

ARKANSAS CIRCUIT JUDGES'

BENCHBOOK, VOL. II

DOMESTIC RELATIONS

AND

PROBATE DIVISIONS

Prepared by: Donna L. Gay  
Administrative Office of the Courts  
Justice Building, 625 Marshall Street  
Little Rock, Arkansas 72201

[donna.gay@arkansas.gov](mailto:donna.gay@arkansas.gov)

(501) 682-9400

Fax (501)682-9410

Click on the double arrows or the bookmark icon to your left here to be able to see a listing of all pages.

## TABLE OF CONTENTS

### DOMESTIC RELATIONS DIVISION

I.	MARRIAGE	I-1
A.	Age of Consent	I-1
B.	Persons Who May Solemnize Marriages	I-3
C.	Marriage Licenses	I-3
D.	Common Law Marriage	I-4
E.	Covenant Marriage Act	I-4
II.	DIVORCE	II-1
A.	Jurisdiction	II-1
B.	Venue	II-2
C.	Matters Which Must Be Proved	II-2
D.	Grounds for Divorce	II-4
E.	Pleadings	II-5
F.	No Judgment Pro Confesso	II-5
G.	Corroboration	II-5
H.	Effect of Collusion	II-6
I.	Condonation Abolished	II-6
J.	Maintenance and Attorney Fees	II-7
K.	Parenting Classes	II-7
L.	Enforcement of Separation Agreements	II-7
M.	Divorce Decree	II-8
N.	Causes of Action for Divorce	II-9
III.	SEPARATE MAINTENANCE	III-1
A.	Authority	III-1
B.	Grounds	III-1
C.	Scope	III-1
IV.	PROPERTY AND DEBT DIVISION	IV-1
A.	Division of Property	IV-1
B.	Marital Property	IV-3
C.	Dissolution of Estates by the Entirety or Survivorship	IV-6
D.	Property Settlement Agreements	IV-7
E.	Debt	IV-8
V.	TEMPORARY ORDERS	V-1
A.	Authority	V-1
B.	Notice	V-1
C.	Hearing	V-1
D.	Duration	V-1
E.	Temporary Support	V-2
F.	Temporary Order of Protection	V-2
VI.	ANNULMENT	VI-1
A.	Venue	VI-1
B.	Conflict of Laws	VI-1
C.	Grounds	VI-1
D.	Child Custody and Support	VI-1
E.	Marriage Before Entry of Divorce Decree	VI-2

VII.	ALIMONY .....	VII-1
	A. Award of Alimony .....	VII-1
	B. Maintenance and Attorney Fees .....	VII-1
	C. Factors in Awarding Alimony .....	VII-1
	D. Rehabilitative Alimony .....	VII-3
	E. Agreements of Parties .....	VII-3
	F. Enforcement of Alimony .....	VII-4
	G. Modification of Alimony .....	VII-4
	H. Termination of Alimony .....	VII-5
VIII.	CHILD SUPPORT .....	VIII-1
	A. Jurisdiction .....	VIII-1
	B. Transfer of Cases Between Local Jurisdictions. ....	VIII-2
	C. Petition for Support .....	VIII-3
	D. Child Support Guidelines .....	VIII-5
	E. Enforcement Provisions .....	VIII-14
	F. Modification of Support .....	VIII-18
	G. Expedited Hearings .....	VIII-20
	H. Termination of Duty to Support .....	VIII-21
	I. Bankruptcy .....	VIII-22
	J. Qualified Domestic Relations Orders .....	VIII-22
IX.	UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA) .....	IX-1
	A. Jurisdiction .....	IX-1
	B. Recognition of Controlling Order .....	IX-1
	C. Civil Proceedings .....	IX-2
	D. Establishment of Support Order .....	IX-4
	E. Terms of Withholding Order .....	IX-4
	F. Direct Enforcement of Another State's Order .....	IX-4
	G. Enforcement and Modification after Registration .....	IX-5
	H. Determination of Parentage .....	IX-6
X.	CHILD CUSTODY .....	X-1
	A. Award of Custody .....	X-1
	B. Best Interest of the Child .....	X-3
	C. Child's Preference for Custody and Sibling Relationships .....	X-5
	D. Modification of Custody Order .....	X-6
	E. Change in Custody Granted—Examples .....	X-7
	F. Change in Custody Denied—Examples .....	X-8
	G. Relocation as a Factor in Custody .....	X-9
	H. Joint Custody .....	X-9
	I. Stepparent Custody .....	X-10
	J. Attorneys' Fees .....	X-10
	K. Transfer of Custody on School Property .....	X-11
	L. Attorneys Ad Litem in Domestic Relations and Guardianship Cases .....	X-11
XI.	VISITATION .....	XI-1
	A. All Parties .....	XI-1
	B. Visitation Rights of Brothers and Sisters .....	XI-1
	C. Visitation Rights of Grandparents .....	XI-1
	D. Visitation Rights of Stepparents .....	XI-5

