years;

(2) The minor's guardian of the person;

(3) An adult member of the minor's family;

(4) A transferor.

A successor custodian may petition the court for an accounting by the predecessor custodian.

Ark. Code Ann. § 9-26-219.

Termination of Custodianship

The custodian shall transfer the custodial property to the minor or the minor's estate upon the earlier of:

(1) The minor's attainment of age 21 years (for property transferred under Ark. Code Ann. §§ 9-26-204 or -205);

(2) The minor's attainment of age 18 years (for property transferred under Ark. Code Ann §§ 9-26-206 or -207); or

(3) The minor's death.

A transferor may designate that custodial property be transferred to the minor at any time between the ages of 18 and 21 years by using designated statutory wording at the time the property is transferred to the custodian.

Ark. Code Ann. § 9-26-220.