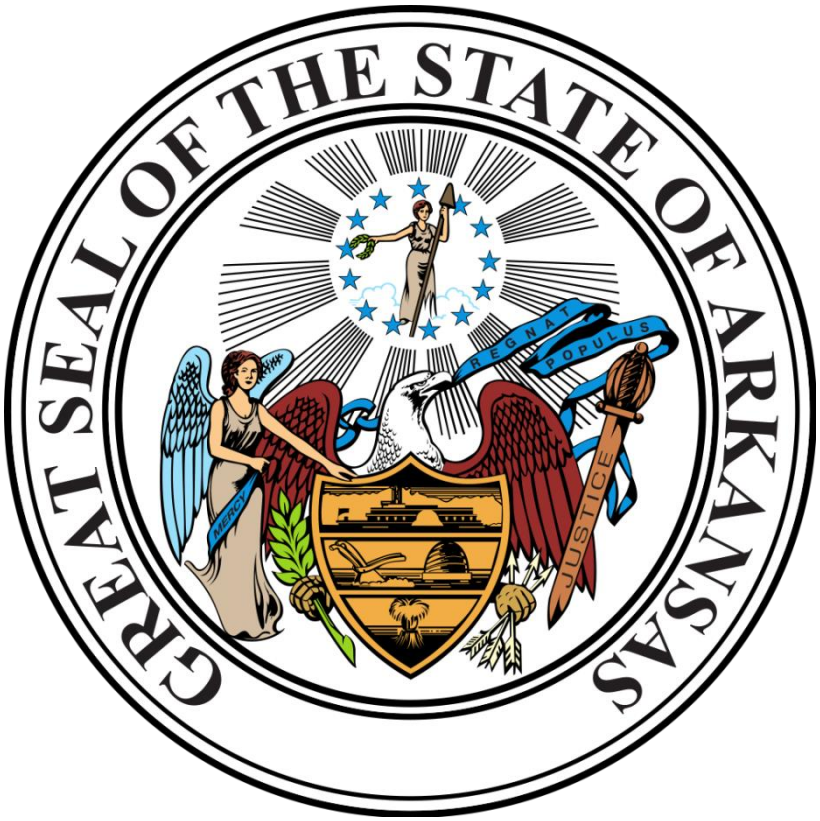
Arkansas Circuit Courts

Judges' Benchbook

Probate Division



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Welcome to the updated Circuit Court Judges' Benchbook for the Probate Division. We are pleased to provide you with this up-to-date resource that we hope will aid you in your legal research and decision-making.

The new format of the Benchbook lends itself to both hardcopy and digital formats. To make the most of this Benchbook, we suggest that you utilize the embedded links to cases, court rules and other resources. In order to access the case law, you will need to sign in to your Fastcase account using your Arkansas Bar Association log in. It is easy to do. You will need to repeat this process each session that you use the Benchbook. You may consider "bookmarking" these links for future reference. If you do not have access to Fastcase because you are not a member of the Arkansas Bar, find out more about becoming a member at https://www.arkbar.com/pages/Join_Renew_Membership_Online.aspx.

First, go to https://www.arkbar.com/ and click on "Fastcase."
Then, sign in using your log in information.
Click "Fastcase" one more time, and you will be logged in.
You are now ready to use the links in the Benchbook.
Without closing out your browser, open the Benchbook, which can be found at https://courts.arkansas.gov/administration/education/publications.
When you click on a case, it should take you straight to Fastcase.

Note: You will continue to be signed in to Fastcase as long as your browser remains open. If you close out of your browser, you will need to sign in to Fastcase again through the arkbar.org website.

Please note that Fastcase has not yet updated the Arkansas Code Annotated with the changes from the 2013 legislative session, so there are not any hyperlinks to online statutes in the Benchbook. They will be added and the Benchbook republished as soon as they become available. To search for statutes online, you will need to use the General Assembly's website.

First, go to http://www.lexisnexis.com/hottopics/arcode/Default.asp.
Then, type in the statute call numbers and press enter.
(For example, "28-25-104" will take you to the statute for holographic wills.)

As always, the staff at the Administrative Office of the Courts is here to help. If you have any questions, please contact:

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Thank you and enjoy!

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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");

Jenkins v. Means, 242 Ark. 111, 411 S.W.2d 885 (1967)(where action arising out of automobile accident was commenced against decedent's estate before a personal representative had been appointed, and after appointment of representative, complaint was amended to name the representative as defendant, the amendment, for purposes of determining venue, did not revert back to date original action was filed); and

Smith v. Rudolph, 221 Ark. 900, 256 S.W.2d 736 (1953)(only court authorized to issue letters of administration was probate court of county in which intestate resided at death).

Statute of Limitations

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

Letters of 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);

Carter v. Meek, 70 Ark. App. 447, 20 S.W.3d 417 (2000)(proponent of will failed to show that it was properly executed, thus requiring reversal of order admitting it to probate; proponent presented testimony of only one of two attesting witnesses, and made no showing as to whether other attesting witness was living at known address within United States, or whether any diligence was exercised in procuring his testimony at hearing); and

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.

See Coleman v. Coleman, 257 Ark. 404, 520 S.W.2d 239 (1974)(party offering a subsequent will may object to probate of a prior will; 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 and that, therefore, such bar was not applicable); and

Atkinson v. Knowles, 82 Ark. App. 224, 105 S.W.3d 818 (2003)(unprobated will could be considered as evidence in determining ownership of contents of decedent's safe deposit box).

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.

Notices may be served by any method allowed by the Arkansas Rules of Civil Procedure, unless otherwise ordered by the Court.

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);

Huffman v. Dawkins, 273 Ark. 520, 622 S.W.2d 159 (1981)(will can satisfy both requirements for holographic and attested will);

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);

Green v. Holland, 9 Ark. App. 233, 657 S.W.2d 572 (1983)(a testator may acknowledge his signature by acts and gestures without expressing it in words);

Watts v. Tidwell, 178 Ark. 951, 12 S.W.2d 896 (1929)(evidence that decedent could not sign will because she could not write held admissible, under allegations that decedent did not sign will);

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);

Balletti v. Muldoon, 67 Ark. App. 25, 991 S.W.2d 633 (1999)(proponent of will offered for probate has burden of proving genuineness of testator's signature in will contest);

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; Warner v. Warner, 14 Ark. App. 257, 687 S.W.2d 856 (1985) (formality essential to the execution of a will is to be tested either by the law of the place of execution or the place of the testator's domicile).

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);

Starnes v. Andre, 243 Ark. 712, 421 S.W.2d 616 (1967)(if that which is essential to validity of whole will is cancelled or obliterated with intention of revoking it, the whole will is revoked);

Hiler v. Cude, 248 Ark. 1065, 455 S.W.2d 891 (1970)(same degree of mental capacity is necessary to revoke a will as to make one);

Wells v. Estate of Wells, 325 Ark. 16, 922 S.W.2d 715 (1996)(only methods of revoking will are those enumerated in will revocation statute);

Parker v. Mobley, 264 Ark. 805, 577 S.W.2d 583 (1979)(where 1973 will was effectively revoked by execution of 1976 will, 1976 will was destroyed in accordance with statutory requirements, and 1973 will was not revived through reexecution nor was any attempt made to do so, decedent died intestate);

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).

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

"Intention of a testator governs as evidenced by the language of the instrument."

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.

The term "lapse" is a technical one, with a specific meaning in probate law. It means that a devise fails or takes no effect. Thus, a lapsed devise will not pass to a devisee's heirs. Consistent with this, 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);

Chlanda v. Estate of Fuller, 326 Ark. 551, 932 S.W.2d 760 (1996)(there is presumption in rules of will construction that person who takes time and effort to make will does not desire partial intestacy); and

Matter of Estate of Harp, 316 Ark. 761, 875 S.W.2d 490 (1994)(intention of testator to dispose of his entire estate will be presumed, unless language of will shows the contrary; while this presumption is not controlling, it must always be considered when language is so ambiguous as to require construction).

Ademption

The most common form of ademption occurs when the property bequeathed is not in existence at the time of the testator's death.

> Mayberry v. Mayberry, 318 Ark. 588, 886 S.W.2d 627 (1994)(where specific bequest was of a savings account that had been closed and CDs had been purchased with the proceeds and other funds, and the daughter's name, which had been on the savings account, was not on the CDs, the property bequeathed was no longer in existence, and an ademption occurred).

Generally, the courts look with disfavor upon the ademption of a specific legacy; however, in construing a will to determine whether there has been ademption of a specific legacy, the intention of the testator is the controlling factor and once the intention of the testator has been determined, all other rules of law pertaining to ademption must bend to such intent, so long as his intent does not violate some positive rule of law.

> Williamson v. Merritt, 257 Ark. 489, 519 S.W.2d 767 (1975)(two grandnephews of testatrix brought suit against executrix of the testatrix' estate to recover funds which had been deposited in savings account bequeathed to the grandnephews and which had been transferred by the testatrix just prior to her death. The court, found that the withdrawals did not amount to an ademption of the specific bequest);

See also 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).

See also Swaffar v. Swaffar, 327 Ark. 235, 938 S.W.2d 552 (1997)(discussing burden of proof).

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.

A holographic Will is:

(1) written entirely in the testator's handwriting; and

(2) signed by the testator; and

(3) subject to the proof as the probate code requires, including manifestation of a dispositive intent.

Although signature of a testator need not be written at the end of the will, if testator's name is written in or upon some part of the will other than at the end thereof, to be a valid signature it must be shown that the testator wrote his name where he did with the intention of authenticating or executing the instrument as his will.

> Nelson v. Texarkana Historical Soc. & Museum, 257 Ark. 394, 516 S.W.2d 882 (1974)(decedent's name which appeared in second paragraph of holographic instrument leaving certain property in memory of decedent's mother, father and decedent was not written with the intent that it constitute a signature in addition to the intention of creating a memorial, and instrument, which was not signed by decedent, did not meet requirements of will statute).

It is imperative that holographic document asserted as will clearly show intention to make will before such instrument is declared by courts to be a will.

> Peevy v. Ritcheson, 261 Ark. 841, 552 S.W.2d 218 (1977)(probate court did not err in refusing to admit to probate handwritten instrument which made no provision for decedent's wife and on which it appeared that decedent's name was placed not as his signature but only to emphasize fact that he wanted everyone to come to his funeral).
>
> Poff v. Kaufman, 224 Ark. 844, 276 S.W.2d 432 (1955)(statement at end of a friendly letter written to his sisters more than four years before decedent's death but never referred to again, that "after all is said and done I intend to leave you and Reba what I have someday," did not express a present purpose to devise or bequeath, was merely an expression of an intent to do something in the future and was not a holographic will).

See also 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 from the face of the document, extrinsic evidence could not be admitted); and

Huffman v. Dawkins, 273 Ark. 520, 622 S.W.2d 159 (1981)(will can satisfy both requirements for holographic and attested will).

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).

Generally speaking, lost or destroyed wills are established by an action in chancery; however, statute grants probate court jurisdiction (concurrent with jurisdiction of other courts) over restoration of lost wills and for construction of wills when incident to administration of an estate.

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)

Shelton v. Keathley, 367 Ark. 568, 242 S.W.3d 223 (2006)(executor of decedent's will was not required to deliver will to the proper court under 28-40-105 because he was the named executor of the will; further, an illegitimate child who had never been declared legitimate did not qualify as an interested person within the Probate Code who was required to receive notice); and

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, 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).

Partial Distribution

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 W. 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, 100 S.W.3d 72 (Ark. App. 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

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).

Collection of Small Estates Without Administration

The distributee of an estate shall be entitled thereto without the appointment of a personal representative when:

(1) No petition for the appointment of a personal representative is pending or has been granted;

(2) Forty-five (45) days have elapsed since the death of the decedent;

(3) The value, less encumbrances, of all property owned by the decedent at the time of death, excluding the homestead of and the statutory allowances for the benefit of a spouse or minor children, if any, of the decedent, does not exceed one hundred thousand dollars ($100,000);

(4) There shall be filed with the probate clerk of the circuit court of the county of proper venue for administration an affidavit of one (1) or more of the distributees setting forth:

(A) That there are no unpaid claims or demands against the decedent or his or her estate, that the Department of Human Services furnished no federal or state benefits to the decedent, or, that if such benefits have been furnished, the department has been reimbursed in accordance with state and federal laws and regulations;

(B) An itemized description and valuation of the personal property and a legal description and valuation of any real property of the decedent, including the homestead;

(C) The names and addresses of persons having possession of the personal property and the names and addresses of any persons possessing or residing on any real property of the decedent; and

(D) The names, addresses, and relationship to the decedent of the persons entitled to and who will receive the property; and

(5) There is furnished to any person owing any money, having custody of any property, or acting as registrar or transfer agent of any evidence of interest, indebtedness, property, or right, a copy of the affidavit certified by the clerk.

The clerk shall file the affidavit, assign it a number, and index it. He or she shall make a charge of twenty-five dollars ($25.00) for filing the affidavit and five dollars ($5.00) for each certified copy. An order of the court or other proceeding is not necessary. An additional fee shall not be charged if a will is attached to the affidavit.

If an estate collected under this section contains real property, in order to allow for claims against the estate to be presented, the distributee shall cause a notice of the decedent's death and the filing of an affidavit for the collection of his or her estate to be published within thirty (30) days after the affidavit has been filed.

The affidavit for collection of small estates can be found on the AOC's website along with the other Official Probate Forms.

Ark. Code Ann. § 28-41-101.

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.

See also Babb v. Matlock, 340 Ark. 263, 9 S.W.3d 508 (2000)("children," as used in portion of wrongful death statute that defines class of persons who are beneficiaries thereunder, does not include descendants of deceased's predeceased children; children of decedent's children who predeceased the decedent are included in the definition of "children," are not heirs at law, and therefore are not entitled to recover in wrongful death settlement).

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.

See Howard v. Adams, 2009 Ark. App. 621, 332 S.W.3d 24 (2009)(title to real property vests immediately in the heirs or devisees upon the death of the owner; if the owner dies testate, real property becomes an asset of the estate when so directed by the will or when the court orders the property sold, mortgaged, leased, or exchanged for payment of claims or other purposes, but if the owner dies intestate, title to his real property vests immediately in his heirs subject to

the personal representative's right to sell, mortgage, lease, or exchange it for payment of claims or other purposes).

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.

See Stokan v. Estate of Cann, 100 Ark. App. 216, 266 S.W.3d 210 (2007)(applying the rule, each of the decedent's surviving first cousins was to take per capita, receiving one full share, and the descendants of each predeceased first cousin were to take per stirpes, dividing one share proportionally among them).

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.

See also Defir v. Reed, 103 Ark. App. 319, 288 S.W.3d 711 (2008)(even if there was written acknowledgment that adult child born out of wedlock was the daughter of intestate decedent, she could not be deemed an "heir," and was not entitled to inherit property through intestate succession, where she failed to commence an action or assert a claim against decedent's estate within 180 days of decedent's death);

Taylor v. Hamilton, 90 Ark. App. 235, 205 S.W.3d 149 (2005)(illegitimate son's claim for intestate share of decedent's estate that was filed after petition to open

estate was filed but before administrator was appointed was valid for purposes of preserving illegitimate child's statutory right to inherit from father's estate, given that son's claim had to be filed under the statute within 180 days of father's death, and administrator was not appointed until after expiration of 180-day period);

Matter of Estate of F.C., 321 Ark. 191, 900 S.W.2d 200 (1995)(even where illegitimate child is attempting to inherit property from the father, probate court cannot establish paternity);

Rager ex rel. Rager v. Turley, 342 Ark. 223, 27 S.W.3d 729 (2000)(statutory provision governing the effect of the legitimacy of a child on inheritance does not apply to claims to share in a wrongful-death settlement; by its terms, this provision applies to a "claim asserted against the estate of the father" and not to claims to participate in wrongful-death settlement);

Rasberry v. Ivory, 67 Ark. App. 227, 998 S.W.2d 431 (1999)(if illegitimate child does not assert right to inherit property from father within 180 days of father's death, right ceases to exist and cannot be claimed or enforced in any form).

Ross v. Moore, 25 Ark. App. 325, 758 S.W.2d 423 (1988)(one who claims to be illegitimate child of deceased person, seeking to share in decedent's estate, must prove paternity by clear and convincing evidence); and

Lakey v. Lakey, 18 Ark. App. 182, 712 S.W.2d 663 (1986)(presumption of legitimacy of children during wedlock of two persons is rebuttable only by strongest type of conclusive evidence, such as impotency of husband or nonaccess between parties).

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.

See Finley v. Astrue, 601 F. Supp. 2d 1092 (E.D. Ark. 2009)(claimant, the mother of a child created through in vitro fertilization (IVF), and her minor child, were not deprived of equal protection, in their claims for social security mother's insurance benefits and child's insurance benefits, by provision of the Social

Security Act which defined "child," in their case, based on Arkansas intestacy law).

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. A Table of Consanguinity is located in the Appendix.

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.

See Hunt v. United States, 566 F. Supp. 356 (E.D. Ark. 1983)(disclaimers executed by four children of intestate who were alive at his death and five children of son who predeceased him, with purpose of having certain property pass to intestate's surviving spouse did not pass property in question to spouse, and she was not entitled to claim that property for marital deduction, where, under Arkansas law, disclaimers resulted in property in issue passing to 12 grandchildren and ten great grandchildren who did not execute disclaimers); and

Scroggin v. Scroggin, 103 Ark. App. 144, 286 S.W.3d 758 (2008)(son's death without any children meant that his estate passed by intestate succession to spouse because they were married for more than three years).

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.

See also Newton Cnty. v. W., 293 Ark. 461, 739 S.W.2d 141 (1987)(escheat occurred immediately upon death of intestate, rather than at time probate court entered order finding estate had to escheat).

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.

See Brown v. Smith, 240 Ark. 1042, 405 S.W.2d 249 (1966)(question as to whether or not a conveyance or transfer of money or property is regarded as a simple gift, advancement, or a sale, is to be determined by the intention of the parent, and such intention is generally purely one of fact to be ascertained from circumstances of transaction).

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.

See Eckert Heirs v. Harlow, 251 Ark. 1018, 476 S.W.2d 244 (1972)(statute providing that heirs of testator to whom property is limited acquire property by purchase and not by descent did not prevent bequests of property to testator's sister who predeceased testator from lapsing).

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 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.

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 § 28-73-901, 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 oo 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.

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.

IV. Guardianship

Procedure

Jurisdiction

The jurisdiction of the circuit court over all matters of guardianship, other than guardianships ad litem in other courts, shall be exclusive, subject to the right of appeal.

The provisions of this chapter shall not affect the jurisdiction of any court authorized to remove disabilities of minority.