	E.	Denial of Visitation . . . . .	XI-5
	F.	Modification of Visitation . . . . .	XI-5
XII.		UNIFORM ACTS FOR CUSTODY AND VISITATION . . . . .	XII-1
	A.	Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) . . . . .	XII-1
	B.	Federal Parental Kidnaping Prevention Act (PKPA) . . . . .	XII-15
XIII.		PATERNITY . . . . .	XIII-1
	A.	Jurisdiction . . . . .	XIII-1
	B.	Limitation Periods and Venue . . . . .	XIII-1
	C.	Transfer Between Local Jurisdictions . . . . .	XIII-1
	D.	Petitions to Establish Paternity . . . . .	XIII-2
	E.	Temporary Orders . . . . .	XIII-4
	F.	Paternity Test . . . . .	XIII-4
	G.	Lying-In Expenses . . . . .	XIII-5
	H.	Custody and Visitation . . . . .	XIII-6
	I.	Modification of Orders or Judgments . . . . .	XIII-7
	J.	Res Judicata and Collateral Estoppel . . . . .	XIII-9
	K.	Acknowledgment of Paternity . . . . .	XIII-9
XIV.		DOMESTIC ABUSE ACT . . . . .	XIV-1
	A.	General Provisions . . . . .	XIV-1
	B.	Time Frames . . . . .	XIV-5
	C.	Service on Respondent . . . . .	XIV-6
	D.	Duties of the Clerk of the Court . . . . .	XIV-6
	E.	Duties of Law Enforcement . . . . .	XIV-7
	F.	Full Faith and Credit . . . . .	XIV-8
	G.	Violation of Orders of Protection . . . . .	XIV-10
	H.	Cases . . . . .	XIV-11
XV.		PREMARITAL AGREEMENT ACT . . . . .	XV-1
	A.	Requirements . . . . .	XV-1
	B.	Enforcement . . . . .	XV-2
	C.	Cases . . . . .	XV-2
XVI.		RECONCILIATION AGREEMENTS . . . . .	XVI-1
	A.	Policy . . . . .	XVI-1
XVII.		ALTERNATIVE DISPUTE RESOLUTION IN DIVORCE . . . . .	XVII-1
	A.	Duty and Authority of Courts . . . . .	XVII-1
	B.	Confidentiality . . . . .	XVII-2
	C.	Immunity . . . . .	XVII-2
	D.	Options Available to Courts . . . . .	XVII-2
XVIII.		NAME CHANGE OF A CHILD . . . . .	XVIII-1
	A.	Best Interest of Child Controls . . . . .	XVIII-1
	B.	Factors for Court to Consider (“ <i>Huffman</i> Factors”) . . . . .	XVIII-1

## PROBATE DIVISION

I.	WILLS	I-1
	A. GRANT OF ADMINISTRATION	I-1
	1. Venue	I-1
	2. Statute of Limitations	I-1
	3. No Will Effectual Until Probated	I-2
	4. Testimony to Prove Attested Will	I-2
	5. Will Subsequently Presented for Probate	I-2
	6. Notice of Hearing	I-3
	B. VALIDITY OF A WILL	I-3
	1. Maker	I-4
	2. Witnesses	I-4
	3. Execution of a Will	I-4
	4. Foreign Execution	I-5
	5. Revocation of a Will	I-5
	6. Revival of Revoked or Invalid Will	I-6
	7. Affidavit of Attesting Witness	I-6
	8. Incorporation of Writing by Reference	I-7
	C. CONSTRUCTION OF A WILL	I-7
	1. Construction	I-7
	2. Intention of Testator	I-8
	3. After-acquired Property	I-8
	4. Failure of a Testamentary Provision	I-8
	5. Lapse	I-9
	6. Partial Intestacy	I-9
	7. Ademption	I-9
	8. Inter Vivos Gift	I-9
	D. HOLOGRAPHIC WILLS	I-10
	1. Defined	I-10
	2. Testimony to Prove Holographic Will	I-10
	E. LOST OR DESTROYED WILLS	I-11
	1. Jurisdiction Over Lost or Destroyed Wills	I-11
	2. Testimony to Prove Lost or Destroyed Will	I-11
	3. Record of Decree	I-11
	4. Restraint of Administrator	I-12
	F. PETITION FOR PROBATE OF A WILL	I-12
	1. Who May Petition	I-12
	2. Content of Petition	I-13
	3. Notice and Methods of Service	I-14
	4. Waiver of Notice	I-16
	5. Requests for Notice	I-17
	6. Hearing on Petition Without Notice	I-17
	G. TAKING AGAINST A WILL	I-17
	1. Surviving Spousal Limitations	I-17
	2. Children Taking Against a Will	I-19
	H. CLAIMS AGAINST ESTATES	I-20
	1. Allowance of Claims	I-20

