

ARKANSAS PROBATE AND TRUST LAW REVIEW

Arkansas Bar Association PROBATE AND TRUST Law Section

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2008-
2009

We are pleased to present the first issue of the Probate and Trust Law Section's review! Our plan is to publish it annually. Each issue will contain digests of Arkansas appellate probate and trust cases of note, as well as short articles on aspects of Arkansas probate and trust law. We welcome your suggestions for future articles. This first issue covers Arkansas, and a few federal, cases from May 1, 2008 through April 30, 2009. Cases are abstracted by law students and reviewed by the editors, who have also added selective comments. Issues are available free to members of the Probate and Trust Law Section. If you are not a member you might want to consider joining. Dues are \$10 annually—arguably much less than the value of this publication.

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LETTER FROM THE CHAIR

Greetings:

Welcome to the inaugural issue of the *Arkansas Probate and Trust Law Review*! The Review is the brain child of Lynn Foster and is modeled after the *Real Estate Review* which is published by the Real Estate Section of the Arkansas Bar. This edition of the *Review* contains case abstracts prepared by law students as well as and recent legislative summaries and Comments by members of our Editorial Board. The Comments are designed to provide tips, suggestion, and commentary on the impact of each case from a practical point of view. This issue also contains an summaries of new legislation and a short article on engagement letters by Lynn. For the time being, the *Review* will be published annually. In the future we hope to have articles from practitioners from around the state on topics of interest. If you would like to submit an article, please contact either Lynn or myself. The Editorial Board has done a great job and we appreciate all of their hard work.

The annual meeting of the Probate and Trust Section will be held at the Arkansas Bar Association annual meeting in Hot Springs at 12:00 p.m. on Thursday, June 11, 2009, in Pine Room I, Sixth Floor at the Arlington Hotel. I hope that each of you will plan on being present and will volunteer to participate in our activities over the coming year. This year the Section hosted the program at the Mid-Year Meeting. Renee Brida chaired the program for the and did an outstanding job. We have been told that the program was one of the most well-received programs of all time. Our thanks to Renee and all of our speakers who made the program such a success. The Bar has asked that we sponsor a probate track at the 2010 Mid-Year Meeting. Lori Holtzwarth has been selected as the program chair and will put together another outstanding program.

I look forward to seeing each you at the Annual Meeting. Our hope is that the *Review* will develop into something that is a great asset to our Section members and the Bar. We would appreciate any comments that you may have on any improvements that we can make. This is your *Review*. Great things are happening in our Section and I hope that you will want to participate. See you in June!

Sincerely,

G. S. Brant Perkins

NEW LEGISLATION OF INTEREST

By Lynn Foster

Unless otherwise noted, the effective date of the legislation is 90 days after the General Assembly adjourned sine die, or July 1, 2009.

[Act 162-TO AMEND SUPREME COURT RULE 5-2 AS AUTHORIZED BY SECTION 9 OF AMENDMENT 80 TO THE ARKANSAS CONSTITUTION.](#)

Amends Arkansas Supreme Court Rule 5-2 to make all opinions (rather than just the "published" opinions) of the Arkansas Court of Appeals precedent and allows them to be cited and relied upon by any party in any proceeding. The only exception is orders affirmed without opinions. They are to be cited by case name, docket number, court name, and date of decision.

COMMENT (LF): The Supreme Court recently considered whether to amend Rule 5-2 to achieve this same purpose and declined to do so. Arguably this act raises a separation of powers issue. The Supreme Court has stated "To protect what we hold inviolate we now declare that we will defer to the General Assembly, when conflicts arise, only to the extent that the conflicting court rule's primary purpose and effectiveness are not compromised; otherwise, our rules remain supreme." This issue has arisen several times, with regard to when criminal judgment and commitment orders and civil decrees are effective. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Price v. Price*, 341 Ark. 311, 16 S.W.3d 248 (2000) (Ark. R. Civ. P. 58 superseded statute); *Pike Avenue Dev. Co. v. Pulaski County*, 343 Ark. 338, 37 S.W.3d 177 (2001) (Inferior Court R. 9 superseded statute); *State v. Sypult*, 304 Ark. 5, 800 S.W.2d 402 (1990) (judicial Rules of Evidence supersede statute). The ball is now in the Supreme Court. Until it acts, beginning July 1, attorneys may cite unpublished Court of Appeals opinions in their briefs.

[Act 217-AN ACT TO AMEND ARKANSAS CODE § 28-40-111 CONCERNING NOTICE OF APPOINTMENT OF A PERSONAL REPRESENTATIVE AND CLAIMS AGAINST ESTATES; AND TO AMEND ARKANSAS CODE § 28-50-101 REGARDING THE LIMITATIONS PERIOD AFTER A DECEDENT'S DEATH.](#)

Amends the notice requirement by personal representatives to correspond with the statute of nonclaim, which was amended in 2007. Creditors have six months in which to submit claims, and tort

claims for injury or death caused by the decedent must also be filed within six months. The three-month period no longer exists.

Act 262-AN ACT TO ENACT THE UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT (2006). Arkansas joins eight other states that have enacted this uniform law, although it is under consideration in numerous others. This act replaces the Uniform Management of Institutional Funds Act of 1972, which Arkansas had enacted, and which is now repealed. The NCCUSL website states "Its rules govern investment of the funds of charitable organizations and total return expenditure of those funds. It establishes a prudent management investment regime derived from the Uniform Prudent Investor Act (which applies only to trusts) and a prudent total return expenditure based upon performance of the portfolio held by a charitable institution. It also provides for delegation of authority for investment to outside agents and reformation of donor restrictions (cy pres) on funds when these are so outdated that the original objective can no longer be honored." For the official comments to the uniform act, click [here](#).

Act 346-AN ACT TO AMEND THE ARKANSAS VERSION OF THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT. Provides clarification as to what happens to the disclaimed interest.

Act 402-AN ACT CONCERNING THE RIGHTS TO CONTROL THE FINAL DISPOSITION OF A DECEASED PERSON. Assigns priorities to which persons have the right to decide on the disposition of a decedent's body, lists factors that a circuit court should consider if persons cannot agree on the disposition and petition the court, and states the rights and liabilities of funeral homes, cemeteries and crematories.

Act 412-TO PROVIDE THAT A SIGNATURE BY MARK IS BINDING AND LEGAL. States that in addition to the provisions in §§ 4-3-401, 7-5-305, 7-7-308, 27-14-705, and 28-25-103, a signature made by mark is legal if the signer at the time of signing cannot write or sign his or her name, and the signature is witnessed by one person.

COMMENT (LF): Of course, § 28-25-103 of the Arkansas Code Annotated is the provision that

covers the testator's signature by mark on a will and the formalities that are required in that case. This provision would pertain to, for example, a settlor's signature on a trust, or power of attorney.

ENGAGEMENT LETTERS

By Lynn Foster

Engagement letters are letters sent by attorneys to their clients at the outset of representation. Typically clients are required to sign and return one copy of the letter to indicate their agreement to the terms. Some firms will not permit attorneys to begin work for a client until the signed engagement letter is on file.

What should an engagement letter cover? Topics that almost certainly must be included are the services to be performed; the manner in which the lawyer's fee will be determined; billing procedures; and the time frame in which the work will be performed. Be careful when discussing the fee-quoting a flat rate or an estimate can lead to trouble if complications arise, unless the lawyer communicates the unexpected developments to the client.

If the attorney is representing multiple clients, such as a husband and wife, multiple family members (such as a child and a parent), the same person in two different capacities, (e.g., as an individual and as a trustee), or cotrustees, it is a "best practice" to include paragraphs about confidentiality (Rule 1.6) and conflicts of interest (Rule 1.7). One example of such paragraphs can be found in John R. Price, *Conflicts, Confidentiality, and Other Ethical Considerations in Estate Planning, Tax Management Portfolio* (Estates, Gifts, and Trusts series no. 801) (2000), in a sample engagement letter for a husband and wife:

Confidentiality. Any information that we receive from either or both of you may be shared with others in our office in order to carry out our engagement. Otherwise, the information will not be communicated to others, particularly persons outside our office. As between yourselves, you have agreed that there will be complete and full disclosure and exchange of all information we receive from either of you that is relevant and material to our engagement. Accordingly, we will be free to share information with one of you that we receive from the other. Our understanding regarding the sharing of

information applies regardless of the time or manner in which it is communicated to us.

Conflicts. Each of you is free to develop an independent plan for the disposition of your property. Some couples establish plans that are mirror images of each other, but others do not. It is entirely possible that there may be some differences between your plans and the manner in which you each choose to dispose of your property. Such differences would not prevent us from assisting both of you. However, as I explained, we will not be able to represent both of you if it becomes necessary to negotiate and define your respective property interests in a property status agreement or if other conflicts of interest develop. Should a conflict arise, we may be required to withdraw from representing one or both of you.

Additional engagement letters can be found on [ACTEC's website](#). Here is a paragraph from ACTEC's sample letter to an executor who is also a beneficiary:

Because you are a beneficiary of the estate, I must advise you that I only represent you in your capacity as executor, and can only represent you as a beneficiary if there is no conflict of interest by reason of such relationship. For example, a conflict could arise in distribution of assets to you if one of the other beneficiaries should object to your individual ownership of partial interest in an estate asset; or by reason of the amount of compensation that you may claim. In the event of such a conflict, consideration may have to be given by you to the employment of independent counsel to represent your personal interests.

Few jurisdictions require engagement letters, so why use them? They set out the scope of your representation (Rule 1.2), in case there is a disagreement later about what you promised to do. An engagement letter can be powerful evidence on your side in case of an ethics complaint or malpractice suit.

Attorneys Ad Litem

[Sanford v. Murdoch](#)
374 Ark. 12, ___S.W.3d___
2008 WL 2447464, 2008 Ark. LEXIS 418
June 19, 2008

Robert L. Brown, Associate Justice.

FACTS: Appellant, attorney Josh Sanford, represented Marilyn Ann Martin in the planning of her estate and other legal matters. Martin named

Sanford the successor trustee of her revocable trust and granted him a durable power of attorney to handle her affairs. As such, Sanford retained in his possession documents relevant to Martin's financial and estate planning. Martin later revoked Sanford's power of attorney and granted a durable power of attorney to Morgan, Martin's niece. Martin then executed a new will in California, leaving her entire estate to Morgan. Morgan requested Sanford to deliver the financial and estate planning documents in his possession to her. Sanford refused and contested Martin's competency at the time his power of attorney was revoked.

Following a petition filed by Morgan for ante-mortem probate and ex-parte relief, the circuit court appointed Timothy Murdoch as an attorney ad litem for Martin for the purpose of determining her mental capacity. The court also ordered Sanford to provide Murdoch with all documents in his possession belonging to Martin. Murdoch filed an ad litem report ultimately concluding that the financial and estate planning documents should be returned to Martin's estate because Martin was competent when she revoked Sanford's power of attorney and executed the new will. During a hearing conducted by the circuit court, Sanford told the judge he had no objection to attorney ad litem fees being paid to Murdoch although the issue as to who would pay the fees was not discussed. The circuit court ordered Sanford to pay Murdoch's ad litem fee in the amount of \$2,492.11. Sanford appealed.

RULES AND ANALYSIS: There were three issues on appeal. Appellee Murdoch responded only as the named appellee and did not take a position on Sanford's arguments. The first two arguments raised by Sanford, which the court considered together, were that the circuit court did not have the authority to appoint an attorney ad litem in an ante-mortem probate case or in a replevin case and that the circuit court violated Ark. Code Ann. § 28-1-112 when it appointed an attorney ad litem without notice, without a hearing, and without adequate time to respond to the underlying petition. When a judgment rendered would have no practical legal effect upon a then-existing legal controversy the case is moot. As a general rule in Arkansas, appellate courts will not review moot issues as doing so would be to render an advisory opinion which the court will not do. The court found Sanford's arguments moot on both points because a judgment either way would have no effect on the controversy.

The third issue raised by Sanford was that the circuit court erred by assessing Murdoch's ad litem fees against him. He contended that ad litem fees may only be awarded when they are expressly authorized by statute and that neither the ante-mortem probate statute nor the replevin statute authorized the award of ad litem fees. Sanford argued that the fee should have been assessed against Martin's estate. However, he cited no authority for his proposition that an attorney ad litem's fee is the equivalent of an award of attorneys' fees in a contested matter. Sanford's argument was only two paragraphs long, and the court found that his point was not sufficiently developed for appellate review. The Supreme Court will not consider an assertion of error if the appellant does not make a convincing argument or cite legal authority.

HOLDING AND DISPOSITION: Affirmed.
Abstractor: Jennifer Morganne Fullington, 1L

COMMENT (NL): When representing a client of questionable capacity, particularly when preparing estate planning documents, it is good practice to have the client's doctor examine the client for mental capacity, and to provide a report as to the mental status of the client prior to the execution of the will or trust. In addition, it is good practice to have the witnesses to the instruments sign a memo as to their impressions of the mental capabilities of the client at the time of signing. If capacity is later questioned, these documents would be of great assistance to support the proposition that the individual did have the requisite capacity.

After this case, it is still unclear as to who the proper party should be to pay the fees of an attorney ad litem appointed in a case, because the issue was not squarely addressed. The appellant did not submit persuasive argument or authority in his brief addressing the issue of whether the individual's estate or he should be responsible for the attorney-ad-litem fees incurred. Rather, the appellant attempted in his argument to convince the court that it was not proper to appoint an attorney-ad-litem in this case, an issue which was moot and therefore not addressed by the court. To assess the fees of an attorney ad litem against an attorney who represented the individual seems unusual given the circumstances of this case; however, because the appellant did not offer persuasive or substantial argument on this point, and because the court would not research the issue for the appellant, it upheld the decision of the circuit court.

Attorneys' Fees

Shula v. Bank of America, N.A. (Shula II)
No. 4:07-CV-00922 BSM
2008 WL 4277722, 2008 U.S. Dist. LEXIS 77549
Sept. 15, 2008
UNPUBLISHED

Brian S. Miller, District Judge.

FACTS: The plaintiff was married to Jackson "Jack" T. Stephens. After the lawsuit detailed below (under Breach of Trust) involving the trust from which the plaintiff's alimony was paid, the defendants moved for attorneys' fees and costs, seeking \$274,833.62 in fees and \$10,722.71 in costs. The defendant contended that both Ark. Code Ann. §§ 16-22-308 and 28-73-1004 justified an award of fees and costs. Plaintiff, in response, asserted that either the court had no authority to grant this motion or that the fees and costs requested were unreasonably exorbitant. This order ensued.

RULES AND ANALYSIS: In any civil action to recover for breach of contract, unless otherwise provided by law or the contract, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs. Ark. Code Ann. § 16-22-308. Hence, the court had authority to grant a motion for attorney's fees and costs. The only issue remaining, therefore, was whether the amount requested was reasonable. What constitutes a reasonable hourly rate is determined by the prevailing rate, i.e., the ordinary rate for similar work in the community where the case has been litigated. *Duvall v. City of Rogers*, No. Civ. 05-5001 (W.D. Ark. Apr. 11, 2006). The party requesting the fee award bears the burden of substantiating the requested rate as well as the hours expended. *Id.* Based on the court's experience with the rates of attorneys of the caliber in the case practicing in Little Rock, the rate in question was reasonable. Based on the court's previous experience in similar cases, however, the number of hours expended upon the case and the size of the staff utilized (thirteen) was too great. Additionally, the absence of more detailed billing records made the repetitive, simplistic billing (e.g., "confer with," "telephone conference with," etc, without a listing of what was discussed) records unpersuasive. The defendant claimed time for tasks that, based on the billing records, seem redundant. The defendant also sought costs for having both the lead counsel and second chair fly to and stay in Florida to depose the

plaintiff. It would be reasonable to charge only for the lead chair to do so. Thus, the court awarded attorneys' fees and costs to the defendant, but for the reduced amount of \$150,000 in attorneys' fees and \$9,305.66 in costs.

HOLDING AND DISPOSITION: Attorneys' fees and costs may be awarded to the prevailing party in a breach of contract suit, provided that the law does not hold otherwise elsewhere and the instrument which is the subject matter of the trial did not otherwise provide. Attorneys' fees awarded in this way must be reasonable, a determination which is made from all relevant factors, including expertise and experience of counsel, the practice area, the geographic area, etc. Defendant's motion was granted.