If a juvenile is the subject matter of an open case filed under the Arkansas Juvenile Code, such as a dependency neglect, delinquency, or FINS petition, the guardianship petition shall be filed in that case if the juvenile resides in Arkansas.

The Department of Human Services may intervene as a matter of right in a guardianship action at any time before the entry of a permanent guardianship order if:

(A) A guardianship action is initiated for a child or adult in the custody of the department, including a seventy-two-hour hold; and

(B) The custody of the child or adult is granted to a party seeking guardianship.

Ark. Code Ann. § 28-65-107.

See also the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, Ark. Code Ann. § 28-74-101 et seq.

And see Matter of Guardianship of Powers, 311 Ark. 101, 841 S.W.2d 626 (1992)(probate court had jurisdiction to establish guardianships of person and estate of ward by her presence in state, though she was not state resident or domiciliary).

Venue

The venue for the appointment of a guardian shall be:

(1) In the county of this state which is the domicile of the incapacitated person;

(2) If the incapacitated person is not domiciled in this state, but resides in this state, then in the county of his or her residence; or

(3) If the incapacitated person is neither domiciled nor resides in this state, then in the county in this state in which his or her property, or the greater part of it in value, is situated.

Ark. Code Ann. § 28-65-202.

However, guardianships may be filed in a juvenile court that has previously asserted continuing jurisdiction of the juvenile.

Ark. Code Ann. § 9-27-307.

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 shall transmit the original file to the proper county.

The proceeding shall be deemed commenced by the filing of a petition, and the proceeding first legally commenced to appoint a guardian of the estate, or of the person and the estate, shall extend to all of the property of the incapacitated person in this state.

If it appears to the court at any time before the termination of the guardianship that the proceeding was commenced in a county of improper venue, the court shall order the proceeding transferred to another circuit court.

If it appears that the residence of the ward or of the guardian has been changed to another county or, in case of guardianship of the estate, that a transfer would be for the best interest of the ward and his or her estate, then the court in its discretion may order the proceedings transferred to another circuit court.

However, in case of any transfer of proceedings, all pertinent papers, files, and certified copies of any court orders shall be transferred to the receiving court.

In case of transfer, the receiving court shall complete the proceedings as if originally commenced in it.

Ark. Code Ann. § 28-65-202.

Petition

Any person may file a petition for the appointment of himself or herself or some other qualified person as guardian of an incapacitated person.

The petition shall state, insofar as can be ascertained:

> (1) The name, age, residence, and post office address of the incapacitated person;
>
> (2) The nature of incapacity and purpose of the guardianship sought in accordance with the classifications set forth in § 28-65-104;
>
> (3) The approximate value and a description of the incapacitated person's property, including any compensation, pension, insurance, or allowance to which he or she may be entitled;
>
> (4) Whether there is, in any state, a guardian of the person or of the estate of the incompetent;
>
> (5) The residence and post office address of the person whom the petitioner asks to be appointed guardian;
>
> (6) The names and addresses, so far as known or can be reasonably ascertained, of the persons most closely related to the incapacitated person by blood or marriage;
>
> (7) The name and address of the person or institution having the care and custody of the incapacitated person;
>
> (8) The names and addresses of wards for whom any natural person whose appointment is sought is already guardian;
>
> (9) The reasons why the appointment of a guardian is sought and the interest of the petitioner in the appointment;
>
> (10) A statement of the respondent's alleged disability;
>
> (11) A recommendation proposing the type, scope, and duration of guardianship;
>
> (12) A statement that any facility or agency from which the respondent is receiving services has been notified of the proceedings; and
>
> (13) The names and addresses of others having knowledge about the person's disability.

Ark. Code Ann. § 28-65-205.

When an application is made for the appointment of a guardian for two (2) or more incapacitated persons who are children of a common parent, or are parent and child or are husband and wife, it shall not be necessary that a separate

petition, bond, or other paper be filed for each incompetent, and the guardianship of all may be considered as one (1) proceeding except that the guardian shall maintain and file separate accounts for the estates of each of his or her wards.

Ark. Code Ann. § 28-65-206.

Notice of Appointment Hearing

Notice of the hearing for the appointment of a guardian need not be given to any person:

(1) Who has signed the petition;

(2) Who has in writing waived notice of the hearing, except the alleged incapacitated person may not waive notice;

(3) Who actually appears at the hearing;

(4) Whose existence, relationship to the alleged incapacitated person, or whereabouts is unknown and cannot by the exercise of reasonable diligence be ascertained;

(5) Other than the alleged incapacitated person, whom the court finds to be beyond the limits of the continental United States or himself or herself incompetent; or

(6) The alleged incapacitated person if the court finds that he or she is detained or confined by a foreign power or has disappeared.

Ark. Code Ann. § 28-65-207.

Except as provided in subsection (a) of this section, before the court shall appoint a guardian, other than a temporary guardian, notice of the hearing of the application for the appointment of the guardian shall be served upon the following:

(1) The alleged incapacitated person if over fourteen (14) years of age, and the alleged incapacitated person shall be notified of his or her rights under § 28-65-213. This notice shall be served with the notice of hearing;

(2) The parents of the alleged incapacitated person, if the alleged incapacitated person is a minor;

(3) The spouse, if any, of the alleged incapacitated person;

(4) Any other person who is the guardian of the person or of the estate of the alleged incapacitated person, or any other person who has the care and custody of the alleged incapacitated person, and the director of any agency from which the respondent is receiving services;

(5) The Department of Human Services when the petition seeks appointment of a guardian who, at the time the petition is filed, serves as guardian of five (5) or more minor wards;

(6) If there is neither a known parent nor known spouse, at least one (1) of the nearest competent relatives by blood or marriage of the alleged incapacitated person; and

(7) If directed by the court:

(A) Any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward or his or her estate;

(B) Any department, bureau, agency, or political subdivision of the United States or of this state or any charitable organization, which may be charged with the supervision, control, or custody of the incompetent person; or

(C) Any other person designated by the court.

Ark. Code Ann. § 28-65-207.

If the incapacitated person is over fourteen (14) years of age, there shall be personal service upon him or her if personal service can be had.

The court, for good cause shown, may reduce the number of days of notice, but in every case at least twenty (20) days' notice shall be given.

It shall not be necessary that the person for whom guardianship is sought be represented by a guardian ad litem in the proceedings.

Ark. Code Ann. § 28-65-207.

Notice of Other Hearings

Whenever notice of a hearing in a guardianship proceeding is required, the notice shall be served upon the following who do not appear or in writing waive notice of hearing:

(1) The guardian of the person;

(2) The guardian of the estate; and

(3) If directed by the court:

(A) Any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward's estate;

(B) Any department, bureau, agency, or political subdivision of the United States or of this state or any charitable organization, which may be charged with the supervision, control, or custody of the incapacitated person; or

(C) Any other person whom the court may designate.

Ark. Code Ann. § 28-65-208.

Requests for Special Notice

At any time after the issuance of letters of guardianship, any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward's estate; or any department, bureau, agency, or political subdivision of the United States or of this state, or any charitable organization, which may be charged with the supervision, control, or custody of the incapacitated person; or an interested person may serve, in person or by attorney, upon the guardian or upon his or her attorney and file with the clerk of the court where the proceedings are pending, with a written admission or proof of service, a written request stating that he or she desires written notice of all hearings on petitions for:

(A) The settlements of accounts;

(B) The sale, mortgage, lease, or exchange of any property of the estate;

(C) An allowance of any nature payable from the ward's estate;

(D) The investment of funds of the estate;

(E) The removal, suspension, or discharge of the guardian or final termination of the guardianship; and

(F) Any other matter affecting the welfare or care of the incapacitated person and his or her property.

The applicant for such a notice must include in his or her written request his or her post office address or that of his or her attorney.

Unless the court otherwise directs, upon filing the request, the person shall be entitled to notice of all such hearings or of such of them as he or she designates in his or her request.

Ark. Code Ann. § 28-65-209.

Initial Determinations

Incapacity

A guardian of the estate may be appointed for any incapacitated person.

A guardian of the person may be appointed for any incapacitated person except a married minor who is incapacitated solely by reason of his or her minority.

Ark. Code Ann. § 28-65-201.

"Incapacitated person" means a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs, or chronic intoxication, to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate. This includes an endangered or impaired adult as defined in the Adult Maltreatment Custody Act.

A person is not incapacitated for the sole reason he or she relies consistently on treatment by spiritual means through prayer alone for healing in accordance with his or her religious tradition and is being furnished such treatment.

Ark. Code Ann. § 28-65-101.

The following persons are considered incapacitated persons by statute:

(1) Persons under age eighteen (18) whose disabilities have not been removed; and

(2) Persons who are detained or confined by a foreign power or who have disappeared.

(3) Persons under age twenty-one (21) who:

(A) Have reached eighteen (18) years of age;

(B) Have a current guardianship established based solely on the minority age of the person;

(C) Agree to allow the current guardianship to continue up to twenty-one (21) years of age; and

(D) Receive a guardianship subsidy paid for or approved by the Department of Human Services.

Ark. Code Ann. § 28-65-104.

The burden of proving incapacity by clear and convincing evidence is upon the petitioner. Deffenbaugh v. Estate of Claphan, 48 Ark. App. 208, 893 S.W.2d 350 (1995)(thorough discussion of what constitutes capacity).

Qualifications of a Guardian

A natural person who is a resident of this state, eighteen (18) or more years of age, of sound mind, not a convicted and unpardoned felon, is qualified to be appointed guardian of the person and of the estate of an incapacitated person. Ark. Code Ann. § 28-65-203.

Any charitable organization or humane society incorporated under the laws of this state is qualified for appointment as guardian of the person and estate of a minor when the major portion of the support of the minor is being supplied or administered by the organization and when the court finds that:

(A) The minor has been abandoned by his or her parents; or

(B) The minor's parents are incapacitated or unfit for the duties of guardianship; or

(C) If no other suitable person can be found who is able and willing to assume the duties of guardianship.

Ark. Code Ann. § 28-65-203.

A parent under eighteen (18) years of age is qualified for appointment as guardian of the person of his or her child.

If the Department of Human Services consents, the department is qualified for appointment as guardian of the estate of a minor when the minor is in the custody of the department.

A corporation authorized to do business in this state and properly empowered by its charter to become guardian is qualified to serve as guardian of the estate of an incapacitated person.

A bank or similar institution with trust powers may be appointed guardian of the estate of an incapacitated person. Ark. Code Ann. § 28-65-203.

A nonresident natural person possessing the qualifications enumerated in this section, except as to residence, who has appointed a resident agent to accept service of process in any action or suit with respect to the guardianship and has caused the appointment to be filed with the court, whether or not he or she has been nominated by the will of the last surviving parent of a minor resident of this state to be appointed as guardian of the minor, is qualified for the appointment. However, unless nominated by will, bond may not be dispensed with.

A person whom the court finds to be unsuitable to perform the duties incident to the appointment shall not be appointed guardian of the person or estate of an incapacitated person.

A sheriff, probate clerk of a circuit court, or deputy of either, or a circuit judge, shall not be appointed guardian of the person or estate of an incapacitated person unless the incapacitated person is related to him or her within the third degree of consanguinity. Ark. Code Ann. § 28-65-203.

Except for DHS, a public agency or employee of any public agency acting in his or her official capacity shall not be appointed as guardian for any incapacitated person.

> An employee of a public agency that provides direct services to the incapacitated person shall not be appointed guardian of the person or estate of the incapacitated person.
>
> Notwithstanding any other provision of law, the Public Guardian for Adults may serve as guardian of the person or the estate, or both, of an incapacitated person receiving services from any public agency.
>
> Ark. Code Ann. § 28-65-203.

A person may be appointed temporary guardian of an incapacitated person notwithstanding other provisions if he or she is related to the incapacitated person within the third degree of consanguinity and the court determines that any potential conflict of interest is unsubstantial and that the appointment is in the best interest of the ward.

A circuit court of this state shall not appoint a person or institution as the permanent custodian or permanent guardian of the person or estate of an adult in the custody of the department unless:

> (1) The department has evaluated the prospective guardian under the department's authority under § 9-20-122 and promulgated department policy; or

(2) The department has evaluated the prospective custodian under the department's authority under § 9-20-122 and promulgated department policy.

Ark. Code Ann. § 28-65-203.

See Martin v. Decker, 96 Ark. App. 45, 237 S.W.3d 502 (2006)(ward's daughter was not entitled to appointment of guardianship over ward, although she claims she was better suited than ward's 72-year-old brother to handle the physical requirements of caring for ward; the only age-oriented qualification in statutes guiding the appointment of guardians required a guardian to be at least 18 years old and of sound mind, and there was no evidence that brother's age or health would interfere with the care he would provide ward);

Bogan v. Arkansas First Nat. Bank of Hot Springs, 249 Ark. 840, 462 S.W.2d 203 (1971)(appointment of bank as guardian of person of incompetent was improper; note difference between guardian over person and guardian over estate);

Kuelbs v. Hill, 2010 Ark. App. 793, 379 S.W.3d 716(statutes setting forth qualifications for a guardian and providing that circuit court must be "satisfied" that the person to be appointed guardian is qualified and suitable did not require circuit court, on competing petitions by brother and sister of incapacitated adult sibling, to hold a hearing to determine sister's qualifications as a guardian or to make specific factual findings regarding her suitability); and

Bailey v. Maxwell, 94 Ark. App. 358, 230 S.W.3d 282 (2006)(paternal grandmother who failed to show that she was not convicted and unpardoned felon was not "qualified" to serve as guardian for her grandchild).

Order of Preference

The parents of an unmarried minor, or either of them, if qualified and, in the opinion of the court, suitable, shall be preferred over all others for appointment as guardian of the person.

Subject to this rule, the court shall appoint as guardian of an incapacitated person the one most suitable who is willing to serve, having due regard to:

(1) Any request contained in a will or other written instrument executed by the parent or by the legal custodian of a minor child for the appointment of a person as guardian of the minor child;

(2) Any request for the appointment of a person as his or her guardian made by a minor fourteen (14) years of age or over;

(3) Any request for the appointment of a person made by the spouse of an incapacitated person;

(4) The relationship by blood or marriage to the person for whom guardianship is sought.

Prior to the appointment of a guardian, the court shall take into consideration any request made by the incapacitated person concerning his or her preference regarding the person to be appointed guardian. This request may be made to the court by any means, but there shall be no necessity that the incapacitated person appear before the court for the purpose of indicating his or her preference.

Ark. Code Ann. § 28-65-204.

See Hicks v. Faith, 2011 Ark. App. 330, 384 S.W.3d 17(evidence supported trial court's finding that appointing minor child's maternal grandparents as guardians of the person and the estate was in child's best interests, though child's father testified that father had been clean of drugs, employed, and supported by family in his interim care of child for several months before trial; evidence indicated that father had been abusing pain medication for years, grandparents were financially stable, owned a home appropriate for a child, and were experienced in child care, particularly with child, and there was no evidence that had father had ever served as child's primary caregiver);

Fletcher v. Scorza, 2010 Ark. 64, 359 S.W.3d 413(the natural-parent preference is but one factor that the circuit court must consider in determining who will be the most suitable guardian for a child; the sole considerations in determining guardianship of a child are whether the natural parent is qualified and suitable, and what is in the child's best interest; the issue of whether a natural parent is "fit" or "unfit," as those terms are used in child custody cases, is not a valid consideration);

Blunt v. Cartwright, 342 Ark. 662, 30 S.W.3d 737 (2000)(statutory preferential status given to natural parents of child is but one factor that probate court must consider in determining who will be the most suitable guardian for child; any inclination to appoint a parent or relative must be subservient to principle that child's interest is of paramount consideration; maternal grandparents, and not putative father, were entitled to permanent guardianship of estate and person of child whose mother died in amusement park accident, given evidence that grandparents had their own home, were gainfully employed, and had a stable living environment, that child was doing well in public school system in grandparents' county, that grandparents contributed continual financial support to both child and mother, that putative father had only been employed at current job for one week prior to hearing and did not have a home of his own, and that

putative father physically abused mother even when mother was seven or eight months pregnant with child);

Bogan v. Arkansas First Nat. Bank of Hot Springs, 249 Ark. 840, 462 S.W.2d 203 (1971)(husband has no absolute right to appointment as guardian of the estate of incompetent wife); and

Martin v. Decker, 96 Ark. App. 45, 237 S.W.3d 502 (2006)(statute that directs a court, in appointing a guardian for an incapacitated person, to consider the incapacitated person's preference for the person appointed, does not mandate an ironclad order of preference, but leaves the appointment of a guardian who would forward the best interests of the incompetent to the sound discretion of the court; trial court acted within its discretion in deciding not to appoint daughter as the guardian of her mother's person and estate, even though mother indicated that she preferred that her daughter be appointed guardian, where the court considered the mother's preference, as required by statute, and the mother appeared especially confused when expressing her preference).

Proof for Appointment of Guardian

Before appointing a guardian, the court must be satisfied that:

> (1) The person for whom a guardian is prayed is either a minor or otherwise incapacitated;
>
> (2) A guardianship is desirable to protect the interests of the incapacitated person; and
>
> (3) The person to be appointed guardian is qualified and suitable to act as such.

Ark. Code Ann. § 28-65-210.

See Bailey v. Maxwell, 94 Ark. App. 358, 230 S.W.3d 282 (2006)(paternal grandmother who failed to show that she was not convicted and unpardoned felon was not "qualified" to serve as guardian for her grandchild);

Light v. Duvall, 2011 Ark. App. 535, 385 S.W.3d 399 (2011)(although it appeared that grandparents were not served with the amended guardianship petition for child, they were present at the guardianship hearing such that notice was not necessary);

Blunt v. Cartwright, 342 Ark. 662, 30 S.W.3d 737 (2000)(statement in maternal grandparents' brief that putative father was a typical "dead-beat" parent, "if he was indeed a parent," and that he contributed only $175 to direct support of child was both inflammatory and false, and as such, would be stricken, in

guardianship case arising from death of mother in accident, where putative father contributed to child's support, in form of regular allotments to mother, while he was in Army);

Fletcher v. Scorza, 2010 Ark. 64, 359 S.W.3d 413(where the incapacitated person is a minor, the key factor in determining guardianship is the best interest of the child); and

Freeman v. Rushton, 360 Ark. 445, 202 S.W.3d 485 (2005)(maternal grandparents, and not biological father, were entitled to guardianship of person and estate of child whose mother died from injuries she received in a car accident; although statute granted preferential status to natural parent of child, statute did not mandate appointment once court determined whether a parent was "qualified" and "suitable," child's best interest was of paramount consideration, and court carefully considered evidence and found that in spite of statutory preference, it was in child's best interest to remain with his maternal grandparents).

Hearings

Determination of Incapacity

The fact of minority, disappearance, or detention, or confinement by a foreign power shall be established by satisfactory evidence.