	2.	Classification . . . . .	I-20
	3.	Time for Filing Claims. . . . .	I-21
I.		DISTRIBUTION AND DISCHARGE . . . . .	I-21
	1.	Conclusiveness of Final Order . . . . .	I-21
	2.	Exoneration of Encumbered Property . . . . .	I-21
	3.	Partial Distribution . . . . .	I-22
	4.	Discharge of Personal Representative . . . . .	I-22
	5.	Reopening Administration . . . . .	I-22
J.		DEVISE OF PROPERTY . . . . .	I-23
	1.	Devise of Encumbered Property . . . . .	I-23
	2.	Contracts Affecting the Devise of Property . . . . .	I-23
K.		CONTESTING A WILL . . . . .	I-23
	1.	Generally . . . . .	I-23
	2.	Notice of Contest . . . . .	I-24
	3.	Grounds for Contest . . . . .	I-25
	4.	Rights of Persons Acquiring Interest . . . . .	I-25
	5.	Family Settlement Agreements . . . . .	I-26
L.		EXECUTORS AND ADMINISTRATORS . . . . .	I-26
	1.	Authority to Act. . . . .	I-26
	2.	Duties . . . . .	I-26
	3.	Removal . . . . .	I-27
II.		INTESTATE SUCCESSION . . . . .	II-1
A.		ELEMENTS . . . . .	II-1
	1.	Definitions . . . . .	II-1
B.		INTESTATE SUCCESSION GENERALLY . . . . .	II-1
C.		DISTRIBUTION AMONG HEIRS . . . . .	II-2
D.		INTERESTS TRANSMISSIBLE BY INHERITANCE . . . . .	II-2
E.		HEIRS AS TENANTS IN COMMON . . . . .	II-3
F.		MALE NOT PREFERRED OVER FEMALE . . . . .	II-3
G.		LEGITIMACY OF CHILD . . . . .	II-3
H.		POSTHUMOUS HEIRS . . . . .	II-5
I.		ALIENAGE . . . . .	II-5
J.		COMPUTING DEGREES OF CONSANGUINITY . . . . .	II-5
K.		KINSMEN OF THE HALF BLOOD . . . . .	II-6
L.		TABLES OF DESCENTS . . . . .	II-6
M.		DEVOLUTION WHEN NO HEIR CAN BE FOUND . . . . .	II-7
N.		ADVANCEMENTS . . . . .	II-7
O.		DEBTS TO DECEDENTS . . . . .	II-8
P.		DOCTRINE OF FIRST PURCHASER ABOLISHED . . . . .	II-8
Q.		DISTINCTION BETWEEN ANCESTRAL ESTATES AND NEW ACQUISITIONS ABOLISHED . . . . .	II-8
R.		DOCTRINE OF WORTHIER TITLE ABOLISHED . . . . .	II-8
III.		TRUSTS . . . . .	III-1
A.		ELEMENTS . . . . .	III-1
	1.	Definitions . . . . .	III-1
	2.	Trusts - Generally . . . . .	III-4
B.		UNIFORM PRINCIPAL AND INCOME ACT . . . . .	III-5
	1.	Administration . . . . .	III-5
C.		UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT . . . . .	III-6

	1. Provisions .....	III-6
	D. CASES INVOLVING TRUSTS .....	III-7
IV.	FIDUCIARIES AND TRUST ESTATES .....	IV-1
	A. FIDUCIARIES .....	IV-1
	1. Types .....	IV-1
	2. Power to Receive and Deposit Funds .....	IV-1
	3. Subject To .....	IV-1
	4. Minors .....	IV-2
	B. ESTATES OF MISSING PERSONS .....	IV-2
	1. Jurisdiction .....	IV-2
	2. Appointment of Trustee .....	IV-3
	3. Powers and Duties of Trustee .....	IV-3
	4. Bond of Trustee .....	IV-3
	C. POWER OF ATTORNEY FOR BENEFIT OF INFIRM .....	IV-3
	1. Purpose .....	IV-3
	2. Methods of Executing Power of Attorney .....	IV-4
	3. Scope .....	IV-4
	4. Judicial Approval .....	IV-4
	5. Contents and Filing .....	IV-5
	6. Attorney in Fact .....	IV-5
	D. UNIFORM TRANSFERS TO MINORS ACT .....	IV-6
	1. Application .....	IV-6
	2. Method of Transfers .....	IV-6
	3. Manner of Creating Custodial Property .....	IV-7
	4. Irrevocable Transfer .....	IV-7
	5. Care and Use of Custodial Property .....	IV-7
	6. Custodian: Power, Expenses, Compensation, Bond .....	IV-8
	7. Exemption of Third Person from Liability .....	IV-9
	8. Liability to Third Persons .....	IV-9
	9. Renunciation, Resignation, Death or Removal of Custodian .....	IV-10
	10. Accounting by Custodian .....	IV-10
	11. Termination of Custodianship .....	IV-11
V.	GUARDIAN AND WARD .....	V-1
	A. PROCEDURE .....	V-1
	1. Jurisdiction .....	V-1
	2. Venue .....	V-1
	3. For Whom a Guardian May be Appointed .....	V-2
	4. Qualifications of a Guardian .....	V-2
	5. Preferences .....	V-4
	6. Petition .....	V-5
	B. NOTICE .....	V-7
	1. Notice of Hearing for Appointment .....	V-7
	2. Notice of Other Hearings .....	V-8
	3. Request for Special Notice of Hearings .....	V-9
	C. PROOF REQUIRED FOR THE APPOINTMENT OF GUARDIAN .....	V-9
	D. HEARINGS .....	V-10
	1. Determination of Incapacity .....	V-10
	2. Evaluations .....	V-11
	3. Effect of Determination Hearings .....	V-12