Abstractor: Anne M. Milligan, 2L

COMMENT (LF): Although the original decision speaks only in terms of trust law (except for allowing attorneys' fees), in this second opinion the court wants to treat the case as a contract case. The court denied the motion for fees under Ark. Code Ann. § 28-73-1004. The court also refused to pay the attorneys' fees from the trust.

COMMENT (LDD): This second opinion is interesting regarding the reasonableness of attorneys' fees and costs. A billing rate of \$285 an hour was a reasonable attorney's fee in the Little Rock market for attorneys with the experience, knowledge and ability of a highly experienced and successful litigator. Billing described as correspondence or conference without further explanation of the nature of the correspondence or conference was ruled unreasonable. Travel expenses of a second chair for a deposition were ruled unreasonable. Billing for counsel to view an unrelated trial to determine the policies and procedures of the court was ruled unreasonable in light of the fact the case did not go to trial. The court also denied the plaintiff's request that the court order the attorneys' fees and costs to be paid from the trust.

Breach of Trust

**Estates of McKnight v. Bank of America
(McKnight I)**
372 Ark. 376, 277 S.W.3d 173
Feb. 21, 2008

and

**Estate of McKnight v. Bank of America (McKnight
II)**
273 Ark. 456, 277 S.W.3d 179
Feb. 21, 2008

NOTE: These two cases involve the same facts and are summarized together.

Paul Danielson, Associate Justice, and Jim Hannah, Chief Justice.

FACTS: Two sibling children, Stephanie McKnight and Natasha Marshall, suffered severe and permanent injuries in an explosion and fire in 1987, leaving them severely disabled and requiring continuing support, assistance and supervision, possibly for the rest of their lives. At the same time, two other children died, and the parents and four other children were injured. Several cases were filed in the probate division of Phillips County circuit court. Worthen Bank and Trust Co. was appointed administrator for the two decedents' estates and guardian for all of the minors in the probate cases. As part of a settlement of a resulting tort claim by all of the family members, the family entered into the McKnight-Marshall Discretionary Irrevocable Trust Agreement.

The purpose of the trust with respect to Stephanie and Natasha was to supplement other benefits they might receive as a result of their disabilities, and the care they would receive from their parents. Worthen was appointed the trustee, and later Bank of America was appointed a successor trustee. The probate court decided how and to whom the trust proceeds were to be distributed, and in 2004 Bank of America filed and served an accounting for the entire administration of the trust. In 2005, the six minor beneficiaries of the trust filed a complaint against Bank of America in the civil division of Phillips County circuit court, alleging breach of fiduciary duty, negligence, conversion, and outrage. The complaint demanded a jury trial or in the alternative a motion to stay the accounting proceedings. The probate court proceeded with the

accounting and issued a letter opinion approving it. The estates of only two of the minors, Stephanie and Natasha, objected to the accounting. The estates of Jerome McKnight, Deonte McKnight, Angela Marshall, Stephanie McKnight and Natasha Marshall appealed (McKnight I), and the estate of Shawn McKnight appealed separately (McKnight II).

RULES AND ANALYSIS: The Bank of America objected to the appeals of those parties who had not objected to the accounting in probate court, and the Supreme Court agreed. At any time prior to a hearing on an account an interested person may object by filing a written objection. Ark. Code Ann. § 28-52-107. The court had no jurisdiction to consider their claims of error on appeal. However, Stephanie and Natasha had objected in probate court and therefore the court heard their appeal.

There were several issues. First, plaintiffs argued that they were entitled to either a jury trial or a stay of the accounting until a tort action ended. Article 2 § 7 of the Arkansas Constitution does not assure the right to a jury trial in every case, but merely in those instances where the right to a jury trial existed in 1874, the year of adoption of the Constitution. *First Nat'l Bank v. Cruthis*, 360 Ark. 528, 203 S.W.3d 88 (2005). An accounting is an equitable remedy and may not be submitted to a jury. *A & P's Hole-in-One, Inc. v. Moskop*, 38 Ark. App. 234, 832 S.W.2d 860 (1992); *Southern Farm Bureau Cas. Ins. Co. v. Tallant*, 372 Ark. 17, 207 S.W.3d 248 (2005). The court noted that plaintiffs had filed a suit in the civil division. Nor was it error for the probate court to proceed with the accounting. It properly had jurisdiction. Second, there was no error in the finding that the Bank of America did not breach its fiduciary duty. The probate division found that the trust was intended to supplement and provide extra care to Stephanie and Natasha, but the trustee was compelled to provide for the basic needs of the family so that Stephanie and Natasha would have a place to live and receive the basic needs of life. Much of the expenditure that was complained of as being wasted actually went towards basic needs, such as a house, a vehicle and utilities. While the accounting over the 15+ years was not perfect, the probate division concluded that the funds were accounted for and were used effectively for trust purposes.

Third, the plaintiffs argued that it was error to release the Bank of America from liability. Since the probate division concluded that there was no misuse

of funds by the trustee and nothing additional was due to the beneficiaries, it had to release the trustee.

HOLDING AND DISPOSITION: A party who does not object to an accounting in a probate procedure in the probate division may not appeal the accounting. A party who objects to an accounting in a probate procedure is not entitled to a jury trial. There was no error in the court's refusal to find breach of trust or to release the trustee from liability.

COMMENT (DH): An action for breach of fiduciary duty against the trustee and/or administrator does not give rise to a jury trial in the probate division of circuit court. Arkansas Constitution art. 2 § 7 only insures a jury trial where right to jury trial exists when the constitution was framed.

Shula v. Bank of America, N.A. (Shula I)
No. 4:07-CV-00922 BSM
2008 WL 2783434, 2008 U.S. Dist. LEXIS 54202
July 16, 2008
NOT DESIGNATED FOR PUBLICATION

Brian S. Miller, District Judge.

FACTS: Plaintiff was married to Jackson "Jack" T. Stephens. After Stephens filed for divorce in June 1991, Stephens and the plaintiff entered into a settlement agreement that finalized the terms of their divorce and provided the plaintiff with \$1M in alimony payments per year for the remainder of her life. This alimony was paid out of an irrevocable trust created in June 1991, funded initially by \$7.25M in ICH Corporation subordinated debentures, a \$1M U.S. Treasury Bond, and \$500,000 in cash. The structure of the trust allowed the settlor to fund the trust and to retain control over the assets that made up the trust corpus and any surplus income from trust, which would be distributed to the settlor or his designee. On termination of the trust, the remainder would be distributed to the settlor or his designee.

Stephens died in 2005, and his son succeeded to his father's rights to the undistributed net income and remainder of the trust. That same year, the defendant Bank transferred certain assets from the trust to the estate of Stephens in exchange for an unsecured promissory note on which the annual interest payment was \$1,000,143.30. The promissory note was placed in the trust in place of the removed assets. Since then, each quarterly interest payment on the note was paid and the defendant paid the plaintiff each of her quarterly alimony payments.

The plaintiff filed suit for breach of contract, breach of fiduciary duty, and for declaratory relief concerning the irrevocable trust. She asserted that the defendant breached the terms of the trust agreement when it accepted the unsecured note from the son of her decedent ex-husband, Stephens. The plaintiff also claimed that the defendant breached its fiduciary duty in breaching the terms of the trust, and she sought a declaratory judgment in the form of an injunction requiring the defendant to guarantee the assets in the trust and to maintain only guaranteed assets in the trust. The defendant filed for summary judgment and plaintiff for partial summary judgment. This order resulted.

RULES AND ANALYSIS: F.R. Civ. P. 53(c) states that a party is entitled to summary judgment in the party's favor if there is no genuine issue as to any material fact and the moving party is entitled to summary judgment as a matter of law. A genuine issue of material fact exists if there is a dispute about a fact material to the outcome of the case, and the dispute is genuine in that a reasonable jury could return a verdict for either party. The evidence will be viewed in the light more favorable to the nonmoving party, and the nonmoving party is entitled to the benefit of all reasonable inferences.

Arkansas statutory law provides that the terms of a trust will prevail over the provisions of the Arkansas Trust Code. Ark. Code Ann. § 28-73-105(b). However, the terms of a trust will not prevail over a trustee's overriding duties to act in good faith and in accordance with the purposes of the trust. Here, though, the defendant did not breach its duties to act in good faith and in accordance with the purposes of the trust. The terms of the trust did not require the assets in the trust to be guaranteed. The plaintiff continued to receive her quarterly alimony payments and she did not believe that the decedent's son was having any kind of financial trouble. A declaratory judgment will not be granted if the danger or dilemma of the plaintiff is merely a contingent hypothetical. This case was premature. Thus, plaintiff's motion was denied, defendant's motion for summary judgment was granted, and the case was dismissed.

HOLDING AND DISPOSITION: Where a trustee acts in good faith and in accord with the purpose of a trust, and where prejudice to the plaintiff is merely hypothetical and the terms of the trust do not require the plaintiff's requested protective action, no declaratory judgment shall be issued from the court

to shield the plaintiff against merely hypothetical future events. Dismissed.

Abstractor: Anne M. Milligan, 2L

COMMENT (LDD): In most circumstances, a corporate fiduciary exchanging shares of a holding company that owned several flourishing businesses for an unsecured promissory note would not be viewed as a prudent investment in a trust. One of the issues presented by the complaint was whether the substitution of the promissory note for the preferred stock was a violation of the trust agreement. The court ruled that there was no violation of the trust agreement.

The undisputed fact that in this case the terms of the trust allowed the settlor to retain total control of the types of assets making up the trust estate, along with other ensuing facts, make me want to raise the issue differently. Did the defendant corporate trustee breach its fiduciary duty to act in good faith and in accordance with the purposes of the trust when it accepted an unsecured promissory note in the amount of \$15,535,000 as an "exchange of due consideration" for 12,135 shares of Class B Preferred Stock of Stephens Holding Company? The court was aware that the Arkansas Trust Code (ATC) at Ark. Code Ann. § 28-73-105(b) provides that the terms of the trust will not prevail over a trustee's duties to act in good faith and in accordance with the purposes of the trust.

In one of the two short opinions granting the defendant's motion for summary judgment and attorneys' fees, the court indicated that it had been provided more than 250 pages of motions, affidavits, billing records and briefs, some of which may have contained further information about the Call and Put Option Agreement and whether it contained more information regarding the meaning of "exchange of due consideration." Also, in the 2005 state probate proceeding regarding the estate of the settlor, the plaintiff filed a Motion to Determine the Present Value of her claim for alimony for which payment this trust was settled. There has been no action on the motion by the probate court which could have provided further information as to whether the exchange of trust assets was an "exchange of due consideration."

On the second issue of whether the plaintiff was damaged as a result of the trust asset substitution, the court concluded the plaintiff had suffered no damages as long as the plaintiff continued to receive her quarterly alimony payment of \$250,000 from the trust. The court did not believe the maker of the unsecured promissory note was in any type of

financial trouble. The second opinion (Shula II) states that this case is on appeal to the Eighth Circuit. Does a settlor of an irrevocable trust who retains total control of the types of assets making up the trust estate stand in the shoes of a fiduciary (Ark. Code Ann. § 28-73-808(d)) and have the duty to act in good faith and invest the trust assets under the (admittedly default) prudent investor rule? If so, would a claim by a beneficiary for breach of such a duty survive the settlor's death? Would the fact, that the irrevocable trust was settled in 1991, well before the 2005 effective date of the ATC, relieve a settlor from being a presumptive fiduciary and from the duty to act in good faith and follow the prudent investor rule? The opinion states the lawyers had a difficult time litigating the case due to the distrust of the parties. In her complaint, plaintiff sought and the court denied to enjoin the defendant from further actions detrimental to the trust and (herself as) the beneficiary. Would it have made a difference if the plaintiff had petitioned the court to appoint a successor corporate trustee with fewer historical business ties to the settlor?

If filing a complaint for breach of fiduciary duty, one should be cautious about pleading breach of contract as well. Pleading breach of contract in the complaint in this case was the reason the court allowed the prevailing party to recover reasonable attorneys' fees pursuant to Ark. Code Ann. § 16-22-308. (Also note, the court denied attorneys' fees pursuant to Arkansas Trust Code Ark. Code Ann. § 28-73-1004. The comments to § 28-73-1004 in the context of this case are worth reading.)

[Taylor v. Woods](#)

103 Ark. App. 144, ___ S.W.3d ___
2008 WL 4149922
April 9, 2008

Robert J. Gladwin, Judge.

FACTS: The decedent, Lowell Taylor Jr., died in 2003, leaving a will executed in 1994 and a codicil executed in 2002. Together they devised to Carra Taylor, the surviving spouse, all of the decedent's personal effects and the decedent's interest in three Florida condominiums and a Memphis residence. The will also created a marital-deduction trust for Taylor for life consisting of 50% of the decedent's adjusted gross estate, with the remainder to those of Taylor's children that the decedent had adopted. The will also created four residuary trusts for the older children. James Woods and Edward Connell were appointed co-trustees of all five trusts. The decedent's will was admitted to probate, where a dispute arose over its proper construction. In 2005,

Taylor petitioned seeking an inventory, an accounting, the removal of Woods and Connell as co-executors and the disgorgement of fees by Connell. Taylor argued that she was entitled to items in the will in addition to 50% of the adjusted gross estate given her by the trust; that Woods and Connell interpreted the will for the benefit of the natural children (decedent's children by a previous marriage), filed incorrect estate tax returns, failed to answer her questions and failed to file inventories or accountings. She accused the co-executors of charging excessive fees and engaging in self dealing. The natural children petitioned to uphold the co-executors' interpretation of the will, and objected to the request for disgorgement of funds and removal of the co-executors. Taylor filed a motion for summary judgment as to the will's interpretation supporting his own construction. In 2006, the circuit court:

- Ordered the co-executors to file an amended tax return and to pay Taylor's attorneys' fees. The court noted discrepancies of almost \$1.5 million between the estate tax appraisals and appraisals for other purposes.
- Ordered the co-executors to file verified inventories and accountings.
- Ordered Connell to repay \$49,445 plus 6% interest to the estate, for attorneys' fees for over twenty years that were not supported by evidence and were billed after the decedent's death.
- Ordered Connell to repay the \$40,000 executor's fee and personally pay Taylor's attorneys' fees.
- Removed Connell as executor because of his unsuitable conduct.
- Declined to remove Woods as executor or require him to disgorge his fee.

Everyone appealed.

RULES AND ANALYSIS: The first issue discussed by the court was the removal of executors and disgorgement of their fees. The court may remove a personal representative for any one of a number of reasons. Ark. Code Ann. § 28-48-105. Here, the circuit court found that Woods misunderstood the role of an executor and that his mistakes were in good faith. He also provided some valuable services to the estate. The court found no error here. Likewise, the court has discretion to award an executor a fee, even if the executor has breached his or her fiduciary duties. Rest. (2d) of Trusts § 243 (1957). The circuit court applied the Restatement's

factors and since it considered the proper factors, it did not abuse its discretion in awarding Woods a fee.

Next, the circuit court did not err in awarding Connell some fees for his legal services provided between 1981 through 2003. The court believed that only a \$10,000 award was actually supported by proof. This too was in the discretion of the court and was not error.

Third, Taylor argued that the court did not award her fees for each point on which she prevailed, whereas Connell and Woods appealed from the order for them to pay fees personally. The court found support for the personal payment of attorneys' fees under Ark. Code Ann. § 28-73-1004. The circuit court had discretion as to whether to award Taylor any fees at all. The court here found no abuse of discretion.

Fourth, the circuit court correctly construed the trust by counting the value of the real property given to Taylor in Article I of the will when figuring the value of the decedent's gross estate. The court examined the wording of will creating the trust and agreed with the circuit court's interpretation.

HOLDING AND DISPOSITION: A court may properly order an executor to pay attorneys' fees personally to a beneficiary if the controversy is over the administration of a trust. A court may decline to award attorneys' fees even if a beneficiary prevails on a particular issue. A court may refuse to remove an executor who has breached his fiduciary duty or force him to disgorge his fee if in weighing all the factors the court finds the executor acted in good faith and did provide valuable services to the estate. Affirmed.