In determining the incapacity of a person for whom a guardian is sought to be appointed for cause other than minority, disappearance, or detention, or confinement by a foreign power, the court shall require that the evidence of incapacity include the oral testimony or sworn written statement of one (1) or more qualified professionals, whose qualifications shall be set forth in their testimony or written statements.

If the alleged incapacitated person is confined or undergoing treatment in an institution for the treatment of mental or nervous diseases or in a hospital or penal institution, one (1) of the professionals shall be a member of the medical staff of that hospital or institution.

The court, in its discretion, may require the presence before it of the person of the alleged incapacitated person.

The court shall fix the fees to be paid to such examiners, which shall be charged as part of the costs of the proceeding.

The costs of the proceeding shall be paid by the petitioner, who shall be reimbursed therefor out of the estate of the incapacitated person, if a guardian is appointed.

Ark. Code Ann. § 28-65-211.

Evaluations

A professional evaluation shall be performed prior to the court hearing on any petition for guardianship except when appointment is being made because of minority, disappearance, detention, or confinement by a foreign power or pursuant to § 28-65-218.

The evaluation shall be performed by a professional or professionals with expertise appropriate for the respondent's alleged incapacity.

The evaluation shall include the following:

(1) The respondent's medical and physical condition;

(2) His or her adaptive behavior;

(3) His or her intellectual functioning; and

(4) Recommendation as to the specific areas for which assistance is needed and the least restrictive alternatives available.

Ark. Code Ann. § 28-65-212.

If no professional evaluations performed within the last six (6) months are available, the court will order an independent evaluation.

If the petition is granted, the cost of the independent evaluation will be borne by the estate of the incapacitated person. In the event the petition is denied, the costs will be borne by the petitioner.

The Department of Human Services shall not be ordered by any court, except the juvenile division of the circuit court, to gather records, investigate the respondent's condition, or help arrange for appropriate professional evaluations, unless the court has first determined all parties to the proceeding to be indigent and assistance provided by the department is limited to actions within the State of Arkansas. Ark. Code Ann. § 28-65-212.

The department shall issue regulations to implement this provision.

Any existing evaluations made by the department of which the court has notice must be considered by the court.

Ark. Code Ann. § 28-65-212.

See Cogburn v. Wolfenbarger, 85 Ark. App. 206, 148 S.W.3d 787 (2004)(professional medical evaluations of mother, which failed to include evaluation of her adaptive behavior, were insufficient to support appointment of a guardian based on a finding that mother was incompetent); and

Matter of Bailey, 299 Ark. 352, 771 S.W.2d 779 (1989)(professional evaluation underlying finding that individual was incompetent to handle his affairs based on his alcoholism did not contain two required statutory elements of findings with respect to individual's adaptive behavior and intellectual functioning, and therefore evaluation could not sustain declaration of incompetency and appointment of coguardians).

Hearing Requirements

At the hearing, the respondent shall have the right to:

(1) Be represented by counsel;

(2) Present evidence on his or her own behalf;

(3) Cross-examine adverse witnesses;

(4) Remain silent;

(5) Be present; and

(6) Require the attendance by subpoena of one (1) or more of the professionals who prepared the evaluation.

The burden of proof by clear and convincing evidence is upon the petitioner, and a determination of incapacity shall be made before consideration of a proper disposition.

If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of less restrictive alternatives to guardianship to meet the needs of the respondent.

(2) If it is found that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action.(3) If it is found that the respondent is substantially without capacity to care for himself or herself or his or her estate, a guardian for the person or estate, or both shall be appointed.

Ark. Code Ann. § 28-65-213.

See Deffenbaugh v. Estate of Claphan, 48 Ark. App. 208, 893 S.W.2d 350 (1995)(failing to appoint guardian for person and estate of adult found to be incompetent was error, despite trial court's finding that incompetent's elderly husband could care for her).

Guardianship Order

A court order establishing a guardianship shall contain findings of fact that the respondent is an incapacitated person and is in need of a guardian for the person or estate, or both. The order may limit the power and duties of the guardian and may define the legal and civil rights retained by the incapacitated person.

If satisfied that a guardian should be appointed, the court shall appoint one (1) or two (2) general or limited guardians of the person or estate, or both, but not more than one (1) guardian of the person shall be appointed unless they are husband and wife.

The order shall specify the nature of the guardianship and the amount of the bond to be given.

If the court determines the guardians should be limited, the order shall set forth the specific powers, authorities, and duties the guardian shall possess, which may be stated in terms of powers or rights the incapacitated person may exercise without intervention of the guardian.

In defining the powers and duties of the guardian, the court shall consider the right of the incapacitated person to rely upon nonmedical remedial treatment in accordance with a recognized religious method of healing in lieu of medical care.

In cases involving minor children, the order may make provisions for visitation and child support as in other cases involving child custody.

Ark. Code Ann. § 28-65-214.

Bond

If the guardianship is to be of the person only, the amount of the bond shall not exceed one thousand dollars ($1,000), or the court may dispense with the bond. Ark. Code Ann. § 28-65-215.

At every accounting, the court shall inquire into the sufficiency of the bond and of the sureties, and, if either or both are found insufficient, the guardian shall be ordered to file a new or additional bond.

If, by the terms of a will, the testator expresses the wish that no bond be required of the person whom he or she requests to be appointed guardian, that

person may be relieved of giving a bond with respect to property given by the will to the incapacitated person. Ark. Code Ann. § 28-65-215.

Section 28-48-201 et seq. with respect to the bonds of personal representatives shall be applicable to the bonds of guardians, except that in fixing the amount of the guardian's bond, the value of the real property, as distinguished from the income arising therefrom, unless it is sold, shall not be taken into consideration and shall not constitute property which may reasonably be expected to pass through the hands of the guardian.

Further, when the ward's estate is all in cash, the court may dispense with the bond if the guardian deposits the entire estate on interest in a bank in Arkansas insured by the Federal Deposit Insurance Corporation or in a savings and loan association in Arkansas insured by the Federal Savings and Loan Insurance Corporation or in a credit union in Arkansas insured by the National Credit Union Administration and the value of the estate is not greater than the amount of the maximum insurance provided by law for a single depositor, and the bank or savings and loan association shall file with the probate clerk of the circuit court an agreement not to permit any withdrawal from the deposit except on authority of a circuit court order.

Ark. Code Ann. § 28-65-215.

See also Jiles v. Union Planters Bank, 90 Ark. App. 245, 205 S.W.3d 187 (2005)(ward's action to recover funds from bank that permitted unauthorized withdrawal sounded primarily in contract, and thus, ward was entitled to award of statutory attorney fees as prevailing party in contract action, even though certain duties of the bank regarding the deposit of funds were imposed by statute, given that bank's obligation to prevent unauthorized withdrawals flowed from the agreement).

Issuance of Letters

When a guardian has given such bond as may be required and the bond has been approved, as provided by § 28-48-205, or if no bond is required and the guardian has filed his or her written acceptance of his or her appointment, letters of guardianship under the seal of the court shall be issued to him or her.

The letters, when so issued, until revoked or cancelled by the court, shall protect persons who, in good faith, act in reliance thereon.

Ark. Code Ann. § 28-65-216.

Letters of guardianship shall be in substantially the form found in Ark. Code Ann. § 28-65-217.

Temporary Guardianship

Appointment

If the court finds that there is imminent danger to the life or health of the incapacitated person or of loss, damage, or waste to the property of an incapacitated person and that this requires the immediate appointment of a guardian of his or her person or estate, or both, the court may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period, which period, including all extensions, shall not exceed ninety (90) days, and the court may remove or discharge him or her or terminate the guardianship.

> If the incapacitated person is a minor, the initial period for the appointment of a temporary guardian shall be for a period not to exceed ninety (90) days.
>
> However, on or before the expiration of the ninety-day period, the court may extend the temporary guardianship for an additional period not to exceed ninety (90) days if the court finds after a hearing on the merits that there remains imminent danger to the life or health of the minor if the temporary guardianship is not extended.

Ark. Code Ann. § 28-65-218(a).

See also Devine v. Martens, 371 Ark. 60, 263 S.W.3d 515 (2007)(an "emergency" existed, which established trial court's jurisdiction under Uniform Child–Custody Jurisdiction and Enforcement Act (UCCJEA) over grandparents' petition for emergency temporary guardianship of grandson, in view of trial court's findings that mother had created a risk of imminent danger to her son based on her lifestyle).

Notice

Immediate notice of the temporary guardianship order shall be served by the petitioner upon the following:

> (1) The ward, if over fourteen (14) years of age;
>
> (2) The parents of the ward, if the ward is a minor;
>
> (3) The spouse, if any, of the ward;
>
> (4) Any other person who is the guardian of the person or of the estate of the ward, or any other person who has the care and custody of the ward,

and the director of any agency from which the respondent is receiving services;

(5) The Department of Human Services when the temporary guardian appointed serves as guardian of five (5) or more wards;

(6) If there is neither a known parent nor known spouse, at least one (1) of the nearest competent relatives by blood or marriage of the ward; and

(7) If directed by the court:

(A) Any department, bureau, agency, or political subdivision of the United States or of this state which makes or awards compensation, pension, insurance, or other allowance for the benefit of the ward or his or her estate;

(B) Any department, bureau, agency, or political subdivision of the United States or of this state or any charitable organization, which may be charged with the supervision, control, or custody of the incompetent; or

(C) Any other person designated by the court.

Ark. Code Ann. § 28-65-218(b).

The notice shall include:

(1) A copy of the petition;

(2) A copy of the temporary order and order of appointment;

(3) Notice of a hearing date; and

(4) A statement of rights as provided in § 28-65-207(b)(1).

Ark. Code Ann. § 28-65-218(c).

Notice need not be given to any person listed in § 28-65-207(a)(1)-(6).

Within three (3) working days of the entry of the temporary guardianship order, a full hearing on the merits shall be held.

The appointment may be to perform duties respecting specific property or to perform particular acts, as stated in the order of appointment.

The temporary guardian shall make such reports as the court shall direct and shall account to the court upon termination of his or her authority.

In other respects, the provisions of this chapter concerning guardians shall apply to temporary guardians, and an appeal may be taken from the order of appointment of a temporary guardian.

The letters issued to a temporary guardian shall state the date of expiration of the authority of the temporary guardian.

Ark. Code Ann. § 28-65-218(d)-(j).

See Earle v. Bennett, 289 Ark. 448, 711 S.W.2d 829 (1986)(guardianship granted by court order was not a temporary guardianship, despite claim of appointed guardian, where petition for appointment of guardian and court order granting petition made no mention of temporary guardianship petition or order, and guardianship granted complied with none of the statutory requirements for temporary guardianship).

Duties of a Guardian

In General

It shall be the duty of the guardian of the person, consistent with and out of the resources of the ward's estate, to care for and maintain the ward and, if he or she is a minor, to see that he or she is protected, properly trained and educated, and that he or she has the opportunity to learn a trade, occupation, or profession.

The guardian of the person may be required to report the condition of his or her ward to the court, at regular intervals or otherwise, as the court may direct.

The guardian of the person shall be entitled to the custody of the ward but shall not have the power to bind the ward or his or her property.

It shall be the duty of the guardian of the estate:

(A) To exercise due care to protect and preserve it;

(B) To invest it and apply it as provided in this chapter;

(C) To account for it faithfully;

(D) To perform all other duties required of him or her by law; and

(E) At the termination of the guardianship, to deliver the assets of the ward to the persons entitled to them.

To the extent applicable, the law of trusts shall apply to the duties and liabilities of a guardian of the estate.

Ark. Code Ann. § 28-65-301.

See Brasel v. Estate of Harp, 317 Ark. 379, 877 S.W.2d 923 (1994)(bank could rightfully allow withdrawal of money from joint checking account by guardian of one of joint tenants of account, under letters of guardianship and contract with parties, where other tenant did not believe gift had been made to her, never attempted to withdraw funds for herself, and knew entire fund originated with ward; guardian exercised his powers to protect and preserve ward's personal property by withdrawing money from bank); and

King v. Beavers, 148 F.3d 1031 (8th Cir. 1998)(under Arkansas law, as predicted by Court of Appeals, probate court's unlimited guardianship order implicitly included power to change ward's residence to that of guardian, and therefore deputy sheriff did not violate ward's Fourteenth Amendment rights by removing him from his home, escorting him and guardian to airport, and accompanying ward and guardian to state in which guardian resided);

Care, Treatment and Confinement of Ward

No guardian appointed prior to October 1, 2001, shall make any of the following decisions without filing a petition and receiving express court approval:

(A) Consent on behalf of the incapacitated person to abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary in a situation threatening the life of the incapacitated;

(B) Consent to withholding life-saving treatment;

(C) Authorize experimental medical procedures;

(D) Authorize termination of parental rights;

(E) Prohibit the incapacitated person from voting;

(F) Prohibit the incapacitated person from obtaining a driver's license; or

(G) Consent to a settlement or compromise of any claim by or against the incapacitated person or his or her estate.

No guardian appointed on or after October 1, 2001, shall make any of the following decisions without filing a petition and receiving express court approval:

(A) Consent on behalf of the incapacitated person to abortion, sterilization, psychosurgery, or removal of bodily organs except when necessary in a situation threatening the life of the incapacitated;

(B) Consent to withholding life-saving treatment;

(C) Authorize experimental medical procedures;

(D) Authorize termination of parental rights;

(E) Authorize an incapacitated person to vote;

(F) Prohibit the incapacitated person from obtaining a driver's license; or

(G) Consent to a settlement or compromise of any claim by or against the incapacitated person or his or her estate.

However, the provisions applying after October 1, 2001 shall not apply to written requests under § 20-17-214.

Ark. Code Ann. § 28-65-302.

If the ward is incapacitated for reasons other than minority and has not been committed to the state hospital as otherwise provided by law, the court, upon petition of the guardian of the person or other interested person and after such notice as the court shall direct, including notice to the guardian of the person if he or she is not the petitioner, may authorize or direct the guardian of the person to take appropriate action for the commitment of the ward to the state hospital or, while retaining control over and responsibility for the care of the person of the ward, to place the ward in some other suitable institution for treatment, care, or safekeeping.

Upon petition of the guardian or other interested person, after a hearing of which the guardian of the person and such other persons as the court may direct shall have notice, the court, for good cause shown, may modify, amend, or revoke such an order.

If the condition of the ward is such as to endanger the person or property of himself or herself or others, the guardian, in an emergency, may temporarily confine the ward in some suitable place or may deliver him or her into the custody of the sheriff for safekeeping in the county jail until such time as the court may hear and act upon a petition, which shall be promptly filed by the guardian, with reference to the commitment of the ward to the state hospital or for other appropriate provision for his or her treatment, care, or safekeeping.

Ark. Code Ann. § 28-65-303.

Title & Possession of Estate

The guardian of the estate shall take possession of all of the ward's real and personal property, and of rents, income, issue, and of the proceeds arising from the sale, mortgage, lease, or exchange thereof. Subject to the possession, the title

to all the estate and to the increment and proceeds of the estate shall be in the ward and not in the guardian.

Ark. Code Ann. § 28-65-304.

Actions – Service of Process

When there is a guardian of the estate, all actions between the ward or the guardian and third persons in which it is sought to charge or to benefit the estate of the ward shall be prosecuted by or against the guardian of the estate as guardian, and the guardian shall represent the interests of the ward in the action.

In every case, process shall be served upon the guardian of the estate and in addition upon such other persons as by law required.

Ark. Code Ann. § 28-65-305.

Enforcement of Contracts

When, prior to his or her incapacity, an incapacitated person has entered into a valid contract for the purchase or sale of any interest in real or personal property, including the sale or relinquishment of a dower or homestead interest, and the contract has not been performed prior to the inception of incapacitation, the court, upon petition of the guardian, the seller or purchaser, or other interested person, if it finds that performance of the contract would have been required on the part of the incapacitated person if the incapacitation had not intervened, may authorize the guardian to complete the performance of the contract and to execute or join in the execution of the deed of conveyance, bill of sale, or other appropriate instrument in the name and in behalf of the incapacitated person pursuant to the terms of the original contract.

The conveyance, bill of sale, or other instrument shall have the same effect with respect to the estate, title, or interest of the incapacitated person as if executed by him or her personally while incapacitated.

Ark. Code Ann. § 28-65-306.

Liability for Continuation of a Business

If, at the time of the appointment of a guardian of the estate, the ward owns a business or an interest in a business, the court, by appropriate order, may authorize the guardian to continue the conduct of or participation in such a business in behalf of the ward for such periods of time and subject to such safeguards as the court may find to be for the best interest of the ward.

The ward's estate, but not the guardian personally, shall be liable for damages resulting from torts or other acts committed by agents and employees of the guardian in the course of their employment in the conduct of the business.

It is specifically recognized that the operation of any business undertaking involves hazards, chance, and danger of loss. In recognition of this fact, it is declared to be the legislative intent that no guardian shall be held personally liable for loss resulting from mere lack of familiarity with the business operations, mistakes of judgment made in good faith, or like causes.

Ark. Code Ann. § 28-65-307.

Power to Borrow Money & Make Gifts

Upon a showing that the action would be advantageous to the ward and his or her estate, the court may authorize the guardian to borrow money, to execute notes and other legal evidences of indebtedness, and to mortgage property of the ward in accordance with the provisions of § 28-65-314.

Upon a showing that the action would be advantageous to the ward and his or her estate, the court may authorize the guardian to make gifts and disclaimers on behalf of the ward.

Ark. Code Ann. § 28-65-308.

Periodic Allowances

The guardian of the estate, or any person, department, bureau, agency, or charitable organization having the care and custody of a ward may apply to the court for an order directing the guardian of the estate to pay to the person, department, bureau, agency, or charitable organization having the care and custody of the ward or, if the guardian of the estate has the care and custody of the ward, directing the guardian of the estate to apply a designated amount periodically as the court may direct, to be extended for the care, maintenance, and education of the ward and of his or her dependents.

In proper cases the court may order payment of amounts directly to the ward for his or her maintenance or incidental expenses.

The amounts authorized under this section may be decreased or increased from time to time by direction of the court.

If payments are made to another under the order of the court, the guardian of the estate is not bound to see to the application of the payments.

Ark. Code Ann. § 28-65-309.

Support of the Minor Incapacitated Person

The support of their unmarried minor children is chargeable jointly and severally upon the property of the husband and the property of the wife, and in the relation thereto, they may be sued either jointly or severally.

Although the responsibility for the care, maintenance, and education of a minor rests upon his or her parents or persons in loco parentis, if there are such persons, nevertheless in appropriate cases and taking into consideration the relative resources and circumstances of a parent and the minor ward, the court, in its discretion, may authorize the guardian of the estate to expend income or principal of the ward's estate for the ward's care, maintenance, and education.