	4.	Guardianship Order . . . . .	V-12
	5.	Bond of the Guardian . . . . .	V-13
	6.	Issuance of Letters . . . . .	V-14
	7.	Temporary Guardian . . . . .	V-14
	8.	Substitution or Removal . . . . .	V-17
	9.	Successor Guardian . . . . .	V-17
	10.	Standby Guardian . . . . .	V-17
E.		DUTIES OF GUARDIAN . . . . .	V-18
	1.	Generally . . . . .	V-18
	2.	Care, Treatment and Confinement of Ward . . . . .	V-19
	3.	Title and Possession of the Estate . . . . .	V-21
	4.	Actions - Service of Process . . . . .	V-21
	5.	Enforcement of Contracts . . . . .	V-21
	6.	Liability for Continuation of A Business . . . . .	V-21
	7.	Power to Borrow Money and Make Gifts . . . . .	V-22
	8.	Periodic Allowances . . . . .	V-22
	9.	Support of the Minor Incapacitated Person . . . . .	V-22
	10.	Investments . . . . .	V-23
	11.	Retention of Property and Investment . . . . .	V-23
	12.	Purchase of A Home . . . . .	V-24
	13.	Sales and Mortgages of Property Generally . . . . .	V-24
	14.	Oil, Gas, and Mineral Interests . . . . .	V-25
	15.	Oil, Gas, and Mineral Interests - Agreements for Operation and Development . . . . .	V-26
	16.	Payment of Claims . . . . .	V-26
	17.	Compromise Settlements . . . . .	V-26
	18.	Employment of Professionals . . . . .	V-27
	19.	Accounting . . . . .	V-27
	20.	Inventory - Appraisal . . . . .	V-28
	21.	Reports . . . . .	V-28
	22.	Administration of Deceased Ward's Estate . . . . .	V-29
F.		TERMINATION OF A GUARDIANSHIP . . . . .	V-30
	1.	Termination - Generally . . . . .	V-30
	2.	Restoration of Capacity of a Ward . . . . .	V-31
	3.	Discharge of Guardian and Surety . . . . .	V-31
G.		DISPENSING WITH GUARDIANSHIP . . . . .	V-31
	1.	Generally Dispensing with Guardianship . . . . .	V-31
	2.	Dispensing with Guardianship in a Small Estate . . . . .	V-32
	3.	Ward Receiving Public Assistance . . . . .	V-32
H.		FOREIGN GUARDIANS . . . . .	V-33
	1.	Petition to Act in Arkansas . . . . .	V-33
	2.	Effect of Petition to Act in Arkansas . . . . .	V-33
	3.	Corporate Guardians . . . . .	V-34
I.		UNIFORM VETERANS GUARDIANSHIP ACT . . . . .	V-34
	1.	Scope . . . . .	V-34
	2.	Requirements for Appointment of Guardian . . . . .	V-35
	3.	Requirements for Discharge of Guardian . . . . .	V-35
	4.	Requirements for Commitment to VA or Other . . . . .	V-36
J.		ATTORNEYS AD LITEM IN GUARDIANSHIP CASES . . . . .	V-36



VI.	CONSERVATORS	VI-1
A.	PROCEDURE	VI-1
1.	Jurisdiction	VI-1
2.	Petitioner	VI-1
3.	Content	VI-1
4.	Service	VI-2
5.	Decision	VI-2
B.	DUTIES	VI-2
1.	Bond - Exception	VI-2
2.	Care and Management	VI-2
3.	Compensation	VI-3
C.	DISCHARGE	VI-3
1.	Petition and Notice	VI-3
2.	Subsequent Appointment of Guardian	VI-3
VII.	ADOPTION	VII-1
A.	PROCEDURE	VII-1
1.	Who May Be Adopted	VII-1
2.	Who May Adopt	VII-1
3.	Petition	VII-1
4.	Jurisdiction	VII-3
5.	Venue	VII-4
6.	Preferences	VII-5
B.	CONSENT	VII-5
1.	Required Consent	VII-5
2.	Consent not Required	VII-6
3.	Execution of Consent	VII-8
4.	Withdrawal of Consent	VII-9
C.	REQUIREMENTS PRIOR TO HEARING	VII-10
1.	Notice	VII-10
2.	Home Studies	VII-11
D.	HEARING AND DECREES OF ADOPTION	VII-13
1.	Required Residency	VII-13
2.	Appearance in Court	VII-13
3.	Continuance	VII-13
4.	Decree of Adoption	VII-13
5.	Effect of Decree of Adoption	VII-14
6.	Appeal of Adoption Decree	VII-15
E.	CLOSED COURT PROCEEDINGS AND RECORDS	VII-16
a.	Confidentiality	VII-16
F.	RELINQUISHMENT AND TERMINATION OF PARENTAL RIGHTS	VII-16
1.	Purpose	VII-16
2.	Voluntary Relinquishment	VII-17
3.	Involuntary Termination	VII-18
G.	COLLECTION OF ADOPTION INFORMATION	VIII-20
VIII.	MENTAL HEALTH	VIII-1
A.	INVOLUNTARY ADMISSION FOR MENTAL ILLNESS	VIII-1
1.	Jurisdiction	VIII-1
2.	Venue	VIII-1
3.	Who May File	VIII-2