COMMENTS (DH): Fees were allowed to a coexecutor even though the court found that this coexecutor had breached his fiduciary duty. The court weighed the coexecutor's actions both positive and negative as to the estate administration, finding that the positive benefits outweighed the negative. The court had authority to award attorneys' fees for a beneficiary against co-trustees individually on the beneficiary's petition for construction of the will including a testamentary trust. Here, the action was to determine whether property was a trust asset and involved "administration of a trust."

Claims Against the Estate

Banks v. Landry

No. CA08-25

103 Ark. App. 47, ___ S.W.3d ___

June 25, 2008

David M. Glover, Judge.

FACTS: On June 23, 2005, five people were killed in a plane crash, including Dr. Robert Landry (the pilot) and Danya Banks. On July 11, 2005, appellee Robert Landry, Jr., administrator of the Landry estate, published the requisite notice to heirs and creditors. On January 9, 2006, appellant Mark Banks, the administrator of the estate of Danya Banks, filed an affidavit to claim against the Landry estate. Attached to the claim was the order filed in the Banks estate, approving the retainer agreement between the estate and an attorney to represent certain individuals (including Mark Banks) and the estate in their "claim(s) against any insurance company of Dr. Robert Landry, the pilot of the airplane; and any manufacturer and/or mechanic service of the airplane of Dr. Robert Landry, for damages and personal injuries resulting from the death of Danya Banks. . ." However, neither the retainer agreement itself nor the court order approving the retainer agreement authorized a suit against the estate. The appellee denied Banks's claim and petitioned to have it discharged.

Following a hearing, on August 22, 2007, the trial court found that the order approving the retainer agreement and the language in the retainer itself did not authorize suits against the assets of the estate, that the affidavit was deficient as to serve notice to the Landry Estate that the Banks Estate was proceeding against the individual assets of the Landry Estate, especially because the affidavit did not contain the amount of claim, the specific names of the plaintiffs and defendants, or other pertinent information necessary to put the Landry Estate on notice. The trial court ruled that the claim did not comply with Ark. Code Ann. § 28-50-103 and denied the claim. Banks appealed.

RULES AND ANALYSIS: Ark. Code Ann. § 28-50-103 requires that a wrongful death claim must describe the amount of the claim if ascertainable. The trial court stated that since this was missing, and since the affidavit did not contain the specific names of the plaintiffs and defendants in the wrongful death claim, that it was insufficient to put the estate

on notice. The appellate court deduced that the claim must have been sufficient with respect to other requirements of the statute, i.e., it was in writing in affidavit form, it stated the nature of the claim, it stated that an “amount” was due, that no payments had been made, and that no offsets existed.

It is true that the retainer order and agreement authorized proceeding against the decedent’s insurance company and not the decedent’s estate. However, possible noncompliance on the part of a plaintiff may be waived by the defendant by failing to deny the claim or object to its form until after the statute of nonclaim has run. *Jones v. Arkansas Farmers Ass’n*, 232 Ark. 186, 334 S.W.2d 887 (1960). The purpose of the statutes is to facilitate the payment of just claims within a specified time, and not to defeat a just claim on a technicality. *Id.* Even though the Jones court’s basis for decision was waiver and not the sufficiency of the claim, here the court recognized the Jones court’s interpretation of the “overall purpose” of the statutes. Substantial compliance with the statute is sufficient.

HOLDING AND DISPOSITION: Where the affidavit accompanying a claim for wrongful death does not contain the name of the estate as a defendant, but when the personal representative does not object before the time for claims has run, in order to allow the plaintiff to cure the claim, there is substantial compliance with Ark. Code Ann. § 28-50-103. Reversed and remanded.

Griffen and Heffley, JJ., dissent.

First, the dissent brought up the fact that the trial court also noted in its ruling that the claim was deficient because the statute requires that if the claim is founded on a written instrument, the original or a copy must be attached. The court stated that a complaint had not yet been filed or served, one and one-half years after the plane crash. Further, the dissent argued that the majority used ambiguous terminology, calling the affidavit the claim. The dissent contended that the statute requires the filing of *both* an affidavit and a claim, and here the plaintiff filed only an affidavit. Plaintiff could have filed either a copy of the tort complaint, or a “signed statement giving all of the details ordinarily found in a complaint.” Here, plaintiff filed neither.

COMMENT (GSBP): This ruling will cause personal representatives to be more careful when a decedent might be a defendant in personal injury litigation. The

decision basically puts the burden of proof on the personal representative to clarify any confusion in a “claim” if he or she anticipates denying the claim based upon defects in its form. A personal representative can no longer wait until the time for filing claims has passed to object to a claim based upon a defect in its form. From the dissent, it appears that the plaintiff did not anticipate making a claim against the assets of the estate at the time that the claim was filed. The plaintiff merely filed the claim to protect the claim against third parties (i.e. insurers and manufacturers of the airplane). In essence, the court held that this apparent contradiction created confusion and that the personal representative had a duty to clarify the plaintiff’s position prior to the passage of the claims period.

COMMENT (LF): If the personal representative published the notice to creditors on July 11, 2005 and the wrongful death plaintiffs filed the “claim” on January 9, 2006, the personal representative would have had only two days in which to object.

Combs v. Stewart

No. 08-276

October 9, 2008

374 Ark. 409, ___ S.W.3d ___

Paul E. Danielson, Associate Justice.

FACTS: James R. Stewart (“Decedent”) and Paula Jane Stewart (“Stewart”) were married in 1980. They farmed their land, growing crops and raising livestock. The couple established joint bank accounts and entered jointly into financial agreements. They each owned separate property as well, acquired from their families. In 1982, the couple signed a postnuptial agreement, waiving rights to dower, curtesy, homestead and statutory allowances. In 2003, the couple jointly obtained a loan from Farm Credit Services (“FCS”) for \$146,630 for the purposes of poultry house improvements, farm equipment, and consolidation of farm debt. The decedent died in 2004 and Stewart attempted to claim her spousal elective rights. However, appellant Paula Sue Combs (“Combs”), the executor of the decedent’s estate, raised the issue of the postnuptial agreement, and in *Stewart v. Combs*, 368 Ark. 121, 243 S.W.3d 294 (2006), this court found the postnuptial agreement valid, ruling against Stewart’s claim. The circuit court divided the assets. In accordance with the postnuptial agreement, the estate received the farm. The court awarded the farm equipment, which was also collateral, to Stewart. The circuit court decided that the estate was responsible for the joint debt owed to FCS. The

court also ruled that Stewart was entitled to monies collected from the sale of livestock after the death of the decedent. Combs appealed.

RULES AND ANALYSIS: On appeal, Combs first argued that the circuit court's ruling on the responsibility for the debt was erroneous, because it was equitable in nature and a circuit court may not make an equitable finding in a probate case. Probate courts have only such jurisdiction and powers as are conferred by the constitution or by statute, or are incident to the exercise of their jurisdiction and powers. *Kidwell v. Rhew*, 371 Ark. 490, ___ S.W.3d ___ (2007). In this case, in distributing the property, the circuit court was bound by a postnuptial agreement as well as by the Probate Code. The Probate Code states that the court may order the personal representative to pay the debt out of the estate's assets. Ark. Code Ann. § 28-49-107. Here, the court determined that the bulk of the loan was used for the construction of the poultry houses. It was within the discretion of the court to order the estate to pay the remainder of the debt.

Secondly, the estate argued that it was entitled to monies from the sale of livestock. However, the sales took place after the decedent's death, and Stewart became the sole owner of the majority of the personal property at the death of her husband, including the livestock that was sold.

HOLDING AND DISPOSITION: Where there is debt jointly owed by spouses, pursuant to a postnuptial agreement the probate division of the circuit court may make equitable decisions as to how the debt will be divided between the estate and the surviving spouse.

Abstractor: Kristin M. Edstrom, 2L

COMMENT (NL): The postnuptial agreement clearly specified how the property was to be divided between the surviving spouse and the estate; however, the agreement was silent as to which party would be ultimately responsible for the debt associated with the property or for any joint debt between the decedent and the surviving spouse.

After entering into a postnuptial agreement, the parties need to plan carefully when they decide to take on a joint debt obligation to see that a dispute such as this one does not arise after the death of the first spouse. The court here ruled properly that the circuit court in a probate proceeding has the authority to determine what an estate should do regarding its debt. In determining how an estate

should pay a joint obligation, a court should determine who received the benefit of the debt proceeds, and apportion responsibility accordingly. While a court certainly has this power, the better practice would be for individuals in these situations to carefully plan how debt is structured between them and clearly address whether the estate or surviving spouse will be responsible for the debt.

Garcia v. Estate of Duvall

___ S.W.3d ___
2009 WL 348184
No.08-845
Feb. 12, 2009

Donald L. Corbin, Associate Justice.

FACTS: James Duvall entered into two installment land contracts, one with Ernest and Beverly Garcia, and the other with Patsy Durham. Following Mr. Duvall's death in 2005, co-administrators were appointed for his estate. On April 19, 2006, their notice of appointment was published in the *Yell County Record*. The period for claims expired on July 19, 2006. On August 21, 2007, the Garcias and Ms. Durham filed a complaint against the estate, its personal representatives, and Mr. Duvall's heirs. Appellants sought certification as a class action and alleged violation of both the usury provision of the Arkansas Constitution, art. 19, § 13, and the Arkansas Deceptive Trade Practices Act. On September 5, 2007, the estate filed an objection and disapproval of the appellants' claims, asserting that the claims were not made within the time set forth by the nonclaim statute and were therefore barred. Appellants contended that usury cases are a "special category" for purposes of measuring the statute of limitations. The trial court found that the nonclaim period applied to the appellants and that their claims were barred. It denied and dismissed their claims with prejudice. Appellants appealed.

RULES AND ANALYSIS: The appellants' sole point on appeal is that the circuit court erred in denying and dismissing their claims when they were reasonably ascertainable creditors, were given no notice of the probate proceedings, and filed their claims within two years of the date of the first publication of notice. Appellants raised this issue in the circuit court, but the argument was not the main focus of the brief, and the trial court made no finding as to the issue. Failure to obtain a ruling on an issue from the circuit court precludes review on appeal. *Parker v. BancorpSouth Bank*, 369 Ark. 300, 253 S.W.3d 918 (2007). Because there was no finding

by the lower court, the Supreme Court refused to address the issue.

HOLDING AND DISPOSITION: If a party fails to obtain a ruling on an argument, even if raised to the trial court, the reviewing court will not address the argument on appeal.

Abstractor: Candace Campbell, 1L

COMMENTS (GSBP): This case emphasizes the importance of obtaining rulings from the trial court after a bench trial. Since the judgment did not address the issue raised on appeal, the Court of Appeals refused to consider it.

Constructive Trusts

Ashworth v. Penney

CA 07-1327

2008 WL 2268347, 2008 Ark. App. LEXIS 470

June 4, 2008

NOT DESIGNATED FOR PUBLICATION

Josephine Linker Hart, Judge.

FACTS: The decedent, Rose Marie Ashworth, was married to James Ashworth in 1981. Rose Marie purchased a house titled solely in her name in 1984. Mary Penney, Rose Marie's daughter, immediately moved in and occupied the property ever since. During that time, she paid the taxes, the insurance, the cost of upkeep, and the cost of remodeling on the property. Ms. Penney never paid rent. At trial, Ms. Penney testified that her mother induced her to move from Illinois with a promise to buy her a house with money that Rose Marie had inherited from a prior husband. Ms. Penney also testified that Rose Marie did not place the house in Ms. Penney's name because Rose Marie feared that Ms. Penney's drinking problem and irresponsibility would cause Ms. Penney to lose the house. Ms. Penney's version of events was corroborated by three of James's siblings, and his niece. James testified that the house was purchased with marital funds Rose Marie had "stolen" from a joint checking account. He also asserted that he wanted Ms. Penney to pay rent, that Ms. Penney paid the taxes and insurance in lieu of rent, and that Ms. Penney never claimed ownership of the house until after Rose Marie's death. James's version was partially corroborated by his grandson's wife.

One week before dying, Rose Marie had asked James to place the house in Ms. Penney's name; he refused. James stood to inherit the house under a 1982 will

that named him the beneficiary of the residue of Rose Marie's estate. Four months after Rose Marie's death, James petitioned to probate the 1982 will. The will was admitted and James was named executor. A week later, Ms. Penney petitioned for declaratory judgment that Rose Marie had conveyed equitable title to the house to Ms. Penney and that the house was not an asset of the estate.

The trial court found that Rose Marie intended to transfer legal and equitable title to the home to Ms. Penney and that the money used to purchase the home came from an inheritance Rose Marie received after the death of a previous husband. Upon these findings the court granted Ms. Penney's petition and placed a constructive trust on the house. James appealed.

RULES AND ANALYSIS: James raised four points on appeal. First, he alleged the trial court erred by finding that the 1982 will did not control the disposition of Rose Marie's estate. Second, he alleged error in the imposition of the constructive trust on the house. Third, he argued that trial court should have found Rose Marie's "true intent" within the "four corners" of her will. Fourth, he argued that he was not guilty of an act or omission required to justify the imposition of a constructive trust on property he stood to inherit under the 1982 will. Three of James's points on appeal were essentially allegations that the trial court had improperly denied the validity of the 1982 will. The validity of the 1982 will was not at issue in the trial court, and therefore the Court of Appeals did not consider these arguments.

The remaining point on appeal was handled with a direct analogy to *Betts v. Betts*, 326 Ark. 544, 932 S.W.2d 336 (1996). In *Betts*, the decedent executed a joint tenancy deed in favor of one of his sons in an attempt to avoid probate. The court found that the decedent intended for his land to be divided among six of his children and a constructive trust was imposed to avoid an unjust enrichment of one of his children. *Betts* was cited for its statement of the rule that a constructive trust arises whenever there is clear and convincing evidence that an unjust enrichment would result if the beneficial interest remained with the legal title.

The Court of Appeals did not agree with James that the trial court had based the imposition of the constructive trust on a finding of misconduct.

HOLDING AND DISPOSITION: Where a daughter acts in reliance upon a promise of her mother to buy her a house, and occupies the house, paying taxes, insurance, remodeling and maintenance for over 20 years, a constructive trust is an appropriate remedy, where the mother's surviving spouse refuses to transfer the house to the daughter.

Abstractor: Will Shelton, 2L

Dower and Curtesy

Stevens v. Heritage Bank

**104 Ark. App. 56, ___ S.W.3d ___
2008 WL 4874402, 2008 Ark. App. LEXIS 848
Nov. 12, 2008**

Josephine Linker Hart, Judge.

FACTS: Decedent died intestate, leaving his wife, appellee Stevens, and two children, appellants who served as co-administrators of his estate. Two claims were made against the estate. The first claim was filed by a real estate broker who claimed a commission for the lease of real property. At the time the lease was executed, the property was owned by the 25% by the decedent and the rest by other members of his family. Afterwards the decedent and Stevens acquired the 75% as tenants by the entirety. The broker had sued the decedent-Stevens was not a party to the suit—and the claim was the settlement amount. The second claim was filed by Heritage Bank and concerned a note signed by Stevens and the decedent, the latter signing individually and as guarantor. The loan was intended to help Stevens start an antiques business, was secured by inventory and accounts receivable, and was not delinquent.

The personal representatives filed a petition seeking direction from the court to determine whether the claims should be paid out of the estate's general assets or set off against Stevens's dower interest. A bench trial was held during which various persons testified as to the details and expectations regarding the debts. Afterward the circuit court ordered Stevens's dower interest in the decedent's personal property to be reduced by 1/3 of the bank's claim and 75% of the broker's claim. Stevens appealed.

RULES AND ANALYSIS: There were two issues on appeal. The first was whether 75% of the settlement amount with the broker should be set off against Stevens's dower share. Here, the circuit

court's justification for subtracting the claim from Stevens's share was to avoid unjust enrichment. However, Stevens was not a party to either the original contract or lawsuit. She did not own any interest in the property at the time the claim the contract was executed. The debt was solely that of the decedent.

The second issue concerned the promissory note owed to the bank. The court characterized this as a contingent claim, subject to unasserted defenses that Stevens might raise. The court suggested that the bank could file suit against Stevens for repayment, as could the estate if it was forced to pay on the note in the future. Ark. Code Ann. § 4-3-419.

HOLDING AND DISPOSITION: A broker's claim for a commission, entered into by the decedent with respect to property owned solely by the decedent at the time, may not be subtracted from the surviving spouse's dower share, even if the surviving spouse takes the property as a tenant by the entirety at the death of the decedent. A promissory note not delinquent may not be subtracted from the surviving spouse's dower share where it is as yet only a contingent claim, and the surviving spouse has not been sued nor had a chance to assert any defenses. Reversed and remanded.