As far as necessary for the purpose, except as provided in subsection (b) of this section, the income of the ward's estate shall be first applied to his or her care, maintenance, and education.

On order of the court, any surplus of the income may be applied to the care, maintenance, and education of the dependents of the ward.

If the income is not sufficient to care for, maintain, and educate the ward and his or her dependents, the court may order the expenditure of such portion of the principal as it from time to time finds necessary for such purposes.

Ark. Code Ann. § 28-65-310.

See Matter of Porter, 298 Ark. 121, 765 S.W.2d 944 (1989)(probate court had exclusive jurisdiction to determine whether guardian of ward's estate could use money represented by certificate of deposit owned by ward to reimburse Medicaid payments which had been made and were to be made for ward's care, despite State's contention that court lacked jurisdiction of issue because it was pending before administrative agencies from which appeal to court would lie).

Investments

By court order, a guardian of an estate may deposit, as a fiduciary, a ward's funds either in a checking or savings account in a financial institution of this state, as a general deposit.

The guardian shall invest the funds not reasonably needed for the ward's care, maintenance, or education in securities selected by the guardian from among the 14 categories listed in this statute.

Investments may be made without prior approval of a court in:

(1) Obligations unconditionally guaranteed as to principal and income by the United States;

(2) Bonds issued by the State of Arkansas;

(3) Shares of any investment company or investment trust described and limited by subsection b (12) of this statute.

The court shall not approve an investment in an issue of securities which has been in default for longer than 120 days during the 5 years preceding the investment.

If the guardian of the estate is a state or national bank or trust company authorized by law to establish and maintain common trust funds and in fact does so, and the fund is limited to purchase of investments listed in this statute, the guardian may invest in the common fund without prior court order.

Ark. Code Ann. § 28-65-311.

Retention of Property & Investment

If it is in the best interest of the ward or his or her estate, the court may order the guardian of the estate to retain any property belonging to the ward which may come into the hands of the guardian otherwise than by purchase by the guardian, whether or not the property is of the nature authorized by § 28-65-311, as an investment of the ward's funds.

If the guardian of the estate makes an investment which at the time of the making thereof shall meet the requirements of § 28-65-311 and the investment later fails to meet the requirements, the guardian may retain the investment, unless otherwise directed by the court.

Ark. Code Ann. § 28-65-312.

Purchase of a Home

The court may authorize the purchase of real property in this state for use by the ward as a home or, unless he or she is an unmarried minor, as a home for his or her dependent family.

The purchase shall be made only upon order of the court after notice to the ward if he or she is fourteen (14) years of age or over and his or her incompetence is due solely to minority, and to such other persons, if any, as the court may direct.

Ark. Code Ann. § 28-65-313.

Sales and Mortgages of Property Generally

Whenever it is in the best interest of the ward, the real or personal property, including a homestead interest, may be sold, mortgaged, leased, or exchanged, or an easement granted by the guardian of the estate, if the court authorizes it to pay the ward's debts and provide for care, maintenance, and education of the ward and/or dependents, or for investing the proceeds.

Any action by the guardian under this section shall be considered an exchange of property of the ward.

A guardian shall not purchase property of the ward, unless sold at public sale and approved by the court, and then only if the guardian is the spouse, parent, child, or sibling of the ward and is a cotenant with the ward of the property.

This does not apply if a special guardian is appointed and reports to the court that a private sale is in the ward's best interest, and notice is given and a hearing is held.

The court shall determine prior to sale whether the guardian's bond is sufficient and may order it increased or supplemented to protect the ward's interest.

Regardless of the law regarding decedents' estates applicable to sales, mortgages, leases, etc., the term of a lease of real property of a ward shall not be limited to 3 years, nor shall the credit to be extended by the guardian be limited to 1 year.

Ark. Code Ann. § 28-65-314.

Oil, Gas & Mineral Interests

A guardian of the estate on behalf of a ward who owns land in this state or an interest in land, or who owns or leases an interest in oil, gas, or other mineral rights may lease, assign, sell or enter into a contract with reference to those rights in the best interest of the ward.

Such transaction shall be binding on the ward and the estate and all parties unless set aside by the court.

Within 60 days of the transaction, the guardian must report the transaction to the circuit court of the county in which the majority of the property is located, explaining the transaction in detail, attaching a copy of the instrument executed, and petitioning the court to ratify the transaction. Failure to so report constitutes a violation, and upon conviction, the guardian shall be fined an amount not to exceed $1,000.00.

After notice and hearing and determination of the sufficiency of the bond, if the court finds the transaction to be in the best interest of the ward at the time of execution or delivery, the court shall enter an order of approval.

If the court determines the transaction was not in the ward's best interest, it shall enter an order setting aside the transaction and require the guardian to return any consideration he or she may have received.

If this county is not the site of the guardianship proceedings, the order shall direct that a copy of the order be forwarded to the clerk of the county of guardianship.

If the guardian fails to file the report within 60 days, the person with whom the guardian contracted has 75 days after the date of the transaction to petition the court to require the guardian to file the report.

The court shall then issue a show cause order to the guardian and approve or set the transaction aside, depending on the outcome of the hearing.

A transaction under this section not reported to the court shall be null and void after the expiration of the time provided for another party to petition the court to require the guardian to file the report and petition.

Ark. Code Ann. § 28-65-315.

Upon petition and notice given as the court may direct, the court may authorize the guardian of the estate to enter transactions, execute instruments necessary or advantageous to the estate in the operation and development of any interest, including leasehold interest, in oil, gas, or minerals.

This may include but is not limited to: unit operating agreements, royalty unitization agreements, royalty pooling agreements, field unitization and repressure agreements, and such other agreements and contracts relative thereto as the court finds in the best interest of the ward.

Ark. Code Ann. § 28-65-316.

Payment of Claims

A guardian of the estate is under a duty to pay from the estate all just claims against the estate of his or her ward, whether they constitute liabilities of the ward which arose prior to the guardianship or liabilities properly incurred by the guardian for the benefit of the ward or his or her estate and whether arising in contract or in tort or otherwise, upon allowance of the claim by the court or upon approval by the court in a settlement of the guardian's accounts.

The duty of the guardian to pay from the estate shall not preclude his or her personal liability for his or her own contracts and acts made and performed in behalf of the estate as it exists according to the common law.

Upon the petition of any person having a claim against the estate of a ward for services lawfully rendered to the ward or his or her estate for necessaries furnished to the ward, or for the payment of a lawful liquidated claim or demand against the estate of the ward, the court, after notice, upon appropriate hearing, may direct the guardian to pay the claim.

Ark. Code Ann. § 28-65-317.

See Forehand v. Am. Collection Serv., Inc., 307 Ark. 342, 819 S.W.2d 282 (1991)(a guardian is under a duty to pay from the estate all just claims against the estate of his ward; probate court has exclusive jurisdiction over payment of claims against ward's account - decided before Amendment 80).

Compromise Settlements

On petition of the guardian of the estate, the court, if satisfied that the action would be in the interest of the ward and his or her estate, may make an order authorizing the settlement or compromise of any claim by or against the ward or his or her estate, whether arising out of contract, tort, or otherwise, and whether arising before or after the appointment of the guardian.

A settlement of a tort claim against a ward made by or in behalf of the guardian of the estate shall be binding, if otherwise valid, without authorization or approval by the court.

However, a guardian shall not take credit in his or her accounts for any money or property expended by him or her in the settlement unless the guardian has first been authorized by the court to make the settlement or unless the guardian, after having made the settlement, establishes to the satisfaction of the court by clear and convincing evidence that the settlement was in the interest of the ward and his or her estate.

A discharge, acquittance, or receipt given by a guardian of the estate for any claim other than one arising out of tort shall be valid in favor of any person who takes it in good faith, but the guardian shall assume the burden of establishing that any compromise not previously approved by the court was made in the interest of the ward and his or her estate and shall be liable to his or her ward if he or she or his or her estate is injured thereby.

Ark. Code Ann. § 28-65-318.

Employment of Professionals

The guardian may employ legal counsel in connection with the discharge of his or her duties, and the court shall fix the attorney's fee, which shall be allowed as an item of the expense of administration.

If the guardian is an attorney and has performed necessary legal services in connection with the guardianship, the court shall take into consideration the nature and extent of such services in fixing the compensation of the guardian.

The guardian, when authorized by the court, may employ accountants, engineers, appraisers, brokers, and other persons whose services are reasonably required in the discharge of his or her duties, and the court shall fix the compensation for such services, which shall be allowed as an item of expense of the administration.

Ark. Code Ann. § 28-65-319.

Factors to be considered when determining a just and adequate fee for an attorney in a guardianship case include the amount and character of the services rendered, the labor, time, and trouble involved, the nature and importance of the litigation or business in which the services are rendered, the amount or value of the property involved in the employment, the skill or experience called for in the performance of the services, and the professional character and standing of the attorneys. Bailey v. Rahe, 355 Ark. 560, 142 S.W.3d 634 (2004)(where the award of attorney fees, to attorney for guardian of ward's person and estate, was an abuse of discretion, where trial court gave no valid explanation for lowering attorney's hourly fee from $150 to $125 an hour, trial court gave no valid explanation for disallowing fees incurred before date of hearing for approval to change guardian's appointment from temporary guardian to permanent guardian, which fees included attorney's assistance to guardian in complying with trial court's accounting and inventory requirements, and the trial court did not consider the *Jones* factors or *Chrisco* factors for determining a reasonable attorney fee).

See also Johnson v. Guardianship of Ratcliff, 72 Ark. App. 85, 34 S.W.3d 749 (2000)(contingency fee contract which minor child's guardian entered into for legal services in connection with child's claims arising from motor vehicle accident in which child's mother died was valid, even though guardian was only guardian of child's person when contract was negotiated, where guardian was subsequently made guardian of child's estate, and guardian took no action to disavow fee contract but had since reaffirmed it in every respect); and

Winters v. Winters, 24 Ark. App. 29, 747 S.W.2d 583 (1988)(trial court did not err in awarding attorney fees to guardian who successfully defended challenge by

ward to final accounting, under statute providing that trial court may deny or reduce attorney fees awarded to guardian who has failed to discharge his duties).

Accounting

Unless otherwise directed by the court, a guardian of the estate shall file with the court a written verified account of his or her administration:

(1) Annually within sixty (60) days after the anniversary date of his or her appointment; and

(2) Within sixty (60) days after termination of his or her guardianship.

Ark. Code Ann. § 28-65-320.

Notice of the hearing of every accounting shall be given to the same persons and in the same manner as is required by §§ 28-65-207 and 28-65-208 for notice of the petition for the appointment of a guardian, except that the court may dispense with the giving of notice to a mentally incompetent ward upon a satisfactory showing that the giving of notice would be detrimental to his or her well-being.

With respect to each item for which credit is claimed, the account shall show whether or not the item has been paid, and, in either event, the court may allow or disallow any item in whole or in part, subject to such protection as is extended the guardian with respect to actions taken by him or her in good faith in reliance upon orders previously made by the court.

When notice has been given as provided in subsection (b) of this section, the settlement by the court of an account is binding upon all persons concerned, subject to the right of appeal and to the power of the courts to vacate its final order.

The provisions of §§ 28-52-101, 28-52-103 -- 28-52-105, 28-52-107, 28-52-108, and 28-52-110 relating to accounting by a personal representative shall apply also to accounting by a guardian.

A guardian who fails to file an accounting within the time limit prescribed by this section may be denied compensation for services performed between the date an accounting should have been filed and the date it is filed.

Ark. Code Ann. § 28-65-320.

Inventory

The guardian of the estate shall file an inventory of the ward's property in the same manner and subject to the same requirements as are provided in § 28-49-110 for the inventory of a decedent's estate.

In its discretion, the court may order the appraisement of the ward's property by one (1) or more disinterested and qualified persons appointed by the court.

Ark. Code Ann. § 28-65-321.

Reporting

All guardians shall file an annual report with the court. The report shall contain:

(1) The person's current mental, physical, and social conditions;

(2) His or her present living arrangements;

(3) The need for continued guardianship services;

(4) An accounting of his or her estate if the guardian has been delegated that responsibility by the court order or as a result of being a guardian of the estate; and

(5) Any other information requested by the court or necessary in the opinion of the guardian.

Ark. Code Ann. § 28-65-322.

Administration of Deceased Ward's Estate

Upon the death of a ward, the guardian of his or her estate is authorized, as such, subject to the direction of the court, to administer the estate of the deceased ward after further letters are issued to him or her, after a hearing, pursuant to a petition for letters, testamentary or of administration, which has been filed not later than forty (40) days after the death of the ward, subject, however, to the provisions of § 28-40-116.

In such a case, the guardian shall file an account of his or her administration of the ward's estate up to the date of the death of the ward and shall cause a notice of the filing of the account to be published combined with a notice to creditors of the deceased ward.

Proceedings for the presentation, allowance, and payment of claims against the estate of the deceased ward shall be governed by the laws relating to claims against decedents' estates, with the guardian serving as personal representative.

Liability on the guardian's bond shall continue and shall apply to the complete administration of the estate of the deceased ward by the guardian.

If letters, testamentary or of administration, are granted to someone other than the guardian upon a petition filed within forty (40) days after the death of the ward, the authority of the guardian to administer the ward's estate shall terminate upon the appointment and qualification of the personal representative, and the guardian shall deliver to the personal representative the assets of the ward's estate remaining in the hands of the guardian.

The probate clerk of the circuit court is entitled to additional fees, not to exceed one hundred dollars ($100), to cover the initiation of the administration of the ward's estate and, if so initiated, shall direct the personal representative to pay them.

Ark. Code Ann. § 28-65-323.

See First Sec. Bank v. Estate of Leonard, 369 Ark. 213, 253 S.W.3d 434 (2007)(estate guardian could no longer act on behalf of estate after ward's death and, therefore, could not file will contest as guardian of the estate, where guardian's petition for letters of administration granting authority to administer estate was filed more than forty days after death); and

White v. Palo, 2011 Ark. 126, 380 S.W.3d 405 (2011)(once ward died, county circuit court that had handled only the guardianship proceeding had jurisdictional authority to close guardianship and make final accounting, but was without authority to order sale and disbursement of assets in living trust created by ward or to proceed with probate of ward's estate, where co-guardians of ward's estate did not comply with statutory requirements for transforming a guardianship into a probate proceeding).

Substitution & Termination

Substitution or Removal

When a minor ward has attained fourteen (14) years of age, his or her guardian may be removed on petition of the ward to have another person appointed guardian if the court is satisfied that the person chosen is suitable, qualified, and competent and that it is for the best interest of the ward that such a person be appointed.

A guardian may also be removed on the same grounds and in the same manner as provided in § 28-48-105 for the removal of a personal representative.

Ark. Code Ann. § 28-65-219.

See Matter of Guardianship of Vesa, 319 Ark. 574, 892 S.W.2d 491 (1995)(probate court may, on its own motion, remove guardian of ward's estate; "unsuitability" of ward's sibling to serve as guardian of estate, justifying removal on probate court's own motion and appointment of neutral successor, was established by evidence of family friction among ward's siblings which adversely affected administration of estate); and

Hoffarth v. Harp, 2009 Ark. App. 240, 303 S.W.3d 96 (2009)(the trial court could rely on *In re Guardianship of Vesa* to determine the standard for removing father as guardian for ward, even though the definition of "unsuitable" from *Vesa*, which referred to the statutory ground for removal of a guardian who had become "unsuitable," had only been applied to guardians of a ward's estate and not to the guardian of a ward's person; the probate code did not make a distinction between guardians of the person and guardians of the estate).

Subsequent Appointment

When a guardian dies, is removed by order of the court, or resigns and the resignation is accepted by the court, the court may appoint another guardian in his or her place in the same manner and subject to the same requirements as are provided in this chapter for an original appointment of a guardian.

Ark. Code Ann. § 28-65-220.

Standby Guardian

Without surrendering parental rights, any parent who is chronically ill or near death may have a standby guardian appointed by the court for the parent's minor children using the same procedures outlined in this subchapter to establish a guardianship. The standby guardian's authority would take effect as outlined in an order of standby guardianship, upon:

(1) The death of the parent;

(2) The mental incapacity of the parent; or

(3) The physical debilitation and consent of the parent.

The standby guardian shall immediately notify the court upon the death, incapacity, or debilitation of the parent and shall immediately assume the role of guardian of the minor children.

The court shall enter an order of guardianship in conformance with this section.

Ark. Code Ann. § 28-65-221.

Termination

A guardianship is terminated:

(1) If the guardianship was solely because of the ward's incompetency for a cause other than minority, by an adjudication of the competency of the ward;

(2) By the death of the ward; or

(3) If the guardianship was solely because of the ward's minority, the marriage of the ward shall terminate a guardianship of the person, but not of the estate of the ward except with respect to the ward's earnings for personal services.

(4) If the guardianship was solely because of the ward's minority, by the ward reaching the age of majority, unless the guardian receives a guardianship subsidy from the Department of Human Services, then the guardianship is terminated when the ward:

(A) Reaches twenty-one (21) years of age; or

(B) Who is eighteen (18) years of age or older requests termination of the guardianship.

Ark. Code Ann. § 28-65-401.

A guardianship may be terminated by court order after such notice as the court may require:

(A) If the guardianship was solely because of the ward's minority, and either the ward attains his or her majority or the disability of minority of the ward is removed for all purposes by a court of competent jurisdiction.

However, if the court finds upon a proper showing by substantial competent evidence that it is in the best interest of the ward that the guardianship be continued after the ward reaches majority, the court may order the guardianship to continue until such time as it may be terminated by order of the court;

(B) If the ward becomes a nonresident of this state; or

(C) If, for any other reason, the guardianship is no longer necessary or for the best interest of the ward.

Ark. Code Ann. § 28-65-401.

When a guardianship terminates otherwise than by the death of the ward, the powers of the guardian cease, except that a guardian of the estate may make disbursements for claims that are or may be allowed by the court, for liabilities already properly incurred for the estate or for the ward, and for expenses of administration.

When a guardianship terminates by the death of the ward, the guardian of the estate may proceed under § 28-65-323, but the rights of all creditors against the ward's estate shall be determined by the law governing decedents' estates.

Ark. Code Ann. § 28-65-401.

But see In re Guardianship of S.H., 2012 Ark. 245, 409 S.W.3d 307 (2012) in which the Court held that consistent with the fundamental right to the care, control, and custody of her child, a parent who has not been deemed unfit, and who has consented to a guardianship, is not required to carry the burden of showing that termination of guardianship is in the child's best interest. Such a parent is entitled to the Troxel v. Granville presumption that a fit parent is presumed to be acting in the child's best interest.