4.	Contents of Petition . . . . .	VIII-2
5.	Involuntary Admission Criteria . . . . .	VIII-2
6.	Filing Petition - Immediate Confinement . . . . .	VIII-3
7.	No Initial Confinement . . . . .	VIII-4
8.	Initial Hearing - Probable Cause . . . . .	VIII-5
9.	Initial Evaluation . . . . .	VIII-6
10.	45-Day Hearing . . . . .	VIII-6
11.	Additional Periods of Involuntary Admission . . . . .	VIII-7
12.	Order . . . . .	VIII-8
13.	Continuances . . . . .	VIII-9
14.	Conversion from Involuntary to Voluntary Status . . . . .	VIII-9
15.	Not Adjudication of Incapacity . . . . .	VIII-9
16.	Commitment Upon Acquittal by Reason of Mental Disease or Defect . . . . .	VIII-9
17.	Discharge or Conditional Release . . . . .	VIII-10
B.	INVOLUNTARY ADMISSION FOR ALCOHOL AND DRUG ABUSE . . . . .	VIII-11
1.	Jurisdiction . . . . .	VIII-11
2.	Venue . . . . .	VIII-11
3.	Who May File . . . . .	VIII-12
4.	Contents of Petition . . . . .	VIII-12
5.	Involuntary Admission Criteria . . . . .	VIII-12
6.	Conversion from Voluntary Status . . . . .	VIII-13
7.	Petition for Immediate Detention . . . . .	VIII-14
8.	Statement of Rights . . . . .	VIII-14
9.	Initial Hearing . . . . .	VIII-15
10.	Additional Commitment . . . . .	VIII-15
11.	Conversion to Voluntary Status . . . . .	VIII-16
12.	Early Release . . . . .	VIII-17
13.	Presumption of Competency . . . . .	VIII-17

## MISCELLANEOUS

I.	CAMERAS IN THE COURTROOM	I-1
A.	AUTHORITY	I-1
1.	Source	I-1
2.	Application	I-1
3.	Authorization - Exceptions	I-1
4.	Procedure	I-2
5.	Contempt	I-2
II.	FINE COLLECTION	II-1
A.	SCOPE	II-1
B.	INSTALLMENT PAYMENTS	II-1
C.	ORDERS	II-1
D.	FAILURE TO COMPLY	II-1
III.	SPECIAL JUDGES	III-1
A.	AUTHORITY	III-1
1.	Election by Regular Practicing Attorneys	III-1
2.	Assignment by the Supreme Court	III-3
3.	Exchange Agreements Between Circuit Judges	III-5
4.	Special Judge's Power to Sign Documents	III-6

## APPENDIX

DOMESTIC RELATIONS

DIVISION

## I. MARRIAGE

Ark. Code Ann. § 9-11-101, et seq. (Repl. 2008 & Supp. 2009)

### A. AGE OF CONSENT

1. 17 years of age for males and 16 years of age for females to be capable in law of contracting marriage.
2. Under 18, both males and females shall provide the clerk with satisfactory evidence of parental or guardian consent before a marriage license can be issued.
  - (a) Consent of both parents necessary unless:
    - (1) Parents are divorced and custody has been awarded to one parent exclusive of the other; or
    - (2) One parent has surrendered custody of the child by abandoning or deserting the child.
    - (3) If "1" or "2," exists, the consent of the custodial parent is sufficient.
  - (b) The consent of the parent may be voided by order of a circuit court on a showing by clear and convincing evidence that:
    - (1) The parent is not fit to make decisions concerning the child; and
    - (2) The marriage is not in the best interest of the child.
  - (c) When a marriage license is issued under the provision requiring consent of the parents or a parent under this section, there shall be a waiting period of 5 business days before the marriage.
3. If a child has a pending case in circuit court, a parent who consents under this section shall immediately notify the circuit court, all parties, and attorneys to the pending cases.

Ark. Code Ann. § 9-11-102 (Supp. 2009).

4. Exception: When one or both parties making application for a marriage license are under the minimum age prescribed above and the female is pregnant, both parties

9/09

may appear before the circuit court of the district where the application for a marriage license is being made and evidence shall be submitted to show the following:

- (a) Evidence of the pregnancy in the form of a certificate from a licensed and regularly practicing Arkansas physician;
- (b) The birth certificates of both parties;
- (c) Evidence of parental consent for either party who is under the minimum age.