Abstractor: Lisa Medford, 1L

COMMENT(NL): This case illustrates the Arkansas law that the dower or curtesy interest of a surviving spouse is to be calculated and paid prior to taking into account any debt of the decedent, although it may be diminished in amount if there are no children and excessive debts. Ark. Code Ann. §§ 28-9-206; 28-11-307. The Supreme Court has long recognized that it is good public policy to protect the rights of the surviving spouse, and that dower or curtesy take precedence over other debts of the decedent.

This principle is very helpful to the surviving spouse in two situations. First, when the surviving spouse and the children of the decedent disagree, and when the decedent died intestate or when the spouse elects to take against the will, the surviving spouse will take his or her share of the estate before accounting for debts of the decedent. The debts of the decedent will be paid out of the children's share of the estate. The surviving spouse should ensure that his or her dower is calculated prior to payment of the debts of the decedent. Second, if a decedent dies insolvent, the surviving spouse may want to elect to take against the will. In such a situation, the surviving spouse's dower or curtesy in the property is calculated prior to the

payment of the debt obligations. If an estate appears to be insolvent, it is always important to consider the possibility of the surviving spouse electing to take against the will, because it will oftentimes enable the spouse to receive more property from the estate at the expense of the creditors.

Fraudulent Transfers

NOTE: The following case and the next are related. This case is not really about fraudulent transfers but since it is closely related to the second it is included here.

United States v. Neal (Neal I)

Civil No. 07-3061

2008 WL 5516514

June 3, 2008

NOT DESIGNATED FOR PUBLICATION

Jimm Larry Hendren, District Judge.

FACTS: The United States brought suit against Fred Neal Jr. and Doris Neal (“the Neals”) to foreclose federal tax liens that had attached to certain real property owned by the Neals. On May 14, 2008, one month before trial, the Neals each filed a Due Presentment Under Notary Seal Demand For Payment (“Demand for Payment”) document with several attachments. One attachment was entitled a Bonded Promissory Note showing, purportedly, that the Neals had made a loan of \$50M to the United States District Court of the Western District of Arkansas, counsel for the United States, and the Clerk of the United States District Court of the Western District of Arkansas. Also attached to the Demand for Payment was a 2008 IRS Form 1099-OID which showed that \$50M of federal income tax had been withheld by Fred Neal and paid to the court, counsel for the United States, and the court clerk. In addition, the court had been mailed documents by a notary public in Marion County, Arkansas, showing “non-performance” of the court, clerk, and counsel on the Bonded Promissory Note. The court stated that claims were false in nature, but had to consider the documents and their purpose prior to proceeding to trial.

RULES AND ANALYSIS: The only issue considered by the court was whether recusal would be necessary. In any case where a court’s impartiality could be reasonably questioned, the court is personally biased or prejudiced towards a party, or the court has personal knowledge

regarding disputed evidentiary facts in a proceeding, recusal will be mandated. 28 U.S.C. § 455. The court held that because the alleged loan could cause a reasonable person to question the impartiality and personal bias of the court towards the Neals, because the court could now have personal knowledge of disputed evidentiary facts in regards to the purported loan and tax documents and their authenticity, and because the court had been exposed to the financial matters of the Neals to the point that it might have to defend itself, recusal was mandated and another judge should be assigned to the case.

HOLDING AND DISPOSITION: Recorded documents purporting to evidence a transaction between a party to a case and the court the case is before, whether actual or fraudulent, will mandate recusal by the sitting judge in order to avoid impartiality, personal bias, prejudice, or personal knowledge of disputed evidentiary facts before the court. Ordered, that Judge Hendren recused himself, that an alternate judge be assigned, and that the U.S. District Attorney investigate the documents filed.

Abstractor: Jeremy H. Yarbrough, 2L

COMMENT (CB): Judge Hendren was required to recuse himself from the case simply because of the potential for bias that was created when the Neals produced forged documents showing they had loaned money to the Judge. Although this is a potential crime, some defendants may find the reward of forcing a judge to recuse himself worth the risk of additional punishment.

United States v. Neal (Neal II)

255 F.R.D. 638

2008 WL 5662531, 2008 U.S. Dist. LEXIS 107768

Dec. 30, 2008

Robert T. Dawson, District Judge.

FACTS: On December 20, 1991, Fred and Doris Neal (“the Neals”) purchased four tracts of real property located in Boone County. The Neals then conveyed the property to themselves as tenants in common on January 24, 1994. That same day, Mr. Neal conveyed his interest in the property to the Fred Neal, Jr. Revocable Trust (“Fred Trust”) while Ms. Neal conveyed her interest into the Doris Neal Revocable Trust (“Doris Trust”). The Neals then filed a “Declaration of Homestead,” on August 22, 1994, declaring the subject property to be their homestead. The same day, the Neals filed a “Declaration of Land Patent” on behalf of their respective trusts. On October 7, 1997, the Neals, in their individual

capacities, purportedly conveyed the property to Teresa Markarian for nominal consideration of twenty-five dollars in silver and “other good and valuable consideration.” No real estate transfer stamps were attached to the deed. At the time, the Neals knew they had or were accruing debt they could not pay and that the conveyances they were making would render them insolvent. Their purpose behind the conveyances was to hinder, delay, and defraud any creditors.

On March 29, 2006, the Neals, acting as trustees for their respective trusts, conveyed an eighty-acre tract of land to Deep Water Designs. The same day, acting as agents of Deep Water Designs, the Neals sold the land for an estimated \$48,000.00. This tract and its conveyance were not at issue in the case. On December 8, 1997, the IRS made an assessment against the Neals and, as of December 4, 2007, they owed a combined outstanding amount of \$1,598,056.76. The United States filed notice of the federal tax lien with the Boone County Recorder of Deeds first against the Neals on December 1, 1998, December 14, 1998, and December 17, 2007; then against Deep Water Designs, the Fred Trust, and the Doris Trust, as nominees of the Neals, on August 1, 2007 and December 17, 2007. Munck Carter was named as a defendant in the action to foreclose because Carter could claim an interest in the real property as a result of a judgment lien filed in Boone County against the Neals. Carter held a final judgment against the Neals in the amount of \$91,604.51 plus five percent post-judgment interest accruing from January 26, 2004. This judgment had been recorded in the real property records of Boone County on or about July 27, 2007, thus creating a judgment lien against all the real property held by the Neals in Boone County. The lien, however, was subordinate to the federal tax liens.

The United States then sued the Neals, John H. Sinclair, as trustee of Deep Water Designs, and Carter seeking to reduce to judgment the unpaid tax assessments against the Neals, to determine that federal tax liens against the Neals had attached to certain real property, to determine that any property transfers by the Neals were fraudulent or, in the alternative, that any transfers were merely to a nominee or alter ego of the Neals, and to order foreclosure of federal tax liens against the property. The United States filed a Motion for Summary Judgment on December 9, 2008, to which the Neals did not respond. On November 14, 2008, Carter filed a Request for Clerk to Enter Default against Cross-

Defendants on Cross-Claim as well as a Motion for Default Judgment against Cross-Defendants on Cross-Claim. The Neals did not respond to the crossclaims. The Neals admitted the facts of the case in their Answer to the United States’ Complaint. Mr. Neal also admitted to his tax liability for 1987 through 1994 and Ms. Neal admitted to her tax liability for 1988 through 1994. The facts of the case were undisputed.

RULES AND ANALYSIS: The court considered three issues. The first issue dealt with whether the United States was entitled to summary judgment against the Neals for unpaid federal income taxes. Summary judgment will be appropriate where the facts and inferences from the facts have been viewed in a light most favorable to the non-moving party and the moving party has met the burden of establishing both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party must show, through specific facts, that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The law recognizes that a determination of a tax deficiency by the Commissioner of the IRS is presumptively correct, and the taxpayer must show that the determination is arbitrary or erroneous in nature. *Day v. Commissioner*, 975 F.2d 534, 537 (8th Cir.1992). In determining whether assessments met statutory and regulatory requirements, Certificates of Assessments and Payments are sufficient proof. *United States v. Bisbee*, 245 F.3d 1001, 1006 (8th Cir.2001). Where a taxpayer has failed to present evidence of an arbitrary or erroneous determination of the tax burden, the United States is entitled to summary judgment. *Lane v. United States*, 328 F.2d 602, 603 (5th Cir.1964). The court granted summary judgment because the United States made a prima facie case by submitting the Certificates of Assessments and Payments and the Neals, because they admitted their tax liability and failed to respond to summary judgment, failed to present the evidence necessary to meet their burden.

The second issue was whether the United States could place a lien on the Neals’ assets held in the Fred Trust and Doris Trust as well as those held by Deep Water Designs. If an individual fails or refuses to pay taxes after assessment, notice, and demand by the United States, the amount due, which may include interest, additional amounts, addition to tax, or assessable penalties, shall be a lien in favor of the United States upon all property and rights to property, real and personal, belonging to the

individual. 26 U.S.C. § 6321. The lien arises at the time of assessment and continues until the tax liability has been satisfied. 26 U.S.C. § 6322. Sham conveyances and property held by an alter ego of the taxpayer cannot be used to avoid the tax lien. *F.P.P. Enterprises v. United States*, 830 F.2d 114, (8th Cir.1987). Arkansas law allows creditors to set aside transactions if the debtor performed the transaction with the intent of hindering, delaying, or defrauding the creditor. Ark. Code Ann. § 4-59-204(a). To determine the debtor's intent to defraud, courts may consider factors such as whether the debtor was still in possession or control of the transferred property following the transfer; whether before the transfer was made the debtor had been "sued or threatened with suit;" whether consideration was given in value equal to the transferred asset; and whether the debtor was insolvent at the time of the transfer or became insolvent shortly afterwards. Ark. Code Ann. § 4-59-204(b). Because the Neals admitted that the Fred and Doris Trusts were sham trusts and Deep Water Designs merely a nominee; that they had transferred real property into the trusts and nominee for nominal consideration; that they did so with the intent of hindering, delaying, and defrauding creditors; and became insolvent as a result of doing so; the court held that assets located in both trusts and held by Deep Water Designs would be subject to the federal tax lien.

The final issue considered by the court was whether Carter's judgment lien against the Neals was valid and enforceable. Arkansas law is clear in that a judgment may be enforced against real property owned by a judgment debtor. Ark. Code Ann. §§ 16-65-117, 16-66-402. When a foreign judgment is properly filed in the county where the judgment debtors real property is located, that judgment is entitled to the same force and effect as an Arkansas court judgment. Ark. Code Ann. § 16-66-602. Thus, because Carter recorded its judgment in the real property records of Boone County on or about July 27, 2007, it created an enforceable lien against all real property held by the Neals in that county, subordinate to the lien of the IRS.

HOLDING AND DISPOSITION: Where the United States has made a prima facie case for summary judgment by submitting Certificates of Assessments and Payments a defendant taxpayer will be deemed to have failed to meet the burden of proof when they have admitted to their tax liability and failed to respond to the Motion for Summary Judgment. Upon a ruling of summary judgment

against a taxpayer who has transferred real property into sham trusts or to nominees for nominal consideration with the intent of becoming insolvent in order to hinder, delay, or defraud creditors, any assets held in the trust, by the nominee, or by an alter-ego of the taxpayer will be subject to the tax lien of the creditor. Where a codefendant has recorded a valid final judgment in the property records of the county where defendant's property is located, an enforceable lien is created and the codefendant is entitled payment from the sale of the property subject to any higher priority liens.

Abstractor: Jeremy H. Yarbrough, 2L

COMMENT (CB): The Neals' admitting their liability of the federal taxes and admitting that the trusts were both sham trusts and alter egos of the taxpayer allowed the court to dispense with the facts quickly. However, the case still stands for the proposition that Arkansas statutes do not allow fraudulent conveyances by property owners to avoid judgment liens. In order to set aside a conveyance on the theory of fraudulent conveyance, a court will analyze the facts using the three factors set forth in the summary above. If the court makes the determination that the conveyance was fraudulent, the court will allow the judgment creditor to foreclose on the real property. Further, the court reaffirmed the holding that foreign judgments may be enforced in Arkansas against real property when the judgment is properly recorded where the judgment debtors' real property is located.

Guardianships

[Smith v. Thomas](#)

CA 07-1170

2008 WL 2055207, 373 Ark. 427

May 15, 2008

NOT DESIGNATED FOR PUBLICATION

Robert L. Brown, Associate Justice.

FACTS: Bryan Smith and Dandra Thomas had a nonmarital child in 1998. The child resided with Thomas until her death in 2003. Thomas's parents petitioned the circuit court to be appointed guardians of the child; Smith counter-petitioned for guardianship. The circuit court found that it was in the best interests of the child to live with his grandparents, as Smith could not provide the stability that the child needed because he was a full-time college student. The court granted permanent guardianship to the Thomases, and ordered Smith to pay \$130 in child support. Smith was granted visitation rights.

In 2004, the Thomases petitioned the circuit court to limit Smith's visitation rights. They alleged that he was living with a woman he was not married to, and refused to inform them of his whereabouts during his visitation with the child. They also alleged that Smith displayed poor parenting skills, and requested that the court order him to take parenting classes. Smith filed a counter-motion to terminate the Thomases' guardianship. The circuit court refused to modify Smith's visitation rights, but did order him to attend parenting classes. The judge also ordered mediation to improve communication between Smith and the Thomases.

Two years later, Smith moved to terminate the guardianship. He had married his fiancé and alleged that he had a stable income to provide for his son. In addition, he had maintained contact with the child since he was granted visitation rights. The circuit judge denied Smith's motion. The judge cited Smith's failure to complete the previously ordered parenting class, his inconsistent statements about his smoking habit, a domestic battery incident at Smith's home, Smith's failure to finish college, and Smith's "bad feelings" toward the Thomases as reasons for his decision. Smith and the Thomases were also ordered to continue mediation to resolve the visitation issues. Smith appealed.

RULES AND ANALYSIS: The issue on appeal concerned whether Smith should have been given preference over the Thomases for custody of the child because he was qualified. While the law prefers a parent over a grandparent or other third party, unless the parent is incompetent or unfit, the best interests of the child is considered the key factor in such determinations. *Devine v. Martens*, 371 Ark. 60, 263 S.W.3d 515 (2007). In its ruling, the circuit court relied on the holding in *Freeman v. Rushton*, 360 Ark. 445, 202 S.W.3d 485 (2005). Grandparents were preferred as guardians in that case because the father had not spent much time with the child, and the grandparents had been the primary caregivers of the child, as he had lived with them since birth. The circuit court used the analysis from *Freeman* to determine that it would be in the child's best interests in the case to remain with his grandparents, as he had lived with them most of his life in a stable and caring home. The circuit court's ruling correctly placed the natural-parent preference as subservient to the best interests of the child.

HOLDING AND DISPOSITION: While a child's parent is the preferred guardian, the key

consideration for the court is the child's best interests. The Supreme Court upholds the circuit court's placement of the child's best interests before the natural-parent preference in determining that the Thomases should remain his guardians. Affirmed.

Abstractor: L. Michelle Simpson, 1L

[Worley v. Spradlin](#)

CA 08-710

2009 WL 619190, 2009 Ark. App. LEXIS 138

March 11, 2009

NOT DESIGNATED FOR PUBLICATION

David M. Glover, Judge.

FACTS: In January 2004, Khara Spradlin was killed in a motorcycle accident. She left behind a 21-month-old daughter, Karissa, who was also injured in the accident. In February 2004, the Spradlins, with the consent of their son, Karissa's father, who was then incarcerated, petitioned the court for an appointment of guardianship of Karissa. At the time that they petitioned for custody, the Spradlins had not informed Karissa's maternal grandparents, the Worleys. The Spradlins were granted guardianship in February 2004, which they accepted. In August of 2007, the Worleys filed a motion for leave to intervene, arguing that they had equally shared in the responsibility of caring for Karissa with the Spradlins after their daughter's death; that the Worleys had not notified them of their intent to petition for guardianship or the guardianship; that the consent from Karissa's father was obtained while he was incarcerated; and that the Spradlins had engaged in conduct that was against her best interest. The trial court granted the motion and allowed them to fully participate in the hearing of whether guardianship should remain with the Spradlins or be changed to the Worleys.