But see also Guardianship of Estate of Strickland, 50 Ark. App. 7, 902 S.W.2d 238 (1995)(guardianship of estate established during ward's minority to protect inheritance on wrongful death settlement from estate of ward's mother would not be continued after ward reached an age of majority, notwithstanding ward's lack of maturity, given that there was no evidence that ward was mentally deficient, emotionally unstable or suffered from any mental illness; purpose of guardianship was to protect ward's interest as a minor).

Restoration of Capacity of Ward

If any person alleges in writing, verified by oath, that any person declared to be incapacitated, or addicted to habitual drunkenness, is no longer incapacitated, or is no longer so addicted, the court in which the proceedings were held shall cause the facts to be inquired into in such manner as it may direct.

If it is found that the person has been restored to capacity or has reformed, he or she shall be discharged from care and custody, and the guardian shall immediately settle his or her accounts and shall restore to the person all things remaining in the guardian's hands belonging or appertaining to him or her.

Ark. Code Ann. § 28-65-402.

See also Potter by Redden v. First Nat. Bank, 292 Ark. 74, 728 S.W.2d 167 (1987)(ward had standing to attack guardianship of his person and his estate).

Discharge of Guardian and Surety

Upon the guardian of an estate's filing receipts or other evidence satisfactory to the court showing that he or she has delivered to the persons entitled thereto all the property for which he or she is accountable as guardian, the court shall make an order discharging the guardian and his or her surety from further liability or accountability with respect to the guardianship.

The discharge so obtained shall operate as a release from the duties of his or her office which have not previously terminated and shall be final, except that, upon a petition's being filed within three (3) years of the entry thereof, it may be set aside for fraud in the settlement of the account.

Ark. Code Ann. § 28-65-403.

Dispensing with Guardianship

The parents of a minor, jointly with equal authority if they are husband and wife living together, or the survivor if one (1) parent is dead, or the competent parent if one (1) is incompetent, or the other parent if one (1) parent is imprisoned for a felony, or the parent to whom the custody of the child has been awarded by a court of competent jurisdiction if the parents are divorced or living apart, or the natural mother of an illegitimate child, shall be the natural guardian of the person of each unmarried minor child of the parents and shall have the care and management of the estate of each such minor derived by gift from the parents or either of them, without the necessity of judicial appointment.

However, upon a showing of a necessity therefor to protect the interests of the minor, the court may appoint a statutory guardian of the estate of the minor, and when appointed and qualified, the statutory guardian shall have exclusive control over the estate of the minor.

The court may appoint the natural guardian as guardian of the estate of the minor.

Ark. Code Ann. § 28-65-501.

See also Beatty v. USAA Cas. Ins. Co., 330 Ark. 354, 954 S.W.2d 250 (1997)(parent as child's natural guardian had insurable interest in automobile given to child by her father who retained title; guardian was responsible for care and management of child's estate and could be held liable for failure to exercise prudence and due care in managing it, and that legal obligation gave insurable interest to guardian).

Dispensing with Guardianship in a Small Estate

When the whole estate of a minor or an incompetent does not exceed the value of five thousand dollars ($5,000), the court, in its discretion, without the appointment of a guardian or the giving of bond, may authorize the payment or delivery of all or any part of the estate to the minor or incompetent or to some suitable person, institution, or agency for him or her, to be retained, used, expended, distributed, or disposed of for the benefit of the minor or incompetent as the court may direct.

Ark. Code Ann. § 28-65-502.

Ward Receiving Public Assistance

The circuit court in its discretion, without the appointment of a guardian or the giving of bond, may authorize the payment and delivery of any moneys or other property due or that may in the future become due the minor or incompetent person to some suitable person, institution, or agency for the minor or incompetent person, to be retained, used, expended, distributed, or disposed of, for the benefit of the minor or incompetent person as the court may direct, in cases in which:

(1) The present total value of the personal property of a minor or an incompetent person is less than one hundred dollars ($100);

(2) The minor or incompetent person owns no real property;

(3) The minor or incompetent person should have a guardian to care for his or her needs; and

(4) The minor or incompetent person is supported in whole or in part by a monthly income from the Department of Human Services, pension boards, or any other person or agency except the United States Department of Veterans Affairs.

In the event the moneys or other property of the minor or incompetent person accumulates to a total value of five hundred dollars ($500) or more, the suitable person shall immediately report that fact to the circuit court.

Ark. Code Ann. § 28-65-503.

Foreign Guardians

Petition to Act in Arkansas

If an incompetent person who is a resident of another state, a territory of the United States, or the District of Columbia has a guardian, curator, conservator, committee, tutor, or other person authorized by the laws of the other jurisdiction to have possession and control of the property of the incompetent person, such a person being hereinafter referred to as "foreign guardian", the foreign guardian may petition the circuit court of the county of this state in which a guardianship of the estate of the incompetent person is pending, or, if no such guardianship is pending in this state, of any county in which there is property belonging to his or her ward, or in which a cause of action in behalf of his or her ward may be lawfully brought, for authority:

(1) To remove the property to the domicile of the guardian and his or her ward;

(2) To sell, mortgage, lease, or exchange the property of his or her ward or to take any other action with reference thereto which a locally appointed guardian would be authorized to take and to remove the proceeds to the domicile of the guardian and his or her ward; or

(3) To bring the action in behalf of his or her ward.

The foreign guardian shall file with his or her petition an authenticated copy of his or her letters of guardianship, or other appropriate evidence of his or her appointment and qualification, an authenticated copy of the bond, if any, filed by him or her with the court which appointed him or her, and evidence of the value of the property of the ward in the jurisdiction of his or her appointment.

Ark. Code Ann. § 28-65-601.

Effect of Grant of Denial of Petition to Act

Upon being satisfied that the foreign guardian is duly appointed, qualified, and acting, that his or her bond is sufficient under the laws of the jurisdiction of his or her appointment to protect the property of the ward within the jurisdiction and the property within this state, or its proceeds, or that no bond is required in the jurisdiction of his or her appointment, and that the action ordered to be taken is in the best interest of the ward and his or her estate, the court may, if there is no locally appointed guardian, grant the petition, in whole or in part, and direct the foreign guardian to proceed with the directed action in the same manner as is provided for similar action by a resident guardian of the estate or a resident ward.

If there is a locally appointed guardian, and upon the same findings as to the qualifications of the foreign guardian and the sufficiency of his or her bond, if any, the court, in the exercise of its discretion, may:

(1) Order the termination of the local guardianship and the payment, transfer, or delivery of the property of the ward to the foreign guardian and grant the petition of the foreign guardian, in whole or in part; or

(2) Order the local guardian to take the action, in whole or in part, for which the foreign guardian asked authority; or

(3) Deny the petition.

If the court orders the termination of the local guardianship, the local guardian shall file his or her account immediately.

Ark. Code Ann. § 28-65-602.

Corporate Guardians

If the foreign guardian is a corporation, it need not qualify as a corporation to do business under the general corporation laws of this state to entitle it to administer the property of its ward situated in this state.

Ark. Code Ann. § 28-65-603.

Public Guardians

Duties

The Public Guardian for Adults shall be appointed by the Director of the Division of Aging and Adult Services of the Department of Human Services pursuant to Ark. Code Ann. § 28-65-701, et seq.

The Public Guardian for Adults shall receive and review referrals for adult guardianship. Ark. Code Ann. § 28-65-703.

A court shall not appoint the Public Guardian for Adults as the guardian of a person or estate unless the Public Guardian for Adults petitions for the guardianship and consents to the appointment. Ark. Code Ann. § 28-65-703.

The Public Guardian for Adults may petition to be appointed guardian of the person of an adult or guardian of the estate of an adult, or both, if:

(1) The Public Guardian for Adults has probable cause to believe that the adult lacks the capacity to make and communicate decisions necessary for his or her health, safety, and welfare or to manage his or her property;

(2) The Public Guardian for Adults believes that the adult is incapacitated;

(3) There is no suitable private guardian qualified and willing to accept the guardianship appointment; and

(4) A circuit court determines that the Public Guardian for Adults would be a suitable guardian for the incapacitated adult.

Ark. Code Ann. § 28-65-703.

If requested by the court having jurisdiction of the ward, the Public Guardian for Adults may petition to intervene in an established guardianship and petition to be named a successor guardian if all of the following conditions are met:

(1) The Public Guardian for Adults determines that the current guardian is unable or unwilling to perform his or her duties under the guardianship;

(2) There is no suitable private guardian qualified and willing to accept the guardianship appointment; and

(3) A circuit court determines that the Public Guardian for Adults would be a suitable guardian for the incapacitated adult.

Ark. Code Ann. § 28-65-703.

The Public Guardian for Adults shall advocate for the ward, and shall be functionally separate from and share no duties with any Department of Human Services employee whose job it is to prepare and offer services or treatment plans, or both, to any person. He or she may consent or withhold consent to health and long-term care treatment. Ark. Code Ann. § 28-65-702.

The Public Guardian for Adults, either directly or through staff or volunteered services, shall monitor each ward and each ward's care and progress on a continuing basis. The monitoring shall include quarterly personal contact with each ward. A written record shall be created and maintained concerning each personal contact. Ark. Code Ann. § 28-65-703.

The Public Guardian for Adults shall keep and maintain financial, case control, and statistical records in accordance with generally accepted professional business and accounting standards in all cases for which the Office of Public

Guardian for Adults has been appointed guardian. Office records that identify individuals for whom the office has provided guardianship services shall be kept confidential except to the extent it is required by other laws. Ark. Code Ann. § 28-65-703.

The court having jurisdiction of the ward shall not terminate the guardianship of a living ward of the Public Guardian for Adults unless the court declares that the ward is restored to capacity or a successor guardian is appointed. Ark. Code Ann. § 28-65-706.

Uniform Veterans Guardianship Act

Scope

Arkansas has a separate Veterans Guardianship Act known as the Uniform Veterans Guardianship Act, which is in addition to and supersedes when in conflict the regular guardian and ward statutes of this state.

It is otherwise generally the same except that the Administrator of Veterans Affairs is a party in interest in veterans' guardianship matters and the Veterans Administration requires notice of appointment or removal of a guardian for a veteran.

Relevant Provisions

Requirements of petition for appointment: Ark. Code Ann. § 28-66-105

Requirements for appointment of guardian: Ark. Code Ann. §§ 28-66-106 – 107

Required notices: Ark. Code Ann. § 28-66-108

Limitations on number of wards: Ark. Code Ann. § 28-66-104

Bond: Ark. Code Ann. § 28-66-109

Accounting and waivers: Ark. Code Ann. § 28-66-110

Prescribed compensation: Ark. Code Ann. § 28-66-112

Maintenance, support, assistance: Ark. Code Ann. § 28-66-114

Compliance with federal law: Ark. Code Ann. § 28-66-118

Requirements for discharge of guardians: Ark. Code Ann. § 28-66-117

Requirements for commitment to V.A.: Ark. Code Ann. § 28-66-118

Attorneys Ad Litem in Guardianship Cases

In General

The Director of the Administrative Office of the Courts is authorized to establish attorney ad litem programs to represent children in guardianship cases in circuit court when custody is an issue.

When a circuit judge determines that the appointment of an attorney ad litem would facilitate a case in which custody is an issue and further protect the rights of the child, the circuit judge may appoint a private attorney to represent the child.

The Supreme Court, with advice of the circuit judges, shall adopt standards of practice and qualifications for service for attorneys who seek to be appointed to provide legal representation for children in guardianship cases.

In extraordinary cases, the circuit court may appoint an attorney ad litem who does not meet the required standards and qualifications.

> The attorney may not be appointed in subsequent cases until he or she has made efforts to meet the standards and qualifications.

When attorneys are appointed pursuant this section, the fees for services and reimburseable expenses shall be paid from funds appropriated for that purpose to the Administrative Office of the Courts.

> When a judge orders the payment of funds for the fees and expenses authorized by this section, the judge shall transmit a copy of the order to the office, which is authorized to pay the funds.
>
> The court may also require the parties to pay all or a portion of the expenses, depending on the ability of the parties to pay.
>
> The office shall establish guidelines to provide a maximum amount of expenses and fees per hour and per case that will be paid pursuant to this section.
>
> In order to ensure that each judicial district will have an appropriate amount of funds to utilize for ad litem representation in custody cases, the funds appropriated shall be apportioned based upon a formula developed by the office and approved by the Arkansas Judicial Council and the Administrative Rules and Regulations Committee of the Arkansas Legislative Council.

The office shall develop a statistical survey that each attorney who serves as an ad litem shall complete upon the conclusion of the case. Statistics shall include:

(A) The ages of children served;

(B) Whether the custody issue arises at a divorce or post-divorce stage;

(C) Whether psychological services were ordered; and

(D) Any other relevant information.

Ark. Code Ann. § 9-13-106.

See Administrative Order No. 15.

See also the Guidelines for Repayment and the Attorney Ad Litem Reporting Forms that are found in the Appendix.

Please note that the statute does not apply to adult guardianship cases.

V. Conservators

Jurisdiction

All laws relative to the jurisdiction of the circuit court over the estate of a person under guardianship as an incompetent person, including the investment, management, sale, or mortgage of his or her property and the payment of his or her debts, shall be applicable to the estate of a person under conservatorship.

Ark. Code Ann. § 28-67-102.

Petition

A hearing may be had upon a petition for appointment of a conservator when:

(1) It is represented to the circuit court, upon verified petition of any person or any relative or friend, that a person is an inhabitant or resident of the county and by reason of advanced age or physical disability is unable to manage his or her property; and

(2) The person, if not himself or herself the petitioner, voluntarily consents to the granting of the petition and, if able to attend, is produced before the court at the hearing.

Ark. Code Ann. § 28-67-103.

Notice

Notice of a hearing in a conservatorship proceeding shall be served upon the following who do not appear or in writing waive notice of hearing:

(1) The spouse, if any, of the person in question;

(2) If there is no known spouse, at least one (1) of the nearest competent relatives by blood or marriage of the person in question; and

(3) Any other person designated by the court.

Ark. Code Ann. § 28-67-104.

Appointment

If, after a full hearing and examination upon the petition, it appears to the circuit court that the person in question is by reason of advanced age or physical disability unable to manage his or her property, the circuit court may appoint a conservator of his or her estate.

Ark. Code Ann. § 28-67-105.

Eligibility

No person shall be appointed conservator of an estate who would be ineligible to act as guardian of the ward in such a case.

Ark. Code Ann. § 28-67-106.

Bond

Every conservator appointed as provided in this chapter shall have the care, custody, and management of the estate of his or her ward until he or she is legally discharged.

He or she must give bond to the State of Arkansas in like manner and with like conditions as provided for guardians of incompetent persons. However, the court may dispense with bond if the conservator is a bank or a trust company whose deposits are insured by the Federal Deposit Insurance Corporation or a trust company chartered and regulated by appropriate state authority.

Ark. Code Ann. § 28-67-107.

Authority

A conservator shall have the same powers and duties, except as to the custody of the person, as a guardian of an incompetent person.

Ark. Code Ann. § 28-67-108.

Discharge

A conservator may be discharged by the court upon the application of the ward or, otherwise, upon such notice to the conservator and next of kin of the ward as the court may determine reasonable and proper when it appears that the conservatorship is no longer necessary.

In the event of death, resignation, or removal of a conservator, the court, on the application of the former ward and upon such notice to the next of kin of the ward as the court may order, may certify that the ward is discharged by operation of law if it appears that the conservatorship of the ward is no longer necessary.

Ark. Code Ann. § 28-67-109.

Compensation

The conservator shall receive as compensation for his or her services the compensation provided by law for guardians.

Ark. Code Ann. § 28-67-110.

Subsequent Appointment of Guardian

Any subsequent appointment of a guardian of the ward as an incompetent person shall be an appointment as guardian of the person, only, of the ward and shall not include the appointment of the guardian of the estate of the ward or in any manner affect the custody, management, and the handling of the estate of the ward by the conservator so long as the conservatorship proceedings are pending.

Ark. Code Ann. § 28-67-111.

VI. Adoption

Procedure

Who May Be Adopted

Any individual may be adopted.

Ark. Code Ann. § 9-9-203.

Who May Adopt

The following individuals may adopt:

(1) A husband and wife together although one (1) or both are minors;

(2) An unmarried adult;

(3) The unmarried father or mother of the individual to be adopted;

(4) A married individual without the other spouse joining as a petitioner, if the individual to be adopted is not his or her spouse; and if:

(i) The other spouse is a parent of the individual to be adopted and consents to the adoption;

(ii) The petitioner and the other spouse are legally separated; or

(iii) The failure of the other spouse to join in the petition or to consent to the adoption is excused by the court by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances constituting an unreasonable withholding of consent.

Ark. Code Ann. § 9-9-204.

See In re Adoption of M.K.C., 373 Ark. 603, 285 S.W.3d 605 (2008)(adoption statutes are to be strictly construed and applied; Arkansas statute setting forth who may adopt does not prohibit an unmarried mother from adopting the mother's, or an unmarried father from adopting the father's, child); and

King v. Ochoa, 373 Ark. 600, 285 S.W.3d 602 (2008)(unmarried biological father of child, who had mother's permission to adopt child, could petition to adopt child; statute provided that the unmarried father or mother of the child to be adopted could petition to adopt child).

Petition

A petition for adoption signed and verified by the petitioner, shall be filed with the clerk of the court, and state:

(1) The date and place of birth of the individual to be adopted, if known;

(2) The name to be used for the individual to be adopted;

(3) The date the petitioner:

(A) Acquired custody of the minor and of placement of the minor and the name of the person placing the minor; and a statement as to how the petitioner acquired custody of the minor; or

(B) Was selected to adopt the minor by the child placement agency licensed by the Child Welfare Agency Review Board;

(4) The full name, age, place, and duration of residence of the petitioner;

(5) The marital status of the petitioner, including the date and place of marriage, if married;

(6) That the petitioner has facilities and resources, including those available under a subsidy agreement, suitable to provide for the nurture and care of the minor to be adopted and that it is the desire of the petitioner to establish the relationship of parent and child with the individual to be adopted;

(7) A description and estimate of value of any property of the individual to be adopted;

(8) The name of any person whose consent to the adoption is required, but who has not consented, and facts or circumstances which excuse the lack of his normally required consent, to the adoption; and

(9) In cases involving a child born to a mother unmarried at the time of the child's birth, a statement that an inquiry has been made to the Putative Father Registry and either:

(A) No information has been filed in regard to the child born to this mother; or

(B) Information is contained in the registry.

A certified copy of the birth certificate or verification of birth record of the individual to be adopted, if available, and the required consents and relinquishments shall be filed with the clerk.

Ark. Code Ann. § 9-9-210.

The caption of a petition for adoption shall be styled substantially "In the matter of the Adoption..." The person to be adopted shall be designated in the caption under the name by which he or she is to be known if the petition is granted.

If the child is placed for adoption, any name by which the child was previously known may be disclosed in the petition, the notice of hearing, or in the decree of adoption.