After considering the evidence and other facts and circumstances, if the judge finds that it is in the best interest of the parties, the judge may enter an order authorizing and directing the county clerk to issue a marriage license to the parties. The clerk shall retain a copy of the order on file in the clerk's office with the other papers.

- 5. However, if the female has given birth to a child, the court, if satisfied that it would be in the best interests of all interested parties (and if all requirements set out above are complied with, except the physician's certificate that the female is pregnant) the court may enter an order authorizing and directing the county clerk to issue a marriage license.

Ark. Code Ann. § 9-11-103 (Supp. 2009).

- 6. Marriage of underage parties when consent of the parents is not given or when the age was misrepresented by a contracting party, may be set aside and annulled upon the application of the parent or parents or guardian to the appropriate circuit court.

Ark. Code Ann. § 9-11-104 (Repl. 2008).

- 7. The marriage of any male under the age of 17 and of any female under the age of 16 is voidable.
  - (a) For marriages contracted before March 26, 1964, when one or both parties were under the minimum age, the marriages are voidable only and are valid for all intents and purposes unless voided by an appropriate court.
  - (b) For marriages contracted between July 30, 2007, and April 2, 2008, in which one or both parties were under the minimum age, the marriages are

voidable only and are valid for all intents and purposes unless voided by an appropriate court.

Ark. Code Ann. § 9-11-105 (Supp. 2009); *State v. Graves*, 228 Ark. 378(1957).

**B. PERSONS WHO MAY SOLEMNIZE MARRIAGES**

1. The Governor;
2. Any former justice of the Arkansas Supreme Court;
3. Judges of courts of record, including former judges who served at least 4 years;
4. Any justice of the peace, including any former JP who served at least 2 terms since passage of Am. 55;
5. Any regularly ordained minister or priest of any religious sect or denomination;
6. Any mayor;
7. Any official appointed for that purpose by the quorum court of the county where the marriage will be solemnized;
8. Any elected district judge, including any former municipal or district judge who served at least 4 years;
9. The Religious Society of Friends (Quakers) through their traditional rites.

Ark. Code Ann. § 9-11-213 (Repl. 2008).

**C. MARRIAGE LICENSES**

1. Marriage license required—obtained from county clerk;

Ark. Code Ann. § 9-11-201, -203(Repl. 2008).

2. Return of license to clerk within 60 days required.

Ark. Code Ann. § 9-11-218 (Repl. 2008); *Fryar v. Roberts*, 346 Ark. 432, 57 S.W.3d 727 (2001)(failure to file marriage license within 60 days does not render a marriage void).

**D. COMMON LAW MARRIAGE**

1. Arkansas does not recognize common law marriages within the boundaries of this state.

*Fryar v. Roberts*, 346 Ark. 432 (2001); *Spicer v. Spicer*, 239 Ark. 1013 (1965); *Furth v. Furth*, 97 Ark. 272 (1911).

2. All marriages contracted in other states are valid in Arkansas, excluding marriages between persons of the same sex.

Ark. Code Ann. § 9-11-107 (Repl. 2008); *Craig v. Carrigo*, 353 Ark. 761 (2003)(no valid common law marriage to be recognized in Arkansas because Alberta, Canada had no statutory law and the parties had not lived as married for the requisite time to meet the Alberta case law definition); *Brissett v. Sykes*, 313 Ark. 515 (1993)(common law marriage); *Knaus v. Relyea*, 24 Ark. App. 7 (1988).

**E. COVENANT MARRIAGE ACT**

1. Requirements of Covenant Marriage

- a. Marriage entered into by a male and a female.

Ark. Code Ann. § 9-11-803(a)(1) (Repl. 2008).

- b. Counseling by authorized counselor before marriage.

Ark. Code Ann. § 9-11-803(a)(2) (Repl. 2008).

- c. Man and woman may contract a covenant marriage by declaring their intention on the application for a marriage license.

Ark. Code Ann. § 9-11-803(b)(1) (Repl. 2008).

- d. Application for marriage license and declaration of intent to enter into a covenant marriage to be filed with clerk.

Ark. Code Ann. § 9-11-803(b)(2) (Repl. 2008).

2. Declaration of Intent for Covenant Marriage



- a. Declaration of intent to contract a covenant marriage shall include the following:
  - (1) required “recitation” set out in Ark. Code Ann. § 9-11-804(a)(1) (Repl. 2008);
  - (2) affidavit by the parties that they have received authorized counseling;
  - (3) attestation of counselor;
  - (4) notarized signatures of parties, along with those required to consent if they are minors;
  - (5) declaration shall include two separate documents--recitation and affidavit with attestation.

Ark. Code Ann. § 9-11-804 (Repl. 2008).

3. Form of affidavit in Ark. Code Ann. § 9-11-805 (Repl. 2008).

4. Couple already married may redesignate marriage as covenant marriage.

Ark. Code Ann. § 9-11-807 (Repl. 2008).