After the hearing, and at the request of the Spradlins, Mr. Spradlin removed himself as a guardian because he was convicted felon. He had been convicted of vehicular homicide in 1988, and had his record expunged in 1991; however, he had not been pardoned. The court decided that Mrs. Spradlin should remain guardian over Karissa. The Worleys appealed this decision.

RULES AND ANALYSIS: On appeal, the Worleys first argued that they were entitled notice of the Spradlins' petition for guardianship under Ark. Code Ann. § 28-65-207 because they provided care for Karissa immediately following the death of her

mother. Ark. Code Ann. § 28-65-207 states that notice of the hearing of the application for the appointment of the guardian shall be served upon 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. The court concluded, that even though the Worleys waited over three years to petition the Spradlins appointment of guardianship, since at the time that they requested a hearing, they were granted one, their due process rights were not violated.

The second and third issues were handled together because the court concluded that they were intertwined. The Worleys argued that the court based its decision to fail to grant their motion for substitution of guardians on the change-of-custody standard; whether or not there had been a material change in circumstances, rather than the on the best interest of the child. The Worleys further argued that under the best interests standard, the trial court's decision for Melba Spradlin to remain guardian was clearly erroneous. However, the court concluded that the trial court was statutorily required to consider the wish of the child's surviving parent, and he wished that Karissa remain with the Spradlins. The court also requested the testimony of an *ad litem* attorney, who stated that it would be in Karissa's best interest to remain with the Spradlins, with visitation from the Worleys. The court concluded that the Worleys had failed to present evidence that demonstrated that it would be in the best interest of Karissa to set aside guardianship with the Spradlins, and to grant it to the Worleys. The trial court did not err when determining that it was in the best interest of Karissa to remain with the Spradlins.

HOLDING AND DISPOSITION: Where an appointment of guardianship is challenged three years later, and challenging party is granted a full hearing, failure of notification of the original petition will not be a violation of the challenging party's due process or notice rights. Where there is no credible evidence provided at trial that would demonstrate that the guardianship should be changed, the court will make a determination based on what is in the best interest of the child. Affirmed.

Abstractor: Martinque Parker, 1L

Young v. Young

CA 08-212

WL 5176763, 2008 Ark. App. LEXIS 826

Ark. App., 2008

December 10, 2008

NOT DESIGNATED FOR PUBLICATION

Josephine Linker Hart, Judge.

FACTS: Helen V. Young established a trust benefitting herself and her sons. In 2004, appellant Robert Young, one of her sons, sued for a declaratory judgment. The appellees, Ms. Young and the other sons (who were minors) counterclaimed for a judgment against Robert. In findings announced from the bench in 2006, the probate division judge stated that Robert had procured a 2003 amendment to the trust, and invalidated it. The judge also found that Robert had exerted undue influence on Ms. Young, who suffered from dementia. The judge ordered Lauren Adams, the guardian of Ms. Young's estate, to file an accounting, and found that every document signed by Ms. Young after June 2003 had been procured and was void.

In February 2006, Ms. Adams filed her report with the court. It stated that Robert's family had received substantially more than the other brothers, that he had refused to turn over his mother's Social Security income, and that the Social Security Administration had opened an investigation into whether any of the funds were misappropriated. In May Ms. Young died.

On February 2007, Mr. Young's siblings, relying on Ms. Adams's accounting, filed a motion for judgment seeking \$201,651.58, plus interest. A hearing on the motion was scheduled for September 26, 2007. Mr. Young notified the court that the date of September 26, 2007 conflicted with his schedule, but failed to provide any alternative dates. On August 21, 2007, the court informed the parties that the hearing would proceed as scheduled.

On September 11, 2007, Mr. Young filed his response to the motion for judgment. Mr. Young stated his intent to participate by phone, since he lived in New Mexico. He stated that if the hearing was to be more than a status hearing, he would need to call witnesses and would have to attend in person. Mr. Young claimed that he had never received a copy of the accounting and requested a copy. He requested that the court defer approval of the accounting until he

had an opportunity to review it. On September 14, 2007, the court informed all the parties that they were expected to be prepared for the September 26, 2007 because it had been scheduled since July 31, 2007, and asked for Mr. Young's phone number.

On September 26, 2007, at the beginning of the Mr. Young's attorneys, participating by phone, inquired as to what type of hearing it was. The court informed Mr. Young's attorneys that the message of the September 14, 2007 letter was clear and that the hearing was one where witnesses would be heard, evidence introduced, and the matter presented for decision. Mr. Young's attorneys requested a continuance because Mr. Young had neither been "formally" provided with a copy of the accounting, nor had an opportunity to do discovery or review the supporting documents. The hearing proceeded as scheduled because the court felt that one year was enough time to conduct discovery. Mr. Young's attorneys respectfully declined to participate in the hearing. During the hearing, Ms. Adams reported that Mr. Young had received \$168,167.70 in overages from the trust, \$26,579 in Mrs. Helen Young's Social Security checks, and \$6,904.88 in attorney's fees to which he was not entitled. On October 9, 2007, the trial court entered judgment against Mr. Young for the trust in the amount of \$201,651.58, plus prejudgment interest, and attorney's fees of \$65,300. Mr. Young appealed.

RULES AND ANALYSIS: Mr. Young raised eight issues on appeal. Many of them concerned the September hearing; he argued that the trial court abused its discretion in refusing to continue the September 26, 2007 hearing and in denying him the opportunity to investigate the accounting. The court found no abuse of discretion, stating that "only an utter lack of diligence could explain Mr. Young's failure to even begin discovery about the accounting long before the hearing." Mr. Young argued that the guardian's report was so deficient that it did not amount to an accounting, and that it had never been distributed. However, the court found that testimony clearly established the contrary.

Mr. Young argued that the trial court erred in awarding judgment to the trust for two claims belonging to the guardianship, which was not a party to the September 26, 2007 hearing. The court found no reversible error in the award because Ms. Young's will had a "pour-over" clause, making it appropriate to award the entire judgment to the trust.

Mr. Young next contended that the trial court was not authorized to award attorney's fees under the Arkansas Trust Code, which was not enacted until after the initial suit was filed. However, Ark. Code Ann. § 28-73-1106 clearly states that the ATC applies to all trusts created before Sept. 1, 2005, and all judicial proceedings concerning trusts initiated after that date. There are a few exceptions but none are relevant to this case. Interestingly, Mr. Young originally filed his suit in 2004, but the guardian issued her report in 2006 and the 2007 hearing related directly to the report.

Finally, Mr. Young argued that the attorneys' fees were excessive, and contended that the trial court simply "rubber-stamped" the fees claimed by appellees' attorneys, erroneously including some services rendered in relation to Mrs. Young's probate proceedings and the litigation over Paul Young, Jr.'s trust. A trial judge is not required to award attorney's fees. *Meyer v. CDI Contractors, LLC*, 102 Ark.App. 290, ___ S.W.3d ___ (2008). Here, Mr. Young had failed to demonstrate how the trial judge abused his discretion in awarding attorney's fees, especially in light of the years spent in litigation and the size of the judgment.

HOLDING AND DISPOSITION: Where a party has received sufficient notice of a hearing, and where an accounting has been mailed to the party over a year in advance of the hearing, failure to conduct discovery will not cause a court to set aside a ruling of the judge. Attorneys' fees may be awarded under the Arkansas Trust Code with regard to trusts created before Sept. 1, 2005.

Abstractor: Jason M. Johnson, 1L

Heirs

**[Finley v. Astrue \(Finley I\)](#)
372 Ark. 103, 270 S.W.3d 849
January 10, 2008**

Editor's Note: The three Finley cases concern the same set of facts, which are set out only once, under Finley I. Finley I is not within the scope of time of opinions included in this issue, but it is the authority for Finley II and III, and is arguably the most important case in this issue, in terms of policy and its implications for the future.

Paul E. Danielson, Judge.

FACTS: On October 6, 1990, Wade and Amy Finley were married. During the marriage, Amy pursued fertility treatments at the University of Arkansas for Medical Sciences (“UAMS”) and participated in the UAMS In Vitro Fertilization and Embryo Transfer Program. In July 2001, doctors produced ten embryos using Wade and Amy’s sperm eggs. Two embryos were implanted in Amy’s uterus and four of the remaining embryos were frozen for preservation. Shortly thereafter, however, Amy suffered a miscarriage of both implanted embryos. On July 19, 2001, Wade Finley was fatally electrocuted while in the course of his employment with Farm Cat, Inc. On June 26, 2002, Amy had two of the remaining four embryos implanted in her uterus, which resulted in a single pregnancy. On February 14, 2003, prior to the birth, the Lonoke County Circuit Court ordered that upon the baby’s birth, the State Registrar of the Arkansas Department of Health, Division of Vital Records should enter Wade Finley, Jr. as the baby’s father and that all federal and state agencies of the United States should uphold the conclusion of paternity and that the baby when born would be the legitimate child of Wade Finley, Jr. and Amy Finley for any and all lawful purposes.

Wade Finley III was born on March 4, 2003. On April 4, 2003, Amy filed for both mother’s and child’s insurance benefits from the Social Security Administration based on the earnings record of Mr. Finley. These claims were denied on the initial and reconsideration levels but an Administrative Law Judge issued a decision on June 16, 2006 awarding both mother’s and child’s benefits. On December 14, 2006, the Appeals Council reversed the ALJ’s decision, finding Amy’s claims without merit. On October 13, 2006, Amy filed her petition in district court, appealing the Commissioner’s final decision. The parties filed a joint motion to certify the issue and stay briefing before the district court. The motion was granted and the issue was certified to the Arkansas Supreme Court.

RULES AND ANALYSIS: On certification, the issue was whether a child implanted after his father’s death by in vitro fertilization may inherit from the parent under Arkansas intestacy law as a posthumous child. Under 42 U.S.C. § 402(d), a child is entitled to child’s insurance benefits if he is the child of an individual who dies while insured and if the child was dependent upon the insure prior to the insured’s death. Child is defined as “the child or

legally adopted child” of an individual. 42 U.S.C. § 416(c). In determining whether a claimant is the “child” of a deceased insured, the Commissioner is instructed to apply such law :as would be applied in determining the devolution of intestate personal property... by the courts of the State in which [the insured] was domiciled at the time of his death.” 42 U.S.C. § 416(h)(2)(A).

The court explained in vitro fertilization in its opinion. The process entails sperm and eggs being placed in a petri dish and being incubated. After existing for three to five days, the embryos are implanted in the woman’s uterus, usually several at a time. In order to inherit as a posthumous child in Arkansas, the child must be conceived prior to the decedent’s death and born after the decedent’s death. Ark. Code Ann. § 28-9-210(a). Amy Finley argued that Wade III was conceived before his father’s death. She argued that the Arkansas legislature was aware of in vitro fertilization because it mandates its coverage by insurance companies. Ark. Code Ann. § 23-85-137.

The court began its analysis with statutory interpretation, attempting to divine the intent of the legislature and noting that the posthumous heir statute was enacted in 1969, well before the first in vitro fertilization in 1978 and cryopreservation in 1984. It summarized authority from other states, which is split. [At this time only a handful of states have decided this question.] In any case, case law interpreting statutes of other states is of no use in interpreting Arkansas statutes. The court declined to define the word “conceive,” stating this in this context such a definition would make public policy, which is not the job of the court. It strongly encouraged the legislature to address the issue. The court’s main reason for its decision, that the child was not an heir, was that since the process did not exist in 1969, the legislature could not have intended the statute to cover it. Amy argued that the legislature was aware of assisted reproductive technologies by virtue of statutes regarding artificial insemination. The court pointed out that artificial insemination and in vitro fertilization are two “completely different procedures.”

HOLDING AND DISPOSITION: A child created as an embryo through in vitro fertilization during his parents’ marriage, but implanted into his mother’s uterus after the death of his father may not inherit from the father under Arkansas intestacy law as a surviving child. The certified question is answered in the negative.

Abstractor: Jaletta Long Smith, 2L

COMMENT (CB): The court appears to be overly concerned with defining the term “conceived” and the implications of a decision on favor of the plaintiff on the finality of probate estates. There are many statutes that do not specifically address every situation, especially when technology was not invented or even contemplated at the time these statutes were adopted. The court does strongly urge the legislature to revisit the intestacy succession statutes to address the issues involved in the instant case and those that have not but will likely evolve. Our legislatures do not have the time to review every statute and amend every statute as technology is developed. The legislature specifically mentioned artificial insemination in the statute, as this was the most advanced technology at the time, and the court could have inferred that the legislature’s intent was to provide for posthumous children conceived through artificial means. This would have allowed them to defer to the legislature on the definition of “conceived,” while still keeping with the true intent of the statute.

COMMENT (LF): This case presents the clash of two policies: the orderly distribution of estates, and the welfare of children. It is true that artificial insemination and in vitro fertilization are two totally different processes, but they are meant to achieve the same end—the birth of a child who could not otherwise be born—and in the context of inheritance should be treated the same. Another approach to this issue might have been to start with a presumption that the child is an heir, but if there is clear and convincing evidence that the decedent intended otherwise, to disallow inheritance. In the context of estate planning, this is another strong argument in favor of a will and/or trust for couples undergoing fertility treatment, since the intestate succession statutes may not come to the assistance of the mother. I wonder whether UAMS advises couples undergoing treatment to see a lawyer because of this issue. Finally, note that the Supreme Court did not discuss the order of the Lonoke County Court except to include the Commissioner’s arguments against it.

[Finley v. Farm Cat, Inc. \(Finley II\)](#)

103 Ark. App. 292, ___ S.W.3d ___

2008 WL 4724076, 2008 Ark. App. LEXIS 748

October 22, 2008

Larry D. Vaught, Judge.

FACTS: After Wade’s death, Amy filed for workers’ compensation benefits, claiming that the child was the dependent child of Wade Finley, Jr., and was entitled to benefits under Ark. Code Ann. §

11-9-527(c). The Administrative Law Judge issued an opinion finding that the preponderance of the evidence established that Wade Finley, III, was entitled to dependency benefits. On appeal, the Commission reversed the ALJ determination. Amy Finley appealed from the Commission decision.

RULES & ANALYSIS: The primary issue was whether Amy and Wade Finley’s child was entitled to workers’ compensation benefits under the Arkansas workers’ compensation scheme. Under that scheme, “compensation for the death of an employee shall be paid to those persons who were wholly and actually dependent upon the deceased employee.” Ark. Code Ann. § 11-9-527(c). All questions of dependency are determined as of the time of injury. Ark. Code Ann. § 11-9-527(h). Dependency is a fact question that can be determined from the surrounding circumstances at the time of the compensable event. In cases where children are not living with the employee at the time of the employee’s death, actual dependency must be shown. Actual dependency does not require a showing of total dependency but rather a showing of actual support or a reasonable expectation of support. Here, Amy argued that the child had a reasonable expectation of support from his father because at the time of his death, they were paying embryo storage fees to UAMS. However, the court found that there fees were not the type of actual support or reasonable expectation of support envisioned by the statutory language and construed in *Lawhon Farm Servs. v. Brown*, 60 Ark. App. 64, 958 S.W.2d 538 (1997). There, the court considered support to be food, clothes, transportation, housing, utilities, furniture and toys.

The court refused to determine whether Wade III was a person at the time of the injury. Despite the fact that, unlike the probate code, the worker’s compensation statute does not require that a posthumous child be conceived before the claimant’s death, the fact that substantial evidence supported the Commissioner’s findings that Wade III was not dependent meant that it was unnecessary for the court to define the term “person” for the future. The court found that this argument was not preserved for appeal because it was not raised below. Amy countered that it was futile to raise it for the administrative proceedings because the commission did not have the power to overrule the Arkansas Supreme Court or make rulings on the probate code. The court disagreed, stating that even arguments of a constitutional dimension must be argued below to be

preserved for appeal.

HOLDING & DISPOSITION: A child conceived and born after its father's death cannot receive workers' compensation benefits due to dependents.

Abstractor: Jaletta Long Smith, 2L

Finley v. Astrue (Finley III)

___ F. Supp. 2d ___ (E.D. Ark.), 2009 WL 499486
February 25, 2009

J. Thomas Ray, U.S. Magistrate Judge.

FACTS: See Finley I, above, for the facts prior to those following. This is the last of the Finley cases, decided by the federal district court after the Supreme Court answered its certified question, discussed in Finley I.