Ark. Code Ann. § 9-9-205(d)-(e).

See also Reid v. Frazee, 72 Ark. App. 474, 41 S.W.3d 397 (2001)(evidence of prospective adoptive father's knowledge and consent was sufficient to satisfy statutory requirements for jurisdiction in the probate court to hear petition to dispense with consent of child's biological father to adoption and for step-parent adoption, even where prospective adoptive father failed to sign and verify petition for adoption; prospective adoptive father appeared before judge and under oath verified allegations in petition, and presented additional testimony about himself, his concern for child's welfare, and his commitment to providing for child financially and emotionally); and

In re Adoption of Reeves, 309 Ark. 385, 831 S.W.2d 607 (1992)(putative father of child who failed to comply with Arkansas' registry law, and as result did not receive notice of adoption proceedings, had no standing to raise issue of child's best interest).

Jurisdiction

Jurisdiction of adoption of **minors**:

The state shall possess jurisdiction over the adoption of a minor if the person seeking to adopt the child, or the child, is a resident of this state.

For purposes of this subchapter, a child under the age of six (6) months shall be considered a resident of this state if the:

(i) Child's birth mother resided in Arkansas for more than four (4) months immediately preceding the birth of the child;

(ii) Child was born in this state or in any border city that adjoins the Arkansas state line or is separated only by a navigable river from an Arkansas city that adjoins the Arkansas state line; and

(iii) Child remains in this state until the interlocutory decree has been entered, or in the case of a nonresident adoptive family, upon

the receipt of approval pursuant to the Interstate Compact on the Placement of Children, § 9-29-201 et seq., the child and the prospective adoptive parents may go back to their state of residence and subsequently may return to Arkansas for a hearing on the petition for adoption;

A child over the age of six (6) months shall be considered a resident of this state if the child:

(i) Has resided in this state for a period of six (6) months;

(ii) Currently resides in Arkansas; and

(iii) Is present in this state at the time the petition for adoption is filed and heard by a court having appropriate jurisdiction.

A person seeking to adopt is a resident of this state if the person:

(i) Occupies a dwelling within the state;

(ii) Has a present intent to remain within the state for a period of time; and

(iii) Manifests the genuineness of that intent by establishing an ongoing physical presence within the state together with indications that the person's presence within the state is something other than merely transitory in nature.

Ark. Code Ann. § 9-9-205(a).

Jurisdiction of adoption of **adults**:

Physical presence of the petitioner or petitioners or the individual to be adopted shall be sufficient to confer subject matter jurisdiction.

Ark. Code Ann. § 9-9-205(b).

Venue

Proceedings for adoption must be brought in the county in which, at the time of filing or granting the petition, the petitioner or petitioners, or the individual to be adopted resides or is in military service or in which the agency having the care, custody, or control of the minor is located.

.If the court finds in the interest of substantial justice that the matter should be heard in another forum, the court may transfer, stay, or dismiss the proceedings in whole or in part on any conditions that are just.

Ark. Code Ann. § 9-9-205(c).

If a child is the subject of an open juvenile case, e.g., a dependency-neglect, FINS, delinquency, or other case, an adoption petition shall be filed in that pending case.

Ark. Code Ann. § 9-9-205(a)(3).

Preferences

In all custodial placements by the Department of Human Services in foster care or adoption, the court shall give preferential consideration to an adult relative over a nonrelated caregiver, provided that the relative caregiver meets all relevant child protection standards and it is in the best interest of the child to be placed with the relative caregiver.

If the genetic parent or parents of the child express a preference for placing the child in a foster home or an adoptive home of the same or a similar religious background to that of the genetic parent or parents, the court shall place the child with a family that meets the genetic parent's religious preference, or if a family is not available, to a family of a different religious background that is knowledgeable and appreciative of the child's religious background.

The court shall not deny a petition for adoption on the basis of race, color, or national origin of the adoptive parent or the child involved.

Ark. Code Ann. § 9-9-102.

See Terry B. v. Gilkey, 229 F.3d 680 (8th Cir. 2000)(Arkansas human services department's placement of children with their aunt and uncle was not placement with a relative, but constituted foster care, with the statutory preference having been given to relatives of the children).

But see also Wilson v. Golen, 2013 Ark. App. 267(Circuit court's decision to determine it was in the child's best interest to be adopted by foster parents, who previously had adopted child's half-sibling, rather than by grandparents, was not clearly against the preponderance of the evidence, where the trial court was faced with two sets of suitable adoptive parents).

Consent

Unless consent is not required under § 9-9-207, a petition to adopt a minor may be granted only if written consent to a particular adoption has been executed by:

(1) The mother of the minor;

(2) The father of the minor if:

(A) The father was married to the mother at the time the minor was conceived or at any time thereafter;

(B) The minor is his child by adoption;

(C) He has physical custody of the minor at the time the petition is filed;

(D) He has a written order granting him legal custody of the minor at the time the petition for adoption is filed;

(E) A court has adjudicated him to be the legal father prior to the time the petition for adoption is filed;

(F) He proves a significant custodial, personal, or financial relationship existed with the minor before the petition for adoption is filed; or

(G) He has acknowledged paternity under § 9-10-120(a);

(3) Any person lawfully entitled to custody of the minor or empowered to consent;

(4) The court having jurisdiction to determine custody of the minor, if the legal guardian or custodian of the person of the minor is not empowered to consent to the adoption;

(5) The minor, if more than twelve (12) years of age, unless the court in the best interest of the minor dispenses with the minor's consent; and

(6) The spouse of the minor to be adopted.

Ark. Code Ann. § 9-9-206.

A petition to adopt an adult may be granted only if written consent to adoption has been executed by the adult and the adult's spouse.

Under no circumstances may a parent or guardian of a minor receive a fee, compensation, or any other thing of value as a consideration for the relinquishment of a minor for adoption. However, incidental costs for prenatal, delivery, and postnatal care may be assessed, including reasonable housing costs, food, clothing, general maintenance, and medical expenses, if they are reimbursements for expenses incurred or fees for services rendered. Any parent or guardian who unlawfully accepts compensation or any other thing of value as

a consideration for the relinquishment of a minor shall be guilty of a Class C felony.

Ark. Code Ann. § 9-9-206.

See Dale v. Franklin, 22 Ark. App. 98, 733 S.W.2d 747 (1987)(one-year period, after which parent may lose his right to consent to his child's adoption if he does not communicate with or support his child, must accrue before adoption petition is filed; there is heavy burden upon parties seeking to adopt child without consent of natural parent to prove failure to communicate or failure to support by clear and convincing evidence; consent of natural father to adoption of his children was necessary, where failure of communication and support by father was proven for four to six-week period at most);

In re Adoption of Baby Boy B., 2012 Ark. 92, 394 S.W.3d 837(biological father's efforts to establish a significant custodial, personal, or financial relationship with child, in light of biological mother's thwarting of those efforts, were sufficient to require his consent to adoption; father not only filed with the putative-father registries in four states but also filed paternity actions in both Texas and Arkansas, he provided some support to mother during the pregnancy and established an account for the support of the baby, and mother refused to inform father of her specific location after she left Missouri prior to child's birth);

Matter of Adoption of B.A.B., 40 Ark. App. 86, 842 S.W.2d 68 (1992)(paternal grandmother, who had been awarded visitation rights with respect to child born out-of-wedlock, did not have standing, in proceeding for adoption of child by man whom mother had married after birth of the child, to contest finding that natural father's consent to adoption was not required due to his failure to communicate with or support the child);

Reid v. Frazee, 72 Ark. App. 474, 41 S.W.3d 397 (2001)(probate court had statutory authority to hold subsequent hearing to ascertain minor child's consent to step-parent adoption, where child was seven years old at time petition for adoption was filed but was past age of ten years at time trial was held thereon);

Britton v. Gault, 80 Ark. App. 311, 94 S.W.3d 926 (2003)(trial court was required to make a factual determination as to whether father was a person required by statute to consent to child's adoption before it could rule on whether father's consent could be statutorily waived); and

In re Adoption of SCD, 358 Ark. 51, 186 S.W.3d 225 (2004)(putative father "legitimated" his child, such that his consent to child's adoption was required, under statute requiring father's consent if he had "otherwise legitimated" child, because father signed putative father registry some weeks prior to child's birth, the fact that the father did not file paternity petition until a few days after

adoption petition was filed did not preclude finding that he "otherwise legitimated" child, and father took significant steps to prepare for having child with him if he was awarded custody, including interviewing day care centers and looking into finding a pediatrician and health insurance for child).

Consent to adoption is **not** required of:

> (1) a parent who has deserted a child without affording means of identification or who has abandoned a child;
>
> (2) a parent of a child in the custody of another, if the parent for a period of at least one (1) year has failed significantly without justifiable cause
>
> > (i) to communicate with the child or
> >
> > (ii) to provide for the care and support of the child as required by law or judicial decree;
>
> (3) the father of a minor if the father's consent is not required by § 9-9-206(a)(2);
>
> (4) a parent who has relinquished his or her right to consent under § 9-9-220;
>
> (5) a parent whose parental rights have been terminated by order of court under § 9-9-220 or § 9-27-341;
>
> (6) a parent judicially declared incompetent or mentally defective if the court dispenses with the parent's consent;
>
> (7) any parent of the individual to be adopted, if the individual is an adult;
>
> (8) any legal guardian or lawful custodian of the individual to be adopted, other than a parent, who has failed to respond in writing to a request for consent for a period of sixty (60) days or who, after examination of his or her written reasons for withholding consent, is found by the court to be withholding his or her consent unreasonably;
>
> (9) the spouse of the individual to be adopted, if the failure of the spouse to consent to the adoption is excused by the court by reason of prolonged unexplained absence, unavailability, incapacity, or circumstances constituting an unreasonable withholding of consent;
>
> (10) a putative father of a minor who signed an acknowledgement of paternity but who failed to establish a significant custodial, personal, or

financial relationship with the juvenile prior to the time the petition for adoption is filed; or

(11) a putative father of a minor who is listed on the Putative Father Registry but who failed to establish a significant custodial, personal, or financial relationship with the juvenile prior to the time the petition for adoption is filed.

Except as provided in §§ 9-9-212 and 9-9-224, notice of a hearing on a petition for adoption need not be given to a person whose consent is not required or to a person whose consent or relinquishment has been filed with the petition.

Ark. Code Ann. § 9-9-207.

See Racine v. Nelson, 2011 Ark. 50, 378 S.W.3d 93 (2011)("failed significantly" without justifiable cause to communicate with the child or to provide for the care and support of the child so that parent's consent is not needed for adoption does not mean "failed totally"; it only means that the failure must be significant, as contrasted with an insignificant failure; adoption of out-of-wedlock child by child's natural mother was in the child's best interests, where the biological father failed to avail himself of the opportunity to parent the child, failed significantly to support her and to communicate with her throughout her lifetime, and took virtually no responsibility for the child, other than to establish that he was the biological father, in contrast to mother, who had adequately supported and maintained the child since her birth and had provided proper care and support for the child);

Gordon v. Draper, 2013 Ark. App. 352 (2013)(biological father's consent to stepfather's petition to adopt child was not required, although child was born when biological father was married to child's mother, where father pled guilty to three counts of raping a minor, with child as one of his victims, and father, who was serving three consecutive 35–year sentences, made no attempt to communicate with child, and failed to provide for care and support of child, for a period of at least one year);

Neel v. Harrison, 93 Ark. App. 424, 220 S.W.3d 251 (2005)(it is not required that a parent fail "totally" in support obligations in order to fail "significantly" within the meaning of statute providing that consent to adoption is not required of a parent of a child in the custody of another, if the parent for a period of at least one year has failed "significantly" without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree; term "significantly" denotes a failure that is meaningful or important; child's stepmother, who sought to adopt child, did not prove by clear and convincing evidence that ex-wife's significant failure for at least one year to

provide for the care and support of her child was without justification; divorce proceedings and orders therein did not command ex-wife to pay child support, ex-husband did not ask for child support, and ex-husband and his wife, who was child's stepmother, refused to accept ex-wife's gifts and refused to permit contact);

Fox v. Nagle, 2011 Ark. App. 178, 381 S.W.3d 900 (2011)(the one-year period set out in adoption statute, dispensing with necessity of consent to adoption if parent has failed to communicate with or support child for at least one year, may be any one-year period, not merely the one-year period preceding the filing of the adoption petition);

In re Adoption of Reeves, 309 Ark. 385, 831 S.W.2d 607 (1992)(putative father who failed to register under Arkansas' putative father registry was not entitled to notice of adoption proceedings, regardless of whether he had developed significant personal relationship with child); and

A.R. v. Brown, 103 Ark. App. 1, 285 S.W.3d 716 (2008)(adoption statutes are strictly construed, and a person wishing to adopt a child without the consent of the parent must prove that consent is unnecessary by clear and convincing evidence; a trial court's determination that a parent's consent to adoption is unnecessary due to a failure to support or communicate with the child will not be reversed unless clearly erroneous).

Execution of Consent

The required consent to adoption shall be executed at any time after the birth of the child and in the manner following:

> (1) If by the individual to be adopted, in the presence of the court;
>
> (2) If by an agency, by the executive head or other authorized representative, in the presence of a person authorized to take acknowledgments;
>
> (3) If by any other person, in the presence of the court or in the presence of a person authorized to take acknowledgments;
>
> (4) If by a court, by appropriate order or certificate.
>
> Ark. Code Ann. § 9-9-208.

A consent which does not name or otherwise identify the adopting parent is valid if the consent contains a statement by the person whose consent it is that the person consenting voluntarily executed the consent irrespective of disclosure of the name or other identification of the adopting parent.

If the parent is a minor, the writing shall be signed by a court-ordered guardian ad litem, who has been appointed by a judge of a court of record in this state to appear on behalf of the minor parent for the purpose of executing consent. The signing shall be made in the presence of an authorized representative of the Arkansas licensed placement agency taking custody of the child, or in the presence of a notary public, or in the presence and with the approval of a judge of a court of record of this state or any other state in which the minor was present at the time it was signed.

Ark. Code Ann. § 9-9-208.

See Bridges v. Bush, 93 Ark. App. 461, 220 S.W.3d 259 (2005)(trial judge's finding that a fraud was practiced on the court in procuring adoption decree was not clearly erroneous; mother and father signed consents to adopt and relinquishments of parental rights, the papers were taken to mother's attorney where they were notarized, but notary was not present when the consents were signed, mother assumed that papers she signed were papers to get child into daycare and signed them without reading them, as did father, and the consents for adoption were in violation of law which required consents to be executed in the presence of the court or in the presence of the person authorized to take acknowledgements);

Matter of Adoption of Parsons, 302 Ark. 427, 791 S.W.2d 681 (1990)(statutes governing consent for adoption are mutually exclusive from statute governing relinquishment of parental rights to third parties in obtaining relinquishment of consent or consent to adoption; either one or the other should be employed based on applicable circumstances of the adoption);

Dale v. Franklin, 22 Ark. App. 98, 733 S.W.2d 747 (1987)(petition to adopt should not have been granted, where father withdrew consent less than ten days after signing consent and at least two weeks before petition for adoption was filed, and consent had been obtained by fraud);

Matter of Adoption of Martindale, 327 Ark. 685, 940 S.W.2d 491 (1997)(adoption is "special proceeding" for purposes of civil rule excluding from application of Rules of Civil Procedure statutorily created proceedings for which a different procedure is provided by statute; appropriate and necessary special procedures have been enacted for adoption proceedings to protect significant public policy concerns such as rights of adoptive parents and minor children to establish stable and secure family relationship).

Withdrawal of Consent

A consent to adoption cannot be withdrawn after the entry of a decree of adoption.

A consent to adopt may be withdrawn within ten (10) calendar days, or, if a waiver of the ten-day period is elected, five (5) calendar days after it is signed or the child is born, whichever is later, by filing an affidavit with the probate division clerk of the circuit court in the county designated by the consent as the county in which the guardianship petition will be filed, if there is a guardianship, or where the petition for adoption will be filed, if there is no guardianship.

> If the ten-day period, or, if a waiver of the ten-day period is elected, the five-day period ends on a weekend or a legal holiday, the person may file the affidavit the next working day. No fee shall be charged for the filing of the affidavit.

The court may waive the ten-day period for filing a withdrawal of consent for adoption agencies, minors over ten (10) years of age who consented to the adoption, or biological parents if a stepparent is adopting.

The consent shall state that the person has the right of withdrawal of consent and shall provide the address of the probate division clerk of the circuit court of the county in which the guardianship will be filed, if there is a guardianship, or where the petition for adoption will be filed, if there is no guardianship.

The consent shall state that the person may waive the ten-day period for the withdrawal of consent for an adoption and elect to limit the maximum time for the withdrawal of consent for an adoption to five (5) days.

Ark. Code Ann. § 9-9-209.

Relinquishment & Termination

Purpose

With the exception of the duty to pay child support, the rights of a parent with reference to a child, including parental right to control the child or to withhold consent to an adoption, may be relinquished and the relationship of parent and child terminated in or prior to an adoption proceeding as provided in this section. The duty of a parent to pay child support shall continue until an interlocutory decree of adoption is entered.

Ark. Code Ann. § 9-9-220.

Note Hudson v. Kyle, 352 Ark. 346, 101 S.W.3d 202 (2003)(termination of parental rights provision in Adoption Code is available only for a termination in connection with an adoption; it does not create an independent cause of action for termination of parental rights).

And see Matter of Adoption of Parsons, 302 Ark. 427, 791 S.W.2d 681 (1990)(statutes governing consent for adoption are mutually exclusive from statute governing relinquishment of parental rights to third parties in obtaining relinquishment of consent or consent to adoption; either one or the other should be employed based on applicable circumstances of the adoption).

Voluntary Relinquishment

All rights of a parent with reference to a child, including the right to receive notice of a hearing on a petition for adoption, may be relinquished and the relationship of parent and child terminated by a writing, signed by an adult parent, subject to the court's approval.

If the parent is a minor, the writing shall be signed by a guardian ad litem who is appointed to appear on behalf of the minor parent for the purpose of executing such a writing.

The signing shall occur in the presence of a representative of an agency taking custody of the child, or in the presence of a notary public, whether the agency is within or without the state, or in the presence and with the approval of a judge of a court of record of this state or any other state in which the minor was present at the time it was signed. The relinquishment shall be executed in the same manner as for a consent to adopt under § 9-9-208.

Withdrawal of Relinquishment

The relinquishment may be withdrawn within ten (10) calendar days, or, if a waiver of the ten-day period is elected, five (5) calendar days after it is signed or the child is born, whichever is later.

Notice of withdrawal shall be given by filing an affidavit with the probate division clerk of the circuit court in the county designated by the writing as the county in which the guardianship petition will be filed if there is a guardianship, or where the petition for adoption will be filed, if there is no guardianship.

If the ten-day period, or, if a waiver of the ten-day period is elected, the five-day period ends on a weekend or legal holiday, the person may file the affidavit the next working day.

No fee shall be charged for the filing of the affidavit.

The relinquishment shall state that the parent has this right of withdrawal and shall provide the address of the probate division clerk of the circuit court in which the guardianship will be filed if there is a guardianship, or where the

petition for adoption will be filed if there is no guardianship; or in any other situation, if notice of the adoption proceeding has been given to the parent and the court finds, after considering the circumstances of the relinquishment and the continued custody by the petitioner, that the best interest of the child requires the granting of the adoption.

The relinquishment shall state that the person may waive the ten-day period for the withdrawal of relinquishment for an adoption and to elect to limit the maximum time for the withdrawal of relinquishment for an adoption to five (5) days.

Ark. Code Ann. § 9-9-220(b).

Consent to adoption can be withdrawn after interlocutory order only upon showing of fraud, duress, or intimidation.

> Martin v. Martin, 316 Ark. 765, 875 S.W.2d 819 (1994)(trial court had natural mother's written consent and jurisdiction of case when it entered its adoption decree, where trial court entered adoption decree 13 days after natural mother executed her consent, which was three days after ten-day withdrawal period had expired).

Involuntary Termination

In addition to any other proceeding provided by law, the relationship of parent and child may be terminated by a court order issued under this subchapter on any ground provided by other law for termination of the relationship, or on the following grounds:

(1) Abandonment as defined in § 9-9-202(7).

(2) Neglect or abuse, when the court finds the causes are irremediable or will not be remedied by the parent.

> If the parents have failed to make reasonable efforts to remedy the causes and such failure has occurred for twelve (12) months, such failure shall raise the rebuttable presumption that the causes will not be remedied.
>
> If the parents have attempted to remedy the causes but have failed to do so within twelve (12) months, and the court finds there is no reasonable likelihood the causes will be remedied by the eighteenth month, the failures shall raise the rebuttable presumption that the causes will not be remedied.

(3) That in the case of a parent not having custody of a child, his or her consent is being unreasonably withheld contrary to the best interest of the child.

Ark. Code Ann. § 9-9-220(c).

See Corley v. Arkansas Dep't of Human Servs., 46 Ark. App. 265, 878 S.W.2d 430 (1994)(although termination of parental rights is extreme remedy and in derogation of natural rights of parents, parental rights will not be enforced to detriment or destruction of health and well-being of child; evidence supported chancery court's finding, as part of decision to terminate mother's parental rights, that causes of abuse had not been or would not be remedied; although case worker testified that mother had complied with all terms of her plan and that mother had been more stable and was maintaining job and housing, case worker also testified that child abuse had been serious and that termination of parental rights would be in children's best interests);

Henderson v. Callis, 97 Ark. App. 163, 245 S.W.3d 174 (2006)(trial court order granting guardian's petition to adopt child and terminating father's parental rights was clearly erroneous; father, while he was incarcerated, made diligent efforts to find child but was unsuccessful, there was no evidence that father posed a threat to child, and there was no evidence that child would suffer any untoward effect by establishing a relationship with father); and

Matter of Adoption of K.M.C., 62 Ark. App. 95, 969 S.W.2d 197 (1998)(in making decision of whether to terminate parental rights, the trial court has a duty to look at the entire picture of how the parent has discharged his duties as a parent, the substantial risk of serious harm the parent imposed, and whether the parent is unfit; trial court improperly limited its consideration of evidence relating to present and prospective fitness of unmarried, teenage, biological father to four-month period between birth of child and date hearing was held to determine whether father unreasonably withheld consent to adoption, since during those statistically insignificant four months court could not adequately discharge its duty of peering into the future and making a projection bearing on the child's welfare).

Who May File

A petition for termination of the relationships of parent and child made in connection with an adoption proceeding may be made by:

(1) Either parent if termination of the relationship is sought with respect to the other parent;

(2) The petitioner for adoption, the guardian of the person, the legal custodian of the child, or the individual standing in parental relationship to the child or the attorney ad litem for the child;

(3) An agency; or

(4) Any other person having a legitimate interest in the matter.

Ark. Code Ann. § 9-9-220(e).

Service

The petition shall be filed and service obtained according to the Arkansas Rules of Civil Procedure.

Before the petition is heard, notice of the hearing and the opportunity to be heard shall be given the parents of the child, the guardian of the child, the person having legal custody of the child, a person appointed to represent any party in this proceeding, and any person granted rights of care, control, or visitation by a court of competent jurisdiction.

Ark. Code Ann. § 9-9-220(f).

Pre-Hearing Requirements

Notice

At least twenty (20) days before the date of hearing, notice of the filing of the petition and of the time and place of hearing shall be given by the petitioner to:

(A) Any agency or person whose consent to the adoption is required by this subchapter but who has not consented;

(B) A person whose consent is dispensed on the grounds of parental abandonment or desertion; parental failure to communicate or support significantly without justifiable cause for at least one year; judicial declaration of parent's incompetence and court dispenses with consent; legal guardian failed to respond to the request for consent and court finds withholding of consent unreasonable; or the spouse of the adoptee fails to consent and court finds one of the reasons set out in the Code. See Ark. Code Ann. § 9-9-207.

(C) Any putative father who has signed an acknowledgement of paternity or has registered with the state's Putative Father Registry.

Ark. Code Ann. § 9-9-212(a)(4).

When the petitioner alleges that any person entitled to notice cannot be located, the court shall appoint an attorney ad litem who shall make a reasonable effort to locate and serve notice upon the person entitled to notice.

Upon failing to so serve actual notice, the attorney ad litem shall publish a notice of the hearing directed to the person entitled to notice in a newspaper having general circulation in the county one (1) time a week for four (4) weeks, the last publication being at least seven (7) days prior to the hearing.

Before the hearing, the attorney ad litem shall file a proof of publication and an affidavit reciting the efforts made to locate and serve actual notice upon the person entitled to notice.

Ark. Code Ann. § 9-9-212(a)(5).

Notice shall be given in the manner appropriate under rules of civil procedure for the service of process in a civil action in this state or in any manner the court by order directs.

Proof of the giving of the notice shall be filed with the court before the petition is heard.

Where consent is not required, notice may be by certified mail with return receipt requested.

Ark. Code Ann. § 9-9-212(e).

When one (1) parent of a child or children is deceased, and the parent-child relationship has not been eliminated at the time of death, and adoption proceedings are instituted subsequent to such decease, the parents of the deceased parent shall be notified under the procedures prescribed in this subchapter of such adoption proceedings, except when the surviving parent-child relationship has been terminated pursuant to § 9-27-341.

Ark. Code Ann. § 9-9-212(f).

When information concerning the child is contained in the Putative Father Registry at the time of the filing of the petition for adoption, notice of the adoption proceedings shall be served on the registrant unless waived by the registrant in writing signed before a notary public. All confidential information regarding the adoptive parents and the child to be adopted shall be removed from the notice prior to being served to the registrant. Service of notice under this section shall be given in accordance with the Arkansas Rules of Civil Procedure, except that notice by publication shall not be required.

Ark. Code Ann. § 9-9-224(b).

See Johnson v. Tomkins, 341 Ark. 949, 20 S.W.3d 385 (2000)(grandparents have a right to notice, but not a right to intervene or to be heard; because grandparents did not have court-ordered visitation and had never stood in loco parentis before initiation of the adoption proceedings, they were not entitled to be heard);

Henry v. Buchanan, 364 Ark. 485, 221 S.W.3d 346 (2006)(maternal grandparents had no right to notice of adoption by their grandchild's stepmother with the consent of the child's biological mother simply because they had preexisting court-ordered visitation with the grandchild);

Mayberry v. Flowers, 347 Ark. 476, 65 S.W.3d 418 (2002)(before actual notice to a father of an adoption of his child may be deemed an adequate substitute for the notice required by Ark. Code Ann. § 9-9-212 and Rule 4 of the ARCP, it must be gained before entry of an adoption decree); and

Escobedo v. Nickita, 365 Ark. 548, 231 S.W.3d 601 (2006)(putative father's due process opportunity-interest in developing a relationship with child was adequately protected in adoption proceeding, though father had not been entitled under Arkansas adoption statutes to notice of filing of adoption petition; six days before adoption hearing, putative father was served with a summons, petition for adoption, notice of hearing, and notice of deposition, putative father appeared at adoption hearing, and his appearance without an attorney was his choice to make).

Home Studies

Before placement of a child in petitioner's home, a home study shall be conducted by any licensed child welfare agency or any licensed social worker. For non-Arkansas residents, it may be conducted by a person or agency licensed in that state to conduct home studies for adoptive purposes. The home study shall be filed before a petition is heard.

The Dept. of Human Services shall not be ordered by any court except the juvenile division of circuit court to conduct a home study unless the responsible party is indigent and the study is of an Arkansas resident.

The home study shall include a state of residence and national fingerprint- based criminal background check on adoptive parents and all household members 16 and older. Each prospective adoptive parent shall be responsible for payment of costs of the criminal background check and shall cooperate with the requirements of the State Police in this regard. For prospective adoptive parents who have lived in the state for at least 6 years immediately before adoption, only a state criminal background check is necessary.

A child maltreatment central registry check is required for all household members aged 10 and older as a part of a home study.

The home study shall address whether an adoptive home is suitable and shall include a recommendation regarding approval of (an) adoptive parent(s).

The home study shall include an evaluation of the prospective adoption with a recommendation regarding the granting of the petition and any other information the court requires.

A home study is not required for an adoption of an adult, and the court may waive for a step-parent adoption.

Before placement, the licensed adoption agency or person handling the adoption shall provide prospective adoptive parents with a detailed, written health history and genetic and social history of the child which excludes information that would identify the birth family.

(1) this document shall be kept separate from information identifying the birth family;

(2) this document shall be filed with the clerk before entry of the adoption decree;

(3) the clerk may tender this information to any person identified by the court as entitled to it, for good cause shown.

(4) Unless directed by the court, a detailed, written health history and genetic and social history is not required if:

1. the person to be adopted is an adult;

2. the petitioner is a stepparent; or

3. the petitioner and child to be adopted are related within the second degree of consanguinity.

Ark. Code Ann. § 9-9-212(b).

Hearings & Decree

Residency

A final decree of adoption shall not be issued and an interlocutory decree of adoption does not become final until the minor to be adopted, other than a stepchild of the petitioner, has lived in the home for at least six (6) months after

placement by an agency or for at least six (6) months after the petition for adoption is filed.

Residence in the home is not required for a minor to be adopted if the minor is in the custody of the Department of Human Services and the minor must reside outside of the home to receive medically necessary health care.

Ark. Code Ann. § 9-9-213.

Appearance

The petitioner and the individual to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown.

Ark. Code Ann. § 9-9-214(a).

See Courtney v. Ward, 2012 Ark. App. 148, 391 S.W.3d 686 (2012)(despite father's unpreserved claim that child's absence from proceedings on petition for adoption required reversal of adoption decree, the child's absence was not a jurisdictional defect that required strict compliance with statute stating that "petitioner and the individual to be adopted shall appear at the hearing on the petition, unless the presence of either is excused by the court for good cause shown").

Continuance

The court may continue the hearing from time to time to permit further observation, investigation, or consideration of any facts or circumstances affecting the granting of the petition.

Ark. Code Ann. § 9-9-214(b).

Decree of Adoption

If at the conclusion of the hearing the court determines that the required consents have been obtained or excused and the required period for the withdrawal of consent and withdrawal of relinquishment have passed and that the adoption is in the best interest of the individual to be adopted, it may (1) issue a final decree of adoption; or (2) issue an interlocutory decree of adoption which by its own terms automatically becomes a final decree of adoption on a day therein specified, which day shall not be less than six (6) months nor more than one (1) year from the date of issuance of the decree, unless sooner vacated by the court for good cause shown.

Ark. Code Ann. § 9-9-214(c).

If the requirements for a decree under subsection (c) of this section have not been met, the court shall dismiss the petition and the child shall be returned to the person or entity having custody of the child prior to the filing of the petition.

Ark. Code Ann. § 9-9-214(d).

In all cases involving a child born to a mother unmarried at the time of the child's birth, the following procedure shall apply: Upon filing of the petition for adoption and prior to the entry of a decree for adoption a certified statement shall be obtained from the Putative Father Registry stating:

> (1) The information contained in the registry in regard to the child who is the subject of the adoption; or
>
> (2) That no information is contained in the registry at the time the petition for adoption was filed.

Ark. Code Ann. § 9-9-224(a).

See Martin v. Martin, 316 Ark. 765, 875 S.W.2d 819 (1994)(failure, if any, of strict compliance with nonjurisdictional adoption code provisions provided insufficient grounds to set aside trial court's adoption decree, entered beyond ten-day period within which natural mother could revoke her consent to adoption);

Apel v. Cummings, 76 Ark. App. 93, 61 S.W.3d 214 (2001)(it is not mandatory for a court to grant an adoption merely because an individual has forfeited his right to require his consent as a condition precedent to the adoption; before granting an adoption, the probate court must find that the adoption is in the best interest of the child by clear and convincing evidence);

Luebker v. Arkansas Dep't of Human Servs., 93 Ark. App. 173, 217 S.W.3d 172 (2005)(a trial court may grant a petition for adoption if it determines at the conclusion of a hearing that the required consents have been obtained or excused and that the adoption is in the best interest of the child; even where the trial court has determined that parental consent to an adoption is not required, the trial court still must find from clear and convincing evidence that the adoption is in the best interest of the child; trial court's independent findings were not contrary to a preponderance of the evidence, and trial court's conclusion that putative grandparents' adoption of grandchildren was not in the children's best interest was supported by clear and convincing evidence);

Henry v. Buchanan, 364 Ark. 485, 221 S.W.3d 346 (2006)(maternal grandparents were not entitled to notice and opportunity to be heard at adoption proceeding for grandchild, even though they had visitation rights; mother had consented to

adoption and was not deceased, grandparents made no claim that they acted in loco parentis by having grandchild live with them, and visitation rights were cut off by adoption); and

In re Adoption of Reeves, 309 Ark. 385, 831 S.W.2d 607 (1992)(putative father who failed to register under Arkansas' putative father registry was not entitled to notice of adoption proceedings, regardless of whether he had developed significant personal relationship with child).

Effect of Decree

A final decree of adoption and an interlocutory decree of adoption which has become final, whether issued by a court of this state or of any other place, have the following effect as to matters within the jurisdiction or before a court of this state:

(1) Except with respect to a spouse of the petitioner and relatives of the spouse, to relieve the biological parents of the adopted individual of all parental rights and responsibilities, and to terminate all legal relationships between the adopted individual and his or her biological relatives, including his or her biological parents, so that the adopted individual thereafter is a stranger to his or her former relatives for all purposes.

This includes inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the individual by name or by some designation not based on a parent and child or blood relationship.

However, in cases where a biological or adoptive parent dies before a petition for adoption has been filed by a step-parent of the minor to be adopted the court may grant visitation rights to the parents of the deceased biological or adoptive parent of the child if such parents of the deceased biological or adoptive parent had a close relationship with the child prior to the filing of a petition for step-parent adoption, and if such visitation rights are in the best interests of the child.

The foregoing provision shall not apply to the parents of a deceased putative father who has not legally established his paternity prior to the filing of a petition for adoption by a step-parent. For the purposes of this section, “step-parent” means an individual who is the spouse or surviving spouse of the biological or adoptive parent of a child but who is not a biological or adoptive parent of the child.

(2) To create the relationship of parent and child between petitioner and the adopted individual, as if the adopted individual were a legitimate blood descendant of the petitioner, for all purposes including inheritance and applicability of statutes, documents, and instruments, whether executed before or after the adoption is decreed, which do not expressly exclude an adopted individual from their operation or effect.

An interlocutory decree of adoption, while it is in force, has the same legal effect as a final decree of adoption. If an interlocutory decree of adoption is vacated, it shall be as though void from its issuance, and the rights, liabilities, and status of all affected persons which have not become vested shall be governed accordingly.

Sibling visitation shall not terminate if the adopted child was in the custody of the Department of Human Services and had a sibling who was not adopted by the same family and before adoption the circuit court in the juvenile dependency-neglect or families-in-need-of-services case has determined that it is in the best interests of the siblings to visit and has ordered visitation between the siblings to occur after the adoption.

Ark. Code Ann. § 9-9-215.

Any rights to a child which a nonparental relative may derive through a parent or by court order may, if the best interests of the child so require, be terminated in connection with a proceeding for adoption or for termination of parental rights.

Ark. Code Ann. § 9-9-223.

See In re Adoption of M.K.C., 2009 Ark. 114, 313 S.W.3d 513 (2009)(circuit court's decision that mother's adoption of her biological child was not in the best interest of the child was not clearly against the preponderance of the evidence; the parent-child relationship already existed between mother and child, the effect of severing child's right to receive financial support and inheritance from biological father was speculative without evidence of father's financial circumstances, and mother's testimony regarding father's abuse and drug and alcohol use lacked credibility);

Lindsey v. Ketchum, 10 Ark. App. 128, 661 S.W.2d 453 (1983)(natural relationship between parent and child is subject to absolute severance in an adoption proceeding, and thus courts are inclined to favor maintaining natural relationship when adoption is sought without consent of a natural parent and against his or her protest);

Poe v. Case, 263 Ark. 488, 565 S.W.2d 612 (1978)(adopted child ceases to be a member of family of natural parents, occupies status of natural child in respect

to adopted parents, becomes a member of their family and adopted parents exercise custody and control over child);

Suster v. Arkansas Dep't of Human Servs., 314 Ark. 92, 858 S.W.2d 122 (1993)(in determining what is in child's best interest, public policy favors complete severing of ties between child and its biological family when child is placed for adoption);

Webb v. Harvell, 563 F. Supp. 172 (W.D. Ark. 1983)(deceased natural father of child, who had been adopted by one of decedent's sisters when he was an infant and who had not lived with decedent for any substantial portion of his life, did not stand in loco parentis with respect to child, so that child was not a "beneficiary" entitled to recover under Arkansas wrongful death statute for death of his father);

In re Adoption of H.L.M., 99 Ark. App. 115, 257 S.W.3d 587 (2007)(proposed step-father was not required to acquire consent of child's biological father or an order showing the termination of biological father's parental rights before he, as a step-parent, could adopt his wife's child, as wife had already adopted child when she was an unmarried adult, and that adoption decree forever severed and held for naught the biological father's rights, responsibilities, and legal relationship with the child);

Tozer v. Warden, 101 Ark. App. 396, 278 S.W.3d 134 (2008)(mother and brother of decedent were not entitled to disinter decedent's remains and have them reinterred in another county over objection of decedent's adoptive father; for all intents and purposes, decedent was the legitimate blood descendant of adoptive father, and so his refusal to approve mother and brother's request for disinterment created a dispute between family members of the same degree of consanguinity, requiring court approval of disinterment); and

Wilson v. Wallace, 274 Ark. 48, 622 S.W.2d 164 (1981)(paternal grandparents of child adopted by stepfather after widowed mother remarried were not entitled to obtain visitation privileges by a chancery court proceeding, as statute amended adoption law to provide that effect of adoption decree is to terminate all legal relationships between adopted individual and his relatives; overruling Hensley v. Wist, 270 Ark. 1004, 607 S.W.2d 80 (1980)).

Appeal

An appeal from any final order or decree rendered under this subchapter may be taken in the manner and time provided for appeal from a judgment in a civil action.

Subject to the disposition of an appeal, upon the expiration of one (1) year after an adoption decree is issued, the decree cannot be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or of the subject matter unless, in the case of the adoption of a minor, the petitioner has not taken custody of the minor or, in the case of the adoption of an adult, the adult had no knowledge of the decree within the one-year period.

Ark. Code Ann. § 9-9-216.

See Larscheid v. Arkansas Dep't of Human Servs., 343 Ark. 580, 36 S.W.3d 308 (2001)(under applicable statute and rules of procedure, orders that terminated parental rights and denial grandparents' adoption petition in consolidated proceedings were final appealable orders, while decision to delay ruling on future visitation by grandparents, as stated in same document as those other orders, was part of ongoing dependency/neglect case and, as such, was not ripe for appeal);

Dougan v. Gray, 318 Ark. 6, 884 S.W.2d 239 (1994)(appeal could not be taken from order of probate court requiring that child placed for adoption pursuant to interlocutory order be returned to state for further procedures; court rule under which order was issued lacked requisite finality);

Falbo v. Howard, 271 Ark. 100, 607 S.W.2d 369 (1980)(Department of Social Services did not have standing to appeal from order dismissing petition for adoption filed by third party for improper venue, where third party did not appeal);

Britton v. Gault, 80 Ark. App. 311, 94 S.W.3d 926 (2003)(in adoption proceedings, Court of Appeals reviews the record de novo, but will not reverse the probate court's decision unless it is clearly erroneous or against the preponderance of evidence, after giving due regard to the court's opportunity to determine the credibility of the witnesses);

Reid v. Frazee, 72 Ark. App. 474, 41 S.W.3d 397 (2001)(court of Appeals does not address issues that are raised for the first time on appeal; child's biological father failed to preserve for appellate review his contention that probate court failed to notify minor child in writing of his right to withdraw his consent to step-parent adoption, where father did not present such arguments to probate court, at hearing on issue of child's consent objected only on ground that consent was not given in timely manner, and never requested ruling on issue); and

Wunderlich v. Alexander, 80 Ark. App. 167, 92 S.W.3d 715 (2002)(question of whether adoptive parents have “taken custody” of child so as to permit adoption decree to be set aside beyond one-year limitations period is one of fact; trial

court's decision setting aside adoption decree past one-year limitations period as provided by statute setting out limitations period for contesting adoptions was not clearly erroneous, where grandparents had not "taken custody" of child; testimony was clear that parties' respective relationships with child did not change with adoption and that grandparents did not consider child to be their child or hold child out to be their own in community, and trial court's ruling was not inconsistent with policy of statute of promoting stability in family relationship since statute itself provided exception to limitations period).

Death of Child Before Decree

In the event the child dies during the time that the child is placed in the home of an adoptive parent or parents for the purpose of adoption, the court has the authority to enter a final decree of adoption after the child's death upon the request of the adoptive parent.

Ark. Code Ann. § 9-9-205(f).

Confidentiality

All hearings held in proceedings under this subchapter shall be held in **closed court** without admittance of any person other than essential officers of the court, the parties, their witnesses, counsel, persons who have not previously consented to the adoption but are required to consent, and representatives of the agencies present to perform their official duties.

Adoption records shall be **closed, confidential, and sealed** unless authority to open them is provided by law or by order of the court for good cause shown.

When an adoption is filed or heard in a juvenile proceeding, the court file relating to the adoption shall be maintained separately from other pending juvenile matters. Once final disposition is made in the adoption proceedings, the adoption file shall be transferred from the clerk who is the custodian of juvenile records to the clerk who is the custodian of probate records.

The entry of the adoption decree will be entered by the clerk in the book containing adoption records. The clerk shall assign the file a docket number, shall prepare an application for a new birth record as provided in this section, and shall maintain the file as if the case had originated as an adoption case. No filing fee shall be assessed by the clerk upon the transfer and creation of the new adoption file. Any adoption record shall be handled using this procedure.

All adoption records shall be maintained for 99 years by the agency, person, entity, or organization that handled the adoption. If that agency, person, entity, or organization ceases to function, all adoption records shall be transferred to the

department or another licensed agency within this state with notice to the department.

Ark. Code Ann. § 9-9-217.

These rules are subject to the Voluntary Adoption Registry Act and shall not prohibit the disclosure of information collected pursuant to that Act.

Ark. Code Ann. § 9-9-501, et seq.

Collection of Adoption Information

The General Assembly finds that:

(1) There is a need for more information on adoptions that occur in Arkansas;

(2) No governmental agency has the responsibility for gathering information on Arkansas adoptions; and

(3) Without adequate data, the General Assembly cannot make informed decisions regarding changes that may need to be made to adoption laws.

The Office of Chief Counsel of the Department of Human Services shall prepare an adoption information sheet and shall distribute the information sheet to each of the circuit clerks in the state for distribution to each petitioner seeking to file an adoption pleading in the state.

Before the entry of an interlocutory or final decree of adoption, the petitioner shall complete the adoption information sheet and return it to the clerk.

The clerk shall mail the completed form to the Office of Chief Counsel of the Department of Human Services.

The adoption information sheet shall include without limitation:

(1) The age of the minor to be adopted;

(2) The state in which the minor was born;

(3) The state in which the minor resided before the adoption;

(4) The state of residence of the birth mother;

(5) The age of each adoptive parent;

(6) The state in which each adoptive parent resides;

(7) Whether the adoption placement was made by a licensed Arkansas adoption agency and, if so, the name of the agency;

(8) Whether the adoption placement was made by:

(A) A private physician;

(B) A private attorney; or

(C) An out-of-state entity or individual;

(9) Whether the adoptive parents are married or single;

(10) Whether the adoptive parent is a stepparent or second-parent adoptive parent;

(11) Whether the adoptive parent is a family member of the minor child; and

(12) An approximate amount for costs paid by the petitioner in the adoption.

Personally identifiable information regarding the child to be adopted or regarding an adoptive parent shall not be requested or gathered on the adoption information sheet.

Ark. Code Ann. § 9-9-104.

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Appendix

App.

The Official Probate Forms can be found on the AOC's website. There are 33 forms in all, ranging from a Petition for Probate to various Accounting forms. You can find them all here.

DOMESTIC RELATIONS/PROBATE ATTORNEYS AD LITEM GUIDELINES FOR AUTHORIZATION AND PAYMENT OF FEES PURSUANT TO ACT 708 OF 1999

ARK. CODE ANN. § 9-13-101)(e) & § 9-13-106(g)

Act 708 of 1999, with pertinent provisions codified at ARK. CODE ANN. § 9-13-101(e) & § 9-13-106, authorized the Administrative Office of the Courts to establish an attorney ad litem program in then-chancery court cases (now Domestic Relations Division of Circuit Court) and guardianship cases in probate court (now Probate Division of Circuit Court) where custody is an issue. In furtherance of the Act, the General Assembly appropriated $50,000 in FY 99-00 and $100,000 in FY 00-01 with which to reimburse attorneys. Pursuant to the Act, the Administrative Office of the Courts ("AOC") prepared a funding formula for apportionment of the funds to ensure that each judicial circuit had access to the funds. The formula was approved by the Arkansas Judicial Council and by the Rules and Regulations Subcommittee of the Arkansas Legislative Council, in conformity with Act 708.

The amount of funding has increased over the years and the funding formula has changed, but the current formula is the same as it was the first year. The funds are allocated pro rata to judicial circuits based upon the number of divorce filings for a previous calendar year. The Administrative Judge for a circuit decides how the funds allocated to his or her circuit will be distributed to the judges in the circuit or whether the funds will be used by all the judges in the circuit first-come, first-served. The circuit judge then notifies the Administrative Office of the Courts how the funds will be used. The current appropriation for the state is $261,750 a year.

The following guidelines for the authorization and payment of fees to be paid from the appropriation are adopted pursuant to Ark. Code Ann. § 9-13-101 (e)(6). The maximums for fees (number 4 below) apply when any portion of the costs of the attorneys ad litem is ordered to be paid from state funds.

1. When a circuit judge determines that an appointment of an attorney ad litem would facilitate a domestic relations or probate case in which custody is an issue and would further protect the rights of the child, the judge may appoint a private attorney to represent the child.

2. To be considered for appointment, an attorney must meet the prescribed standards of practice and qualifications adopted by the Arkansas Supreme Court and ~~now~~ set out in Administrative Order Number 15. In extraordinary cases, the trial court may appoint an attorney ad litem who does not meet the required standards and qualifications. The attorney may

not be appointed in subsequent cases, however, until he or she has made efforts to meet the standards and qualifications. Attorneys who serve as an attorney ad litem shall file with the trial court a fee petition for services rendered and any out-of-pocket expenses.

3. The judge shall review and approve the fee which shall be contained in an order of the court. The judge or the attorney shall then transmit a copy of the order to the AOC, which is authorized to pay the attorney. This action shall not limit the ability of the court to require the parties to pay all or a portion of the expenses, depending upon the ability of the parties to pay.

4. If a circuit judge appoints an attorney ad litem and determines that the parties can afford to pay the attorney ad litem's fee without state assistance, the judge can approve any fee the judge finds reasonable. However, if the judge authorizes part or all of the attorney ad litem fee to be paid by the state the judge shall not approve an hourly rate in excess of $90 per hour for either the portion to be paid by the state or the portion to be paid by the litigants. In addition, the judge may award out-of-pocket expenses including long-distance telephone calls, mileage at the approved state rate, witness fees, and other incidental costs. The total award to be paid from the appropriation in any single case shall not exceed $1,250. If a case is completed and then reopens, the case is eligible for additional payment, up to $1,250 for each reopening.

5. An attorney who receives payment from state funds shall be required to complete a statistical survey prepared by the AOC which will include information about the amount of time expended on the case and the type of services provided.

6. Orders for payment shall be received by June 1 of each fiscal year, or by a date set by the AOC. The AOC shall pay each of the ordered amounts from the appropriation for that fiscal year, in the order they are received. Once the funds appropriated for this purpose have been expended, the Administrative Office of the Courts shall have no further obligation to pay for attorney ad litem services in that fiscal year.

7. The AOC shall maintain and distribute to the circuit judges, on a monthly basis, the status of the funds available. The AOC also shall prepare an accounting on a quarterly basis of all funds distributed for review by the Arkansas Supreme Court.

ADMINISTRATIVE OFFICE OF THE COURTS
CIRCUIT COURT ATTORNEY AD LITEM REPORT FORM

Attorney Ad Litem:_____ Judge:_____
(please print)
Attorney Address:_____Telephone_____

County:_____ Judicial Circuit #:_____ Case Docket #:_____

Date Appointed:_____ # of children represented_____ Ages of children_____

Duration of Appointment:_____

Type of case or issue: ☐ divorce ☐ paternity ☐ guardianship
☐ initial custody ☐ custody modification ☐ other

☐ **Please attach statement showing breakdown of fees and expenses, time spent, and hourly rate. Hourly rate is not to exceed $90.00 per hour. Total fee and out-of-pocket expenses are not to exceed $1,250.00.**

Amount requested for ad litem services:

Attorney fee $_____

out-of-pocket expenses $_____

Total requested $_____

Was a portion of fee paid by others? ☐ yes ☐ no. If yes, by whom?_____

Services requested on behalf of child(ren): ☐ psychological ☐ educational ☐ medical
☐ parenting ☐ mediation ☐ other (describe):

Services ordered: ☐ psychological ☐ educational ☐ medical ☐ parenting
☐ mediation ☐ other (describe):

Attorney Signature:_____

Bar #:_____ Date:_____

Report must be returned to AOC before payment can be made.

AOC Form Revised 10/2001

ADMINISTRATIVE OFFICE OF THE COURTS
CIRCUIT COURT ATTORNEY AD LITEM REPORT FORM

Attorney Ad Litem:_____ Judge:_____
(please print)
Attorney Address:_____Telephone:_____

County:_____ Judicial Circuit #:_____Case Docket #:_____

Date Appointed:_____ # of children represented_____ Ages of children_____

Duration of Appointment:_____

Type of case or issue: _____divorce _____paternity _____guardianship

_____initial custody _____custody modification _____other

___Please attach statement showing breakdown of fees and expenses, time spent, and hourly rate. Hourly rate is not to exceed $90.00 per hour. Total fee and out-of-pocket expenses are not to exceed $1,250.00.

Amount requested for ad litem services:

Attorney fee $_____

Out-of-pocket expenses $_____

Total requested $_____

Was a portion of fee paid by others? ___ yes ___ no. If yes, by whom?_____

Services requested on behalf of child(ren): _____psychological _____educational _____medical

_____parenting _____mediation _____other (describe):

Services ordered: _____psychological _____educational _____medical _____parenting

_____mediation _____other (describe):

Attorney Signature:_____

Bar #:_____ Date:_____

Report must be returned to AOC before payment can be made.

AOC Form Revised 10/2001

INSTRUCTIONS FOR COMPLETING CIVIL-PROBATE COVER SHEET

The probate reporting form and the information contained herein is intended for case assignment and statistical purposes. It shall not be admissible as evidence in any court proceeding or replace or supplement the filing and service of pleadings, orders, or other papers as required by law or Supreme Court Rule. Authority: Supreme Court Administrative Order Number 8.

FILING INFORMATION

The Filing Information must be completed by the attorney or pro se litigant filing an initial pleading with the court Clerk. The Clerk shall not accept the pleading unless accompanied by this reporting form. The Clerk shall place the original reporting form in the case file and send a copy of the filing information to the Administrative Office of the Courts in a weekly mailing.

Line 1: Fill in the blanks for County and Judicial District where this pleading is being filed. Unless this is a re-opened case, the Clerk will assign you the docket number to fill in that blank.

Line 2: Fill in the blanks for Judge's name and Division (if applicable). In a multi-judge county, the Clerk will tell you the correct Name and Division or will complete this information. The Filing Date is the month, day, and year you are filing this pleading.

Line 3: Fill in the Name of the Case as it appears in the style of the pleading you are filing.

Line 4: Fill in your name and address. "Pro Se" means you are filing this pleading on your own behalf and are not represented by an attorney.

Line 6: Reference any related case(s).

Type of Case: Place an "X" in the single box which best describes the subject matter of the pleading you are filing. If no Type accurately describes the subject matter, place an "X" in the box for Other.

Manner of Filing: Place an "X" in the appropriate box. For the purposes of this reporting form, the following definitions apply. "Original" means a filing of a complaint or petition at the beginning of a case. "Re-open" means a case which has been disposed of but is now being resubmitted to the court. For example, a guardianship has been granted and terminated, and the subject of this pleading is a petition requesting the appointment of a new guardian. "Transfer" means a case filed with this court from another court due to invalid jurisdiction, venue, etc.

DISPOSITION INFORMATION

When the final order/decree/judgment is filed with the Clerk, the Clerk or other official as the trial court may designate, shall complete the following disposition information on the reporting form which was placed in the case file when the initial pleading was filed.

Disposition Date: This is the month, day, and year of the Clerk's date stamp.

Place an "X" in the appropriate box for type of trial. For the purposes of this reporting form, the following definitions apply. A "Bench Trial" is a trial in which there is no jury and in which a judge determines both the issues of fact and law in a case. A "Non-Trial" is where a probate case is disposed of by one of the following methods:

- **a) a settlement by agreement of the parties;**
- **b) an order of dismissal;**
- **c) an order granted prior to trial which concludes the case;**
- **d) the respondent did not respond to the allegations contained in the petition, e.g. an uncontested matter.**

Disposition Type: Place an "X" in the box which best describes how the trial court disposed of the matter.

The Clerk or a Deputy Clerk shall sign on the signature line. A Clerk's signature stamp will suffice. The date is the same as the Disposition Date. The Clerk shall retain the original reporting form in the case file and send a copy of the disposition information to the Administrative Office of the Courts in a weekly mailing.

To Save a copy of this form to your computer, please click the disk icon on the toolbar above.

Multiple claims. If a complaint asserts multiple claims which involve different subject matter divisions of the circuit court, the cover sheet for that division which is most definitive of the nature of the case should be selected and completed.

COVER SHEET
STATE OF ARKANSAS
CIRCUIT COURT: PROBATE

The probate reporting form and the information contained herein shall not be admissible as evidence in any court proceeding or replace or supplement the filing and service of pleadings, orders, or other papers as required by law or Supreme Court Rule. This form is required pursuant to Administrative Order Number 8. Instructions are located on the back of the form.

FILING INFORMATION:

County: _____ District: _____ Docket Number: PR_____

Judge: _____ Division: _____ Filing Date: _____

In the Matter of: _____

Attorney Providing Information: _____ _____
Address

Litigant, if Pro Se: _____ _____
Address

Related Case(s): Judge _____ Case Number(s): _____

TYPE OF CASE:

- ☐ (DE) Decedent Estate Administration
- ☐ (AA) Ancillary Administration
- ☐ (SE) Small Estate
- ☐ (TA) Trust Administration
- ☐ (GD) Guardianship
- ☐ (AD) Adoption
- ☐ (CP) Conservatorship
- ☐ (CV) Civil Commitment
- ☐ (AL) Alcoholic Commitment
- ☐ (NC) Narcotic Commitment
- ☐ (PC) Adult Protective Custody
- ☐ (OT) Other _____

MANNER OF FILING: ☐Original ☐Re-open ☐Transfer

DISPOSITION INFORMATION:

Disposition Date: _____ ☐ Bench Trial ☐ Non-Trial ☐ Jury Trial ☐ Small Estate

Disposition Type

- ☐ (JD) Judgment/Decree/Order
- ☐ (DW) Dismissed with Prejudice
- ☐ (DN) Dismissed without Prejudice
- ☐ (TR) Transferred

_____ _____
Clerk Signature Date

AOC 25 10-01
625 Marshall Street
Little Rock, AR 72201

Effective 1-1-2002

Send 1 copy to AOC upon filing.
Send 1 copy to AOC upon disposition.
Keep original in court file.

Table of Consanguinity

Showing degrees of relationship