5. Dissolution of Covenant Marriage

- a. Requirements of divorce in Ark. Code Ann. § 9-11-808, -809, -810 (Repl. 2008).
- b. No second marriage unless dissolution of prior marriage.
- c. Party seeking to dissolve and set aside a covenant marriage shall state in the petition for divorce that he or she is seeking to dissolve a covenant marriage as authorized in the Covenant Marriage Act of 2001.

Ark. Code Ann. § 9-11-804(a)(1) (Repl. 2008); and Ark. Code Ann. § 9-12-301(a) (Repl. 2008).

- d. In divorce decree dissolving a covenant marriage, the court shall enter a finding that the marriage being dissolved is a covenant marriage.

Ark. Code Ann. § 9-12-324 (Repl. 2008).

## II. DIVORCE

Ark. Code Ann. § 9-12-301, et seq. (Repl. 2008 & Supp. 2009)

### A. Jurisdiction

1. The circuit court shall have the power to dissolve and set aside a marriage contract.

Ark. Code Ann. § 9-12-301 (Repl. 2008); *Jackson v. Jackson*, 81 Ark. App. 249, 100 S.W.3d 92(2003)(wife failed to comply with Rule 4 in attempting service by publication, so no jurisdiction was acquired over defendant and all proceedings as to him were void. Divorce was reversed and dismissed).

2. The action for divorce shall be by equitable proceedings.

Ark. Code Ann. § 9-12-302 (Repl. 2008).

3. The court where the final divorce decree is rendered shall retain jurisdiction for all matters following entry of the decree, except:

- a. Pursuant to Ark. Code Ann. §9-12-320 (Repl. 2008), the case is transferred to another county in which at least one party resides on the petition of either party or upon the court's own motion.
  - (1) Both parties have established residency in another judicial circuit within the state; or
  - (2) One party has moved to another judicial circuit within the state and the other party has moved from the state.
- b. If the party residing in the county to which the case has been transferred moves from that county or from the State of Arkansas, the case shall be transferred back to the county of original jurisdiction or the county of residence of the party still residing in Arkansas.

Ark. Code Ann. §9-12-320 (Repl. 2008).

4. The decision to transfer a case is within the discretion of the court in which the final decree of divorce was entered.

Ark. Code Ann. §9-12-320 (a)(2)(A)(ii) (Repl. 2008).

**B. Venue**

1. The proceedings shall be in the county where the petitioner resides, unless the petitioner is a nonresident, and in that case, the proceedings shall be in the county where the defendant resides.

Ark. Code Ann. § 9-12-303(a) (Repl. 2008).

2. Service of process may be directed to any county in the state.

Ark. Code Ann. § 9-12-303(a) (Repl. 2008); *Hargis v. Hargis*, 292 Ark. 487 (1987)(and venue of an action may be waived).

3. When one spouse initiates an action against the other for absolute divorce, divorce from bed and board, or separate maintenance, then the venue for the initial action shall also be the venue for any of the three named actions filed, regardless of the residency of the other spouse.

Ark. Code Ann. § 9-12-303(c) (Repl. 2008); *Tortorich v. Tortorich* (“*Tortorich III*”), 333 Ark. 15 (1998).

4. The court issuing a final decree of divorce retains jurisdiction for all matters following entry of the decree, although either party may request and the court may agree that the case be transferred to another county in which at least one party resides if certain conditions are met.

Ark. Code Ann. § 9-12-320 (Repl. 2008).

**C. Matters Which Must Be Proved**

1. To obtain a divorce, the plaintiff must prove:

- a. a legal cause for divorce;

See Ark. Code Ann. § 9-12-301(Repl. 2008), for grounds for divorce. *Dee v. Dee*, 99 Ark. App. 159, 258 S.W.3d 405 (2007)(petitioner failed to prove statutory grounds of general indignities; even though defendant/appellant admitted that he had waived corroboration of grounds, the injured party must always prove statutory grounds whether divorce is contested or uncontested; granting of divorce was reversed and dismissed).

- b. residency by either plaintiff or defendant for:

- (1) 60 days before the action is commenced; and

*Roberts v. Yanyan Yang*, 102 Ark. App. 384, 285 S.W.3d 689 (2008)(court had jurisdiction over the parties because wife was required to live in the state for 60 days before the commencement of the proceeding, not immediately before entry of the divorce decree.)

- (2) 3 months before the final judgment granting a divorce;
- (3) at least 30 days must have elapsed from the date of the filing of the complaint to the decree of divorce;
- (4) residency must be proven in every case, despite an admission by a defendant;

*Rogers v. Rogers*, 90 Ark. App. 321, 205 S.W.3d 856 (2005)(residency must be proved and corroborated in every instance and the question of whether it has been proven and corroborated is jurisdictional); *Hodges v. Hodges*, 27 Ark. App. 250 (1989).

- (5) plaintiff only, when personal service of process cannot be had, or defendant fails to appear, must prove that for not less than 3 full months the plaintiff has maintained actual residence in the state.

c. that the cause of divorce:

- (1) occurred or existed in the state; or
- (2) occurred out of state but was legal cause in that state according to their laws; or
- (3) occurred or existed within 5 years before commencement of the suit. *See Jessie v. Jessie*, 53 Ark. App. 188 (1996)(minimum contacts).

2. Residence means domicile.

*Smith v. Smith*, 223 Ark. 627, 267 S.W.2d 771 (1954); Ark. Code Ann. § 9-12-307(b) (Repl. 2008).

#### **D. Grounds for Divorce**

1. One seeking to set aside a covenant marriage shall so state in the petition for divorce.
2. Grounds for absolute divorce or divorce from bed and board are:
  - a. impotency;
  - b. conviction of a felony or other infamous crime;
  - c. habitual drunkenness for 1 year;
  - d. cruel and barbarous treatment so as to endanger the life of the other;
  - e. indignities to the other so as to render his or her condition intolerable;

*Dee v. Dee*, 99 Ark. App. 159, 258 S.W.3rd 405 (2007)(divorce reversed and dismissed for petitioner's failure to prove general indignities); *Moore v. Davidson*, 85 Ark. App. 104 (2004)(every minute detail of complainant's testimony need not be corroborated to support grounds of general indignities and trial court erred in denying divorce based upon insufficient corroboration); *Poore v. Poore*, 76 Ark. App. 99 (2001)(failure to establish indignities; mere incompatibility is not grounds for divorce in Arkansas); *Gunnell v. Gunnell*, 30 Ark. App. 4 (1989)(indignities must be proven by evidence of specific acts and conduct).

- f. adultery;

*Lytle v. Lytle*, 266 Ark. 124 (1979)(adultery may be proven by evidence leading to an inference of guilt).

- g. separation for 18 continuous months, without cohabitation, whether the separation is voluntary, by mutual consent, or either or both parties' fault;
- h. separation for 3 consecutive years, without cohabitation, because one is incurably insane, upon showing (1) commitment to an institution for the past 3 years, and (2) proof of insanity is supported by the testimony of 2 physicians, one being a regularly treating physician, and, when the insane spouse is confined to an institution, by the superintendent or one of the physicians of the institution where confined;

- (1) The court shall require the plaintiff to provide for the care and maintenance of the insane defendant. The trial court will retain jurisdiction for the purpose of enforcing the provisions.
- (2) Service of process shall be upon the duly appointed guardian of the insane spouse.
  - i. willful failure to support.

*Gibson v. Gibson*, 234 Ark. 954 (1962). Ark. Code Ann. § 9-12-301(Repl. 2008); *Lytle v. Lytle*, 266 Ark. 124 (1979)(grounds for divorce are the same for absolute divorce and a divorce from bed and board); *Harpole v. Harpole*, 10 Ark. App. 298 (1989) (grounds for divorce must always be proven and cannot be stipulated or waived by a spouse).

#### **E. Pleadings**

1. Pleadings are not required to be verified by affidavit.
2. However, interrogatories regarding the marital property shall be answered on oath.
3. Notarized affidavit of financial means to be required by the trial court prior to hearing to establish or modify child support. Administrative Order No. 10, §IV (See Appendix).
4. Unless initiated by the court itself, petitions to cite for contempt committed outside the presence of the court must be supported by affidavit.

Ark. Code Ann. § 9-12-304 (Repl. 2002); *Hilton Hilltop v. Riviere*, 268 Ark. 532 (1980).

#### **F. No Judgment Pro Confesso**

1. The statements of the complaint for a divorce shall not be taken as true because of the defendant's failure to answer or admission of their truth on the part of the defendant.

Ark. Code Ann. § 9-12-305 (Repl. 2008).

#### **G. Corroboration**

1. Plaintiff's grounds need not be corroborated in an uncontested divorce suit.
2. Proof of residence and separation without cohabitation must still be corroborated.

*Gunnell v. Gunnell*, 30 Ark. App. 4 (1989)(corroborating evidence may be slight when there is no evidence of collusion; corroboration of continuity of separation is required relative to grounds of 3-year separation and failure to support found in Ark. Code Ann. §9-12-301); *Hodges v. Hodges*, 27 Ark. App. 250 (1989); *Araneda v. Araneda*, 48 Ark. App. 236 (1995).

3. In contested suits, corroboration may be expressly waived in writing by the other spouse.

Ark. Code Ann. § 9-12-306 (Repl. 2008); *Rachel v. Rachel*, 21 Ark. App. 77 (1987)(corroboration required to prevent parties from obtaining a divorce by collusion; appellate court found corroboration insufficient and that no waiver had been made); *Hodges v. Hodges*, but see, *Russell v. Russell*, 19 Ark. App. 119 (1986); *Oates v. Oates*, 340 Ark. 480, 10 S.W.3d 891 (2000)(divorce reversed because neither express waiver of corroboration nor corroboration of grounds was provided).

#### **H. Effect of Collusion, Consent, or Equal Guilt of the Parties**

1. No divorce shall be granted if the grounds are:
  - a. occasioned by collusion of the parties; or
  - b. established with the intent to procure a divorce; or
  - c. adultery, and both parties have been guilty of that or other offense or injury complained of.

Ark. Code Ann. § 9-12-308 (Repl. 2