RULES AND ANALYSIS: The court addressed several on appeal. The first was whether the Commissioner violated the plaintiff's son's right to equal protection under the 14th Amendments. The Equal Protection argument had two distinct components. First, the plaintiff argued that the intestacy law as applied by the Commissioner created a new class of children, conceived by in vitro fertilization in Arkansas, who are deprived of certain rights solely because of the way they were conceived. The court did not find a suspect classification or fundamental right, and therefore applied the rational basis test. The plaintiff argued that three cases supported her claim of denial of equal protection under the rational basis test: *Jimenez v. Weinberger*, 417 U.S. 628 (1974), a case invalidating two classes of nonmarital children, one of whom could receive Social Security benefits and the other who could not. The second case, *Mathews v. Lucas*, 427 U.S. 495 (1976), invalidated a statute that presumed that marital children were dependent but nonmarital children were not. The final case was the landmark decision of *Trimble v. Gordon*, 430 U.S. 762 (1977), holding an Illinois statute unconstitutional that precluded all nonmarital children from inheriting from their fathers. However, the Arkansas Supreme Court's decision did not distinguish between marital or nonmarital status, but focused on children "created" through in vitro fertilization. The state has a legitimate interest in protecting against a possible outcome of an IVF child reopening a father's estate years after the father's death.

Next, the plaintiff argued that 42 U.S.C. § 416(h)(2)(A) creates the possibility that claimants

will be treated differently on a state by state basis because it incorporates state intestacy laws. The statute, as interpreted, applies in the narrow circumstance of children who are implanted in the womb after the death of their father. The court also applied rational basis review to the second claim under equal protection. The court determined that the incorporation of state intestacy statutes into the federal law is rationally related to legitimate government purposes. Specifically, the incorporation of state intestacy law furthers the purpose of benefitting those children that Congress perceives as most likely being dependent upon the deceased wage earner for support, and furthers administrative convenience by avoiding case-by-case determinations.

Third, the plaintiff argued that the Commissioner erred in not giving full faith and credit to the Lonoke County Circuit Court's order declaring Wade III to be a legitimate child. Under the full faith and credit clause, federal courts must give state court judgments the same preclusive effect those judgments would be given in the courts of the states rendering them. The court determined that the statute did not apply to the Lonoke Circuit Court order for two reasons: 1) because it only established the paternity of her son and 2) because the Arkansas Supreme Court overrides any arguably contrary holding by the lower court.

Finally, the plaintiff argued that a federal case with similar facts, but construing Arizona law, and several state cases from other states should be authoritative. However, the court stated that it was "not the role of the Court to pick and choose among alternative constructions of an Arkansas statute after the Arkansas Supreme Court has interpreted the statute as requested by the parties and the Court."

HOLDING AND DISPOSITION: To disallow Social Security benefits to a child conceived by IVF after the death of its father, under Arkansas intestacy law, is not a denial of equal protection. For the Commissioner not to follow a circuit court order basically superseded by a subsequent Arkansas Supreme Court decision is not a violation of the full faith and credit statute.

Abstractor: Jaletta Long Smith, 2L

Irrevocable Trusts

Scroggin v. Scroggin

No. CA 07-1011

103 Ark. App. 144, ___ S.W.3d ___

2008 WL 4149922

Sept. 10, 2008

Eugene Hunt, Judge.

FACTS: Joseph Scroggin died intestate on February 12, 1956, survived by his widow Eva Scroggin and their six sons. At the time of his death, Joseph owned substantial property in Conway County. In 1959, the six sons executed a trust that provided that they would convey the property in trust to one son, Afton, so that it could be sold or mortgaged and the proceeds used to benefit Eva. At her death, the remainder was to be divided equally between the sons per stirpes. On the same day, Eva, the sons and their spouses all executed a deed conveying the property to Afton as trustee.

In 1971, Afton, as trustee, conveyed the property, reserving 50% of the oil, gas and mineral rights. In 1985, Afton, as trustee, amended the trust to appoint Benny (another son) as the successor trustee at Afton's death. Eva died intestate in 1999, at the age of 102. By 2002, three of the sons had also died. In September 2005, Wilhelmina (a surviving spouse of a son) executed an oil and gas lease for the property, later testifying that she received \$2,400 from the lessee. One month later, Benny, acting as trustee, executed a similar lease with the same lessee. In March 2006, several surviving spouses and heirs filed a complaint to determine heirship. The complaint asserted that no trust was created; that the conveyance to the trustee should be set aside; and in the alternative, that the court should consider the conveyance to the trustee as benefitting all of the heirs. The three surviving sons and their spouses answered and filed a motion for summary judgment, arguing that the appellees' claims were barred under either the seven-year or five-year statutes of limitation. Ark. Code Ann. §§ 18-61-101 and 16-56-115. Appellees also moved for summary judgment, requesting that a trustee should be appointed to terminate the trust and distribute the proceeds. Appellants moved to strike appellees' motion for summary judgment, contending that it violated Ark. R. Civ. P. 56(a), being filed less than 45 days before a scheduled trial date.

The circuit court issued a letter opinion, finding that the primary purpose of the trust was to use the property to provide for Eva during her life, and that the trust terminated at her death. The court found the trust to provide that if a son was deceased at the time of termination, the son's interest would pass to his heirs. The court found that the appointment of Benny was invalid, as well as any conveyances executed by Benny. The court found that Wilhelmina was entitled to all of Edwin's (a son's) 1/6 interest in the property. Appellants appealed.

RULES AND ANALYSIS: On appeal, there were four issues. First, the appellants asserted that the statute of limitations began to run at the death of Eva, and no matter which period was used, the five-year or seven-year, that the appellees' claims were now barred. The court stated that whereas statutes of limitation can bar claims for the recovery of a share of an estate, the statute of limitations does not begin to run until an issue of "pecuniary consequence" arises. *McDermott v. McAdams*, 268 Ark. 1031, 598 S.W.2d 427 (Ark. Ct. App. 1980) (ruling on § 16-56-115). Here, there was no evidence that any of the appellees made a demand for a distribution of the trust property that would trigger the statute of limitations. The only such event was the execution of the mineral leases.

With respect to the late filing of the appellees' motion for summary judgment, the court ruled that since the appellants did not allege that they suffered any prejudice, the case could not be reversed on that ground. *Keenan v. Am. River Transp. Co.*, 304 Ark. 42, 799 S.W.2d 801 (1990).

Third, the court agreed with the appellees that the appointment of Benny as successor trustee and the lease of mineral interests by Benny were void. Under the case law at the time, a trustee had no power to appoint a successor unless the trust conferred such authority or a court approved it. Similarly, the leasing of the mineral interests was void.

Finally, appellants disputed the trial court's ruling that Wilhelmina, Edwin's surviving spouse, was entitled to 1/6 share. They argued that she waived any interest by releasing her dower rights in 1959. However, the court reasoned because Wilhelmina and Edwin were married for three years and had no children, the estate passed to her as an heir. Ark. Code Ann. § 28-9-214.

HOLDING AND DISPOSITION: Neither Ark.

Code Ann. §§ 18-61-101 nor 16-56-115 begin to run until an act of pecuniary significance has occurred. The leasing of mineral rights by a trustee is such an act of pecuniary significance.

COMMENT (DH): Here, the court said that the time for measuring limitation of actions in petitioning for trust termination began when the trustee either repudiated the trust or gave notice to beneficiaries when he was holding trust property adversely to them. An event constituting a “pecuniary consequence” to the beneficiary initiates the limitations period. This seems to mean an event which affects the financial interest of a beneficiary. For example, the trustee repudiating the trust or taking action which the beneficiary knows or should know was notice that the trustee was claiming adversely to them, thus affecting their beneficial interest.

COMMENT (LF): As I read this case, I wondered why the Arkansas Trust Code didn’t apply to the issue of termination. If the parties are suing to set aside a deed, then the applicable statutes of limitation are the ones cited. But if the question is the termination of a trust, then it seems to me there should be no statute of limitations at all. What if the plaintiffs had waited ten years after the lease? If the appellants won, when could the trust ever be terminated? Would it exist until it was terminated by the Rule Against Perpetuities? Here, the trust instrument stated that it would terminate at the death of Eva. Once Eva has died, the beneficiaries should be able to sue at any time. A trust terminates to the extent that no purpose of the trust remains to be achieved. Ark. Code Ann. § 28-73-410. With respect to the successor trustee, the court cited case law as authority. What if the issue arose today? Afton would have been able to resign. Ark. Code Ann. § 28-73-705. The resulting vacancy would be filled in this order of priority: 1) a person designated by the trust to be the successor (there was none here); 2) a person appointed by unanimous consent of the qualified beneficiaries; or 3) a person appointed by a court. If all qualified beneficiaries agree there is no need for a court proceeding.

Personal Representatives

Hartsfield v. Lescher

104 Ark.App. 1, ___ S.W.3d ___
2008 WL 4822976, 2008 Ark. App. LEXIS 779
November 5, 2008

Josephine Linker Hart, Judge.

FACTS: Hartsfield was the trustee of the George Wright Lescher Trust (“Lescher Trust”) during the lives of the four beneficiaries of the trust. George Hamilton Lescher, the final beneficiary, died on April 17, 2003. On June 17, 2003, Hartsfield petitioned to have the holographic will of the decedent, which devised all “things” to Hartsfield, admitted to probate and to have himself named as personal representative. On May 27, 2004, the children of the decedent petitioned to have the will set aside and Hartsfield removed as the personal representative. The petition also requested that the probate court order that Hartsfield provide an accounting detailing all property and funds received and distributed since the death of their father as well as for the time Hartsfield served as trustee of the Lescher Trust.

The probate court set aside the holographic will on February 7, 2006, after finding that the decedent lacked testamentary capacity and that the will was a result of Hartsfield’s undue influence. The court also removed Hartsfield as personal representative of the estate. The order of the court also specifically reserved ruling on the request for an accounting of the Lescher Trust. Afterwards, Hartsfield filed a notice of appeal for the reserved ruling order, but failed to perfect it because he did not timely file the transcript. On February 14, 2007, the probate court entered an order requiring Hartsfield to file an accounting within forty-five days detailing all assets and funds he had administered during his time as the trustee of the Lescher Trust. Hartsfield was thereafter granted additional time to file on March 21, 2007, at which time the probate court set a review hearing for June 27, 2007.

At the review hearing, Hartsfield asserted for the first time that the probate court did not have the jurisdiction to order the accounting. The trial court found merit in the assertion. At that time, Hartsfield conceded that he failed to file an accounting of the estate in his capacity as personal representative because he was “not familiar with the Probate Code with respect to the filing of an accounting.” The

probate court allowed Hartsfield an additional thirty days to submit the accounting. The court awarded attorney fees to the estate; compensation to a witness for lost earnings resulting from having to attend the hearing; and travel expenses and lost earnings to the personal representative. Hartsfield appealed.

RULES AND ANALYSIS: There was one issue on appeal: the validity of the sanctions in regards to the requirements of Rule 54(d) and (e) of the Arkansas Rules of Civil Procedure. Under Arkansas law, attorney's fees are not allowed except where expressly provided for by statute. The decision to award attorney's fees and the amount awarded are reviewed under an abuse-of-discretion standard. *Calvert v. Estate of Calvert*, 99 Ark. App. 286, 359 S.W.3d 456 (2007). Arkansas courts are given express authority to assess any costs against the personal representative that are "incurred by reason of his or her neglect of duty." Ark. Code Ann. § 28-52-103(c)(2). The court thus ruled that the attorneys' fees and expenses given to appellees were not an award of fees and costs pursuant to Ark. R. Civ. P. 54, but were rather "a tool of enforcement made available to the probate court through the probate code." Ark. Code Ann. § 28-52-103(c)(2).

HOLDING AND DISPOSITION: When the personal representative fails to file the required accounting of the estate it constitutes a neglect of duty. Under the probate code, courts may award any costs that result from this neglect of duty by the personal representative. Affirmed.

Abstractor: Jeremy H. Yarbrough, 2L

COMMENT (GSBP): This case expands the typical notion of "costs" from the way that the term is used in Arkansas Rules of Civil Procedure. Under this section of the Probate Code, the term "costs" includes lost earnings and travel expenses of witnesses. It is obvious that the trial court was not pleased that the personal representative waited until the hearing to raise the jurisdictional issue and to advise the parties that the accounting had not been prepared. The trial court wanted to punish the personal representative and used Ark. Code Ann. §28-52-103(c)(2) to do it. The Court of Appeals was careful to note that these expenses were levied as a sanction as opposed to traditional costs awarded under Rule 54.

Hensley v. Estate of Reddell

No. CA 07-1291

2008 WL 2268352, 2008 Ark. App. LEXIS 461

June 4, 2008

NOT DESIGNATED FOR PUBLICATION

D.P. Marshall, Jr., Judge.

FACTS: Brian Smith, the driver, and Brian Reddell, a passenger, were killed in a motor vehicle accident in 2003; Michael Hensley, another passenger, survived. On February 26, 2006, Hensley filed a petition for the appointment of an administrator for Reddell's estate and nominated David Davies, a Conway attorney. The circuit court appointed Davies as administrator that day. The next day, Hensley filed a personal injury complaint against the estate of Brian K. Reddell. The summons was issued in the name of Davies. The following May, the estate moved for summary judgment, arguing that the case must be dismissed because Davies had not been sued in his capacity as administrator. The estate also argued that Davies was actually a special administrator, appointed for the sole purpose of accepting service of the complaint, but that a special administrator could not be appointed for this sole purpose, and also argued that the statute of limitations had run, as well as several similar arguments. On September 17, 2007, the circuit court entered summary judgment for the estate, holding that the suit was not brought in the name of the real party of interest and that Davies was a "special administrator appointed solely for the purposes of accepting summons." Hensley appealed.

RULES AND ANALYSIS: On appeal, the court ruled on two issues. First, Hensley argued that summary judgment was improper because the summons was issued to the administrator and there was no confusion as to the identity of the true defendant. The court agreed that whether Davies was a special administrator or a general administrator was a question of fact, and thus summary judgment was improper. Second, the circuit court erred by not allowing Hensley to substitute Davies as the defendant. Davies was the proper party to sue. Davies was also a necessary party. Ark. R. Civ. P. 15(c) gave the circuit court the authority to permit Hensley to amend his complaint, which would then relate back to the original complaint.

HOLDING AND DISPOSITION: Regardless of whether the administrator is general or special with the sole task to accept service of process, Arkansas statutes and the Ark. R. Civ. P. allow amendment of a

complaint issued to the estate's administrator personally. Reversed and remanded.

Abstractor: Amy Szczepanik Tracy, 2L

Kelly v. Estate of Edwards

No. 08-1234

2009 WL 412894, [NO LEXIS CITE FOUND]

Feb. 19, 2009

Annabelle Clinton Imber, Associate Justice.

FACTS: In 1996, Kenneth Edwards, Jr. pled guilty to two felony charges in Washington County circuit court. The circuit court entered a judgment and disposition order based on the guilty plea. In November 1996 Edwards petitioned the Supreme Court to remove him from the list of licensed attorneys, acknowledging that his conviction was a violation of the Arkansas Rules of Professional Conduct. In 2003, Edwards filed a petition seeking appointment as the administrator of his father's estate. The Sebastian County circuit court, probate division, granted the petition in November 2003. In November 2004, Edwards filed a wrongful death complaint against the appellants, Thomas Kelly M.D. and the Cooper Clinic, PA. In October 2005, in deposition testimony in the wrongful death case, Edwards acknowledged that he had been charged but claimed that there had been no conviction and that the file was sealed. In November 2005, the Washington County circuit court granted Edwards's petition to expunge his record.

In July 2006, the appellants moved for summary judgment alleging that Edwards was not qualified to serve as administrator because he was a convicted felon. In October 2006, the circuit court dismissed the lawsuit in favor of the appellants, finding that Edwards was a convicted felon at the time of his appointment. The court also declared as void the order appointing Edwards as administrator. On appeal, the Supreme Court of Arkansas reversed and remanded, finding that the civil division of circuit court usurped the authority of the probate division of circuit court in ruling on Edwards' appointment. *Edwards v. Nelson*, 372 Ark. 300, ___ S.W.3d ___ (2008). On remand, appellants filed a motion to intervene in the probate case, but the motion was denied on the grounds that the appellants did not have an interest in the probate proceeding, and they failed to make timely application to intervene. The doctor and clinic appealed.

RULES AND ANALYSIS: There were two issues on appeal, which the court discussed together. The first and second issues concerned whether the probate court abused its discretion in denying appellants' motion to intervene 1) as a matter of right or 2) under permissive intervention, as set forth in Ark. R. Civ. P. 24. A threshold question in determining whether intervention should be allowed under either provision is whether the application was made in a timely manner. Timeliness is to be determined from all the circumstances, with three factors to consider: 1) how far the proceedings have progressed; 2) prejudice to other parties which would be caused by an intervention after said delay; and 3) the reason for the delay. *McLane Company, Inc. v. Davis*, 342 Ark. 655, 33 S.W.3d 473 (2000).

As to the first factor, the court observed that the appellant's petition to intervene was filed almost four years after the order appointing the administrator was filed. The wrongful death suit was filed in November 2004, and appellants did not raise the issue of validity of appointment until July 2006 when the time for contesting the appointment order had expired. As to the second factor, because of the long lapse of time, the estate could be prejudiced if appellants intervened. If Edwards was disqualified as administrator, the wrongful death action would be subject to dismissal and a refile of the suit would be barred by the statute of limitations. Finally, the reason for the delay was unpersuasive. Appellants could have investigated the status of Edwards's qualification to serve as administrator at any time after the suit was filed. His conviction was a matter of public record until it was sealed in November 2005. Thus the court ruled that the probate judge did not abuse his discretion in finding that the appellants' petition to intervene was untimely.

HOLDING AND DISPOSITION: To intervene in a proceeding, either as a matter of right or under permissive intervention, the court must find that the threshold inquiry of timeliness has been met. Where an intervention would be untimely under the three factor analysis, the motion to intervene will be denied. Affirmed.

Abstractor: Anne M. Milligan, 2L

COMMENT (CB): This opinion illustrates the separation of powers between the Circuit Court's probate and civil divisions. A civil division does not have the authority to void a probate division's order, nor does a probate division have the authority to void a probate division's order. Further, it appears the

Arkansas Appeals Court has implied a duty on beneficiaries and defendants to inquire as to the qualifications of a personal representative or administrator of an estate.

Revocable Trusts

Holbrook v. Freeman

CA 08-181

2008 WL 4493587

October 8, 2008

NOT DESIGNATED FOR PUBLICATION

Eugene Hunt, Judge.

FACTS: J.T. and Margaret Freeman, husband and wife, executed the Freeman Family Trust, a revocable trust, on February 20, 1992. Betty Cowan, their daughter, was designated the trustee. The relevant portions of the trust were as follows:

4. *Revocability.* Settlor specifically reserve the right and power to alter, delete, modify, change and/or revoke any paragraph of this Trust Agreement and all provisions thereof at any time; provided, however, that this right is personal to Settlor and may not be exercised by a personal representative.

8. . . . Upon the death of the surviving Settlor, this Trust shall terminate, and after having paid the expenses of their respective last illnesses and funerals. . . , shall be distributed as follows: The remaining assets of the trust, whether real or personal, shall be sold and the proceeds from such sale shall be divided and distributed in equal shares unto our daughters, Brenda McCurrie, Betty Cowan, Shirley Brides, and Teresa Holbrook.

In 1998, Brenda McCurrie was removed from beneficiary status. On June 16, 2005, the settlors removed Betty Cowen as trustee of The Freeman Family Trust and appointed themselves as trustees in her place. J.T. Freeman died on August 9, 2005. On September 8, 2008, Margaret Freeman revoked Paragraph 8 of the trust agreement, which set out the termination of the trust and the distribution of the trust assets. She directed \$20,000 to be distributed to Brenda McCurrie, and the remainder to be distributed equally among the other three daughters. Margaret remarried after J.T.'s death.

Petitioners-appellants sued, seeking a temporary restraining order preventing Margaret from distributing trust assets, an accounting of all trust

property, attorneys' fees, and if a court found a breach of trust, restoration of trust property and removal of Margaret as the trustee. Margaret answered and moved to dismiss. The trial court granted the motion to dismiss for failure to state facts upon which relief could be granted. This appeal followed.

RULES AND ANALYSIS: The issue on appeal was whether one of two settlors of a revocable trust can amend the trust after the death of the other settlor. Arkansas courts follow the general rule in construing a trust instrument that the intention of the settlor must be ascertained, and the settlor's intention will govern. *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004). Here, the trust specifically reserved in Paragraph 4 the power to "alter, delete, modify, change and/or revoke any paragraph" of the trust.

On appeal the appellant offered a more ingenious argument: that Margaret could amend the trust only with respect she contributed to the trust after J.T.'s death, using Ark. Code Ann. § 28-73-602 as justification, which states that if a revocable trust is created or funded by more than one settlor, amendments affecting community property must be joint, and if it consists of separate property one settlor may amend only with respect to her own property. Since the argument was only raised on appeal, the court did not rule on it, but in dictum it stated that there was no evidence that the trust property was anything other than tenancy by the entirety property.

HOLDING AND DISPOSITION: A revocable trust with standard revocability language, executed by husband and wife, whose assets are marital property, may be amended or revoked by the surviving spouse. Affirmed.

Abstractor: Joycelyn Bell, 3L

COMMENT (LF): This opinion illustrates the usefulness of spelling out clearly what rights a surviving spouse has with regard to revoking or amending a joint trust. The Arkansas Trust Code makes trusts revocable by default, but it is a good idea to discuss this issue with your clients and make sure they understand the possibilities and consequences. A trust might become completely irrevocable after the first spouse dies, or stay completely revocable, or remain revocable with respect to the surviving spouse's property. All these alternatives and more are possible. The alternative may have tax consequences.

Small Estates

Osborn v. Bryant

CA 08-589

2009 WL 215408, 2009 Ark. App. LEXIS 110

Jan. 14, 2009

NOT DESIGNATED FOR PUBLICATION

Robert Gladwin, Judge.

FACTS: Lacy Bryant died in 1994, leaving an attested will and proof of will. He was survived by his widow and eight children. The will left property to his wife for life, and the remainder to his daughter, Osborn, should she choose to pay \$200 per acre to Bryant's other heirs for the tract. The will further instructed that if Osborn did not elect to buy the property, it would be divided equally between decedent's children per stirpes. Osborn filed an affidavit for collection of small estates with the county circuit court, attaching the decedent's will. A Notice of Probate and proof of publication of that notice were also filed. In 1995, Osborn executed an administrator's deed, conveying the property of the decedent according to the terms of the will, with a life estate and alternate contingent remainders. Some of the children accepted Osborn's payments but others did not.

Upon the death of the decedent's widow, the appellees, the children who did not accept Osborn's payments, filed suit seeking a declaration that the will and administrator's deed were invalid and that the property should pass intestate. The appellees argued that the will and deed were nullities because 1) the will was never probated and 2) the exceptions in Ark. Code Ann. § 28-40-104 did not apply to allow the will to be offered as evidence of a devise because the small estate affidavit was a probate proceeding. The circuit court found that the decedent's will was not admitted to probate and could not be used as evidence of a devise under the exceptions to the general rule because the filing of an affidavit of small estates was a probate proceeding under Ark. Code Ann. § 28-40-104(b)(1). The court concluded that the decedent effectively died intestate. Osborn and other heirs who had previously accepted her payments for the land appealed.

RULES AND ANALYSIS: The main issue on appeal concerned the interpretation of Ark. Code Ann. § 28-40-104. The basic rule of statutory construction is to give effect to the intent of the legislature. Where the language is plain and

unambiguous, the court will determine intent from the ordinary meaning of the language used. The statute should be construed so that no word is left void, superfluous, or insignificant. *Great Lakes Chemical Corp. v. Bruner*, 368 Ark. 74, 243 S.W.3d 285 (2006). With this understanding, the court interpreted the statute. Section 28-40-104(a) provides that no will shall be effectual for proving title or right to possession of property disposed of by a will, unless that will has been admitted to probate. Section (b) of the same statute provides two exceptions to the general requirement of a finding of validity of a will by a court. The exception relevant to the instant case was that an unprobated will could only be offered as evidence of a devise if no proceeding concerning the succession or administration of the estate had occurred. However, by the plain language of the statute, the small estate procedure is excepted from section (b) (i.e., "except as provided in § 28-41-101"). The two conditions are relevant in cases where the small-estate procedure is not used. The court held that the circuit court erred in its application of the law to the undisputed facts. A plain reading of the statute gives no other conclusion.

HOLDING AND DISPOSITION: Generally, a will must be submitted to probate for a finding of validity thereof in order for the will to be introduced as evidence of a devise; however, a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if no proceeding concerning the succession or administration of the estate has occurred and either the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will. The exceptions to the general rule of a requirement of probate to introduce a will to prove a devise do not, however, apply to small estate proceedings. Reversed.

Abstractor: Anne M. Milligan, 2L

COMMENT (LDD): Why did the appellees not raise their objections and concerns when the affidavit for collection of small estate was filed by Osborne in 1994? The current statute for collection of small estates by distributes (Ark. Code Ann. § 28-41-101) requires that if an estate collected under this section contains any real property, a notice shall be published and a copy of the notice served on each heir and devisee. An earlier version of the statute does not contain notice publication requirement.

COMMENT (LF): I attended a meeting of the committee working on an update to the Arkansas

Real Estate Title Standards during March. The committee brought up this opinion and expressed surprise that property could pass on the strength of an affidavit, with no court order. It does seem odd. Is not a better practice to obtain a probate without administration, in order to obtain a court order with respect to the property? This will raise fewer problems later when the owner seeks to sell.

Testamentary Capacity/Undue Influence

Blanton v. Jackson

CA 08-4

2008 WL 4724121

Oct. 22, 2008

NOT DESIGNATED FOR PUBLICATION

Sam Bird, Judge.

FACTS: Decedent James Richard Oliver died in 2005 with a will leaving all of his property to his neighbor, appellee Daisy Jackson, and nothing to his five grown children. Appellee lived several houses down from the decedent, and she had a key to the decedent's house. She was listed as the decedent's wife on his life insurance policy of which she was the beneficiary, and the decedent paid for a life insurance policy on appellee's daughter of which appellee was the beneficiary. The decedent executed a quitclaim deed giving one-half ownership interest in his house to the appellee a month before he died. In hospital records from June 2005, the appellee was referred to as the decedent's caregiver and girlfriend. In hospital records from October 19, 2005, the appellee was referred to as the decedent's primary caregiver. In the decedent's final hospital stay on October 24-28, 2005, the decedent executed a health care power of attorney in favor of the appellee. A friend of the decedent, Harris, testified that he spoke to the decedent every day and visited the decedent's house sometimes. Harris testified that the appellee cared for decedent as a wife or caretaker would and he considered the appellee to be the decedent's girlfriend. Harris further testified that the decedent spent holidays with the appellee and her children. The appellee testified that she took the decedent to the hospital when necessary and on other errands, and that, at one point, she shared a bank account with him. She occasionally paid his bills for him, and she checked on him regularly. The appellee further testified that the decedent occasionally gave her money and purchased a refrigerator for her. She also testified

that the decedent gave his keys and wallet to her when he was in the hospital, and upon his death, the appellee ordered the release of the decedent's body from the hospital to the funeral home and made all of the funeral arrangements.

The appellee testified that the decedent asked her to bring him papers from his house. She testified that she did not know one of the documents she brought to him was a will until he executed it. The appellee testified that she told Pilson, the decedent's nurse, that decedent needed witnesses in order to sign some papers, and that Pilson obtained witnesses. The appellee testified that her son, Pilson, Helenese (another nurse), and a notary public were in the room when the decedent signed the will.

Pilson testified that he was in the room when decedent signed the will, and that he was pretty sure that Helenese was also in the room. Pilson's notes from that day reflect that Pilson and the notary were in the room, but that Helenese was not in the room. Helenese testified that Pilson never mentioned a last will and testament, and that she was not aware that she was a witness to the decedent's last will and testament. Helenese testified that she walked into decedent's room and signed the document but believed that the document was a living will and power of attorney. Furthermore, Helenese testified that the decedent's signature was already on the document, and she did not see the decedent sign the document. The notary testified that part of her duties at the hospital were to notarize patient documents, but she did not have specific memory of notarizing the decedent's will. However, the notary did note in her log that she notarized the decedent's will, and it was her usual practice to make sure that the patient knew what he was about to sign before he signed it and to have all of the witnesses in the room at one time. The notary also testified that it was her practice to ask witnesses for identification.

The appellee testified that she brought the will to the hospital when the decedent was in a weakened state, that she and her son were both present when decedent executed the will, that they were the only people who knew that a will existed, and that she took possession of the will after it was signed. The appellant's mother and ex-wife of the decedent testified that the decedent would never have left his children out of the will. Freddie Oliver, the decedent's niece, testified that she had never seen the decedent type, and that the decedent was not in the physical condition necessary to type. Freddie also

testified that decedent told her most of the details of his financial affairs but had never mentioned a will. Finally, Freddie testified, in concurrence with the appellee, that the decedent loaned money to appellee, and he bought a refrigerator for the appellee when hers stopped functioning.

The appellee petitioned to admit the will to probate. The decedent's children petitioned to set aside the will and remove the appellee as personal representative. The circuit court ruled that the testamentary formalities for a valid will were met, and thus the burden of proof was on the contestants to prove undue influence or lack of testamentary capacity. The court found insufficient proof of either of the former and denied the petition to set aside the will.

RULES AND ANALYSIS: There were two issues on appeal. The first issue is whether the trial court erred in finding that the will complied with the requisite statutory formalities for executing a valid will. Arkansas law requires a will to be signed by the testator and at least two witnesses. Ark. Code Ann. §28-25-103). Moreover, the signature must either be executed in the presence of the witnesses or the testator must acknowledge his signature in their presence. Ark. Code Ann. § 28-25-103(b). Finally, the attesting witnesses must sign at the request and in the presence of the testator. Ark. Code Ann. § 28-25-103(c). Here, there was conflicting testimony. Giving deference to the trial court, the trial court was not clearly erroneous. There are additional statutory requirements that the testator must declare the instrument to be his will and ask the witnesses to sign, but the Arkansas Supreme Court has held that substantial compliance is sufficient with respect to these requirements. *Faith v. Singleton*, 286 Ark. 403, 692 S.W.2d 239 (1985). Here, the appellant testified that both witnesses were in the room when the decedent signed his will, and the notary asked the decedent questions about the will including whether the decedent knew what he was signing. The notary testified that, in her usual practice, she would have all the witnesses in the room together, and she would make sure that the person signing understood what he was signing. Both witnesses signed in the presence of the decedent. These facts constitute substantial compliance, and, therefore, the trial court's determination was not clearly erroneous.

The second issue is whether the trial court erred in failing to require the appellant to overcome the rebuttable presumption of undue influence and lack of mental capacity. The general rule in a will contest is that the contestant has the burden of proving by a preponderance of the evidence that the testator lacked the mental capacity at the time the will was executed or acted under undue influence. *Looney v. Estate of Wade*, 310 Ark. 708, 839 S.W.2d 531 (1992). Procurement of a will requires actual drafting of the will for the testator or planning the testator's will and causing him to execute it. *Bell v. Hutchins*, 100 Ark. App. 308, ___S.W.3d ___ (2007). Procurement shifts the burden to the proponent of the will to show beyond a reasonable doubt that the will was not the result of undue influence, and that the testator had the mental capacity to make the will. *Id.* Here, it was not clear how the decedent's will was drafted, but there was no evidence that the appellee drafted the will or planned the will and caused the decedent to execute it. Therefore, the trial court did not clearly err in finding that the appellee procured the will. Another issue that will cause the burden of proof to shift is a confidential relationship between the testator and the beneficiary. In this case, the proponent must prove by a preponderance of the evidence that no undue influence or lack of testamentary existed. *Medlock v. Mitchell*, 95 Ark.App. 132, 234 S.W.3d 901 (2006). Here, there was abundant evidence regarding the confidential nature of the relationship between the appellee and the decedent. The trial court erred in failing to shift the burden of proof to the proponent.

HOLDING AND DISPOSITION: Where a confidential relationship exists between the beneficiary of a will and the testator, the beneficiary must overcome the rebuttable presumption of undue influence by a preponderance of the evidence. Reversed and remanded.

Abstractor: Matt Runge, 2L

COMMENT (LF): The procurement/confidential relationship cases of the Court of Appeals and the Supreme Court contain myriad details and tend to be very fact specific. There is something in these cases for everyone, particularly if attorneys will now be allowed to cite unpublished cases.

McPhail v. Smith

CA 08-304

2008 WL 4724115

October 22, 2008

NOT DESIGNATED FOR PUBLICATION

Wendell L. Griffen, Judge.

FACTS: Appellant Gregory McPhail and appellee Marlene Smith are the children of the late Mr. McPhail by his wife Dorothy, also deceased. Appellee Jessica Lay is the daughter of Marlene. On June 8, 1995, Mr. and Mrs. McPhail established a revocable trust naming Gregory McPhail and Marlene Smith as successor co-trustees. Also on the same day, Mr. McPhail executed a will, nominating Gregory and Marlene as coexecutors. In 2003, Mr. McPhail was diagnosed with Alzheimer's disease as well as dementia and at some point suffered at least one stroke. Mrs. McPhail died on December 20, 2004. Eleven days after Mrs. McPhail's death, Mr. McPhail executed another will in which he devised all of his estate to Gregory, and expressly excluded Marlene as a beneficiary. The will "poured over" Mr. McPhail's entire estate into the trust, which was amended to also expressly exclude Marlene and to distribute all of the trust property to Gregory. After Mr. McPhail's death, Gregory filed a petition to probate the will and to be appointed as the sole personal representative of his father's estate. Mr. McPhail died on April 12, 2006, at the age of eighty-six.

Appellees Smith and Lay filed a statement and notice of will contest, on the grounds that the final documents were procured by undue influence and that Mr. McPhail lacked the mental capacity to execute the documents. They also filed a petition for declaratory relief to cancel the 2004 trust instrument and will, again based on Mr. McPhail's alleged lack of mental capacity. The circuit court consolidated the cases and found that Gregory did not procure the will, but that Mr. McPhail did lack the mental capacity on December 31, 2004 to execute the will and trust and the final will was invalidated. Gregory appealed the order.

RULES AND ANALYSIS: The issue on appeal was whether or not Mr. McPhail had the testamentary capacity to execute the will and trust during a "lucid interval." The party challenging the will must prove by a preponderance of the evidence that the testator lacked the mental capacity or was unduly influenced when the will was executed in order to have it invalidated. Complete sanity is not essential,

as long as testamentary capacity exists when the will is executed, during a lucid interval. Evidence presented by five doctors and caregivers put Mr. McPhail in a state of "orientation x 2" at the most, meaning that he was aware as to his person and location. They testified that patients with dementia can have lucid intervals in which they are fairly clear, but Mr. McPhail had vascular dementia which causes these intervals to become less and less frequent and clear as the disease progresses. In 2004, Mr. McPhail was in the later stages of the disease and for him to have a lucid interval clear enough to knowingly execute a will excluding his daughter would have been very unlikely.

"In contrast to all of the medical testimony" was that of the attorney who prepared the final will and amended trust. The attorney stated that Mr. McPhail seemed to be completely aware of what he was doing, taking his daughter out of his will, during two phone calls and one hour-long meeting. He also stated, though, that he was not aware of the fact that Mr. McPhail was suffering from Alzheimer's and dementia, and that if he had known these facts, he would have made more of an effort to make sure Mr. McPhail was capable of making those decisions and would have contacted his doctor. When weighing this evidence, more weight is given to the medical evidence over the observations of an attorney. It would also be very unlikely that Mr. McPhail would have three lucid intervals, two phone calls and one meeting, at the exact times that these conversations took place with the attorney, as these intervals are usually unexpected and short.

HOLDING AND DISPOSITION: Where multiple medical personnel unanimously testified that the decedent had progressive dementia, confusion, lack of memory and disorientation, and the only contradictory testimony was that of the attorney who prepared the final will and trust, the court did not err in its ruling of lack of testamentary capacity. Affirmed.

Abstractor: Jessica Lindsey Howard, 1L

Testamentary Formalities

Murry v. Furgason

Arkansas Court of Appeals

2009 WL 1085958

April 22, 2009

NOT DESIGNATED FOR PUBLICATION

Josephine Linker Hart, Judge.

FACTS: Raymond Murry died in 2007. While in the intensive care unit, he executed a pre-printed will form, giving the bulk of his estate to his “life partner” David Furgason. Furgason had purchased the will form and Murry’s sister Brenda had filled in all blanks except the signatures. Furgason petitioned to have the will admitted to probate. Murry’s mother, Mary, contested the will, challenging the validity of its execution. At the hearing, the Charlotte Gilliam, the notary and also Murry’s sister, testified that she did not witness Murry signing the will. The witnesses, three in number, testified that they signed the will at Brenda’s house, outside of the presence of Murry, who was in the hospital at that time. They testified that when they saw the will it was blank except for Murry’s signature. In their presence, Brenda filled in all the blanks at the direction of Furgason. Furgason, however, testified that the witnesses all signed at the hospital the next day in the cafeteria, after Raymond signed. Furgason also testified that Raymond would do whatever Furgason told him. The trial court denied Murry’s mother’s petition, based on the credibility of the witnesses, stating that Furgason’s recollection appeared more credible. Murry’s mother appealed.

RULES AND ANALYSIS: There were three issues on appeal. The court addressed the first two together, regarding testamentary formalities. Mary first argued that the attesting witnesses did not sign in the testator’s presence and at his request. She also argued that there was no evidence that Murry signed the will in the presence of the witnesses or that he declared it to be his will. She also challenged the validity of Murry’s signature and raised the issue of undue influence. The court found it unnecessary to address the last issue because it invalidated the will on the grounds of lack of testamentary formalities. The court quoted the statute setting out what is required with respect to attestation and execution and noted that whether the accounts of the witnesses or of Furgason were considered, they all agreed that the witnesses did

not sign in the presence of the testator. Arkansas requires that the witnesses must sign at least within the range of the testator’s senses. *Connor v. Donahoo*, 85 Ark. App. 43, 145 S.W.3d 395 (2004). Further, according to the only testimony addressing this issue, Murry signed the will in the presence of only one witness, Brenda. The formalities required by Ark. Code Ann. § were not followed, and thus the will was invalid.

HOLDING AND DISPOSITION: An attested will is invalid when the witnesses sign in another room or building from the testator, but in any case in a place where he cannot possibly see or hear them. Reversed and remanded.

Testamentary Trusts

Carmody v. Betts

104 Ark. App. 84, ___ S.W.3d ___
2008 WL 4938336, 2008 Ark. App. LEXIS 846
November 19, 2008

Robert J. Gladwin, Judge.

FACTS: Joseph Coan, Jr. (“Joseph”) was the guardian of his disabled and incompetent sister, Helen Coan (“Helen”). Joseph set up a testamentary trust in his will for Helen. The trust authorized the co-trustees to pay to Helen “any part of the annual income from said trust necessary to provide for her care, welfare and maintenance.” Joseph also gave the co-trustees the authority to invade any of the principal to provide for her care if necessary but directed them to use only the income of the trust if possible. Any undistributed income was to become part of the principal. At Helen’s death, the remainder was to be distributed equally between the Metropolitan Opera Association and Georgetown University.

After Joseph’s death in 1984, Linnie Betts, an employee of Joseph’s bank, was appointed successor guardian of Helen, co-administrator of Joseph’s estate, and co-trustee of his testamentary trust. After Helen’s death in 1985, petitioners-appellants Thomas Carmody and Norman Savers, co-administrators of Helen’s estate, alleged that the trustees had violated the terms of the trust by considering Helen’s personal assets in determining the amount of income from Joseph’s trust to be paid to her. Appellants, who were the administrator of the estate of Ms. Betts, the bank, and the remainder beneficiaries, argued that the trustees had discretion to consider Ms. Coan’s

personal assets in determining her need of support from the trust. At the hearing, all parties agreed that the will (including the trust) was unambiguous. The circuit court found Joseph's objectives to be 1) that Helen would receive the best care; 2) that the family home be preserved and 3) that the remainder beneficiaries would receive a remainder. The court distinguished several past cases, citing different facts and also different wording in the trust. The circuit court found a clear intention of Joseph for the preservation of assets during Helen's life, and cited the Rest. 3d Trusts § 50 cmt. e in support. The administrators of the estate of Ms. Coan appealed.

RULES AND ANALYSIS: The issue on appeal was whether the circuit court misconstrued the will. The first principle of construction is that the intent of the testator governs. The intent is to be ascertained from the four corners of the instrument if possible; extrinsic evidence may only be considered if the instrument is ambiguous. Here, all parties agreed that the terms were unambiguous. Past Arkansas cases have held phrases such as "necessary for support" to mean that the trustee should use the money for support even if the beneficiary could pay unless the language indicated something to the contrary. *Cross v. Pharr*, 215 Ark. 463, 221 S.W.2d 24 (1949). The *Restatement (Second) of Trusts* also takes this position.

However, the new *Restatement (Third) of Trusts* presumes that the trustee is to consider the beneficiary's other resources but has some discretion, if the trust language is not clear. Rest. Trusts (3d) § 50. Comment e sets out three possibilities: 1) that the trustee is "required to take account of the beneficiary's resources"; 2) that the trustee "is prohibited from taking account of the beneficiary's other resources"; or 3) that the trustee "is to consider the other resources but has some discretion in the matter." Also relevant is "whether the settlor's intended treatment of the beneficiary or the purposes of the trust will in some respect be better accomplished by not doing so."

However, this section has not yet been relied upon by any Arkansas court, and the court declined to do so here. Instead, the court found language in Joseph's trust that it construed to prove that Joseph believed that the trust income would be more than sufficient to meet Helen's needs.

HOLDING AND DISPOSITION: Where a trust contains some language indicating a purpose other

than an intention that the beneficiary will be supported from the trust income and principal without regard to the beneficiary's personal resources, unspent income is to become part of the principal, and there are remainder beneficiaries, a trustee is justified in considering the beneficiary's resources and exercising discretion. Affirmed.

Abstractor: Mariah L. Cole, 1L

COMMENT (WDH): The one aspect of the Court of Appeals decision I think is interesting is its discussion of § 50 of the *Restatement (3d) of Trusts*, dealing with the significance of a trust beneficiary's other resources in making discretionary distributions to such beneficiary under some objective standard expressed in the governing document. Circuit Judge Landers refers to § 50 of the *Restatement (3d)* in his opinion (indeed, that is the primary authority he cites). Court of Appeals Judge Gladwin does likewise (and quotes comment e to § 50, noting that the approach of the *Restatement (3d)* represents a change from that of *Restatement (2d)* on this issue – in effect, the presumption should be that the beneficiary's other resources *are* to be considered by the trustee). The Court of Appeals affirmed Judge Landers, based on the language in the decedent's will, without ruling specifically on the applicability of § 50, but its discussion of that section suggests the court is favorably disposed to the approach of the *Restatement (3d)*, even though earlier Arkansas decisions followed the *Restatement (2d)* rule.

COMMENT (LDD): This opinion is good guidance for trustees making discretionary distributions to beneficiaries under an objective standard. When a beneficiary urgently requests a trustee to make a discretionary distribution, if the law requires the trustee to take into consideration the beneficiary's resources outside of trust, then the trustee will need to obtain beneficiary financial information before making the distribution. Beneficiary financial information is often difficult and time consuming for the trustee to gather and organize, particularly if the beneficiary is incapacitated. The *Restatement (3d) of Trusts*, § 50 (2003) takes the view that when a trustee needs to make a determination regarding a distribution to a beneficiary under an objective standard and the trust is silent, the general rule is that the trustee is to consider the other resources but has some discretion in the matter. On the other hand, this holding supports the Arkansas general rule with regard to discretionary distributions for beneficiary care, welfare and maintenance, that the trustee need not look to resources of the beneficiary outside of

trust unless the trust contains language indicating a contrary intent. The opinion includes good examples of trust language indicating a contrary intent. It does not appear that the existence of a remainder interest alone is adequate to indicate contrary intent. Many trusts use the discretionary distribution standard of health, education, maintenance and support. Would the Arkansas rule of law as stated in this case also apply to other objective standards such as health, education and support? I would think so.

COMMENT(LF): The *Restatement (3d) of Trusts* has appeared in pieces—vols. 1 and 2 were adopted and published in 2003, and vol. 3 in 2007. There is at least one more volume to go, on trust administration, and Bill Haught reports that a tentative draft was approved on May 18. The *Restatement (3d)* relates closely to the Uniform Trust Code, and, therefore, also to the Arkansas Trust Code. Thus far, our appellate courts have cited §§ 10(c) (formal transfer of property not necessary for a self settled trust), 16(1) (transfer necessary if a trust is not self settled), 38, (a trustee is usually entitled to reasonable compensation), and 71 (a trustee may apply to a court for instructions) as authority and mentioned § 59 (exceptions to spendthrift provisions).

Unauthorized Practice

Birts v. The Estate Plan, Inc.
No. 4:08-cv-04047-HFB
2009 WL 692207, 2009 U.S. Dist. LEXIS 26724
Mar. 13, 2009
NOT DESIGNATED FOR PUBLICATION

Harry F. Barnes, District Judge.

FACTS: Plaintiffs, as potential representatives of a class of consumers living in Arkansas and Texas who purchased living trust documents from The Estate Plan, Inc. from January 1, 1998 through March 6, 2009, brought suit against The Estate Plan, Inc. The Estate Plan's website claims that it has produced "over 60,000 documents nationwide." Plaintiffs alleged fraud, unauthorized practice of law, breach of fiduciary duty and civil conspiracy. The plaintiff-consumers alleged that The Estate Plan utilized an overarching scheme designed to defraud senior citizens and other consumers by enticing them to buy living trust documents from non-lawyers. On the alleged facts of a geographically dispersed and potentially large class of consumer-plaintiffs uniformly and systematically defrauded, plaintiffs moved for class certification as to The

Estate Plan. They sought the return of unjustly obtained profits, restitution, injunctive relief, exemplary damages and attorneys' fees.

RULES AND ANALYSIS: According to Fed. R. Civ. P. 23(a) and (b), six factors must be established as a part of a two-step analysis for a class to be certified. In the first step, (1) the class must be so numerous that joinder of all member is impracticable; (2) the class must have common question of law or fact; (3) the claims or defends of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interest of the class. Fed. R. Civ. P. 23(a). The court analyzed each of the six factors and decided that the plaintiffs met each requirement.

In the second step, plaintiffs must show that (1) the questions of law or fact common to the class members predominate over any individual claims and (2) that a class action is better than other methods for settling the controversy. Fed. R. Civ. P. 23(b). The court found the questions of law and fact were common to the class members. The court also determined that the superiority requirement of Rule 23(b)(3) was met. The claims of the class would not have been litigated but for the existence of the class action device; there were too many class members and the individual claims were too small. A class action would also protect the defendant from inconsistent obligations and class members from receiving amounts other than their just and proportional share of the claim.

Of interest to the Probate and Trust Section, more than the class certification issue, is what The Estate Plan was actually doing. The opinion does not provide a lot of detail, but does reveal that plaintiffs alleged that The Estate Plan provided "fraudulent uniform presentations and notebooks/binders." Plaintiffs also alleged that The Estate Plan assured them that living trusts were necessary for avoiding estate taxes and probate, but omitted the fact that a pour-over will would require a probate proceeding.

DISPOSITION: As the requirements of numerosity, commonality, typicality, adequacy, predomination, and superiority were met, the court ordered the requested class to be certified. Specifically, the court certified the class of consumers living in Arkansas or Texas who purchased living trust documents from The Estate Plan, Inc. or any of their affiliates or agents, from January 1, 1998 though March 6, 2009.

Abstractor: Anne M. Milligan, 2L

COMMENT (LDD): It will be helpful to see the outcome of this class action with regard to the unauthorized practice of law. It could provide guidance of interest to non-lawyer financial advisors who commonly review clients' estate plans and refer them to attorneys to prepare the documents. Also of interest, will be guidance around allegations in the complaint regarding fraud as shown by use of uniform seminars and uniform notebooks and the possibility that it is fraudulent to indicate living trusts were necessary for avoiding estate taxes and probate, while omitting fact that pour-over wills would require probate. The defendant's website is at www.theestateplan.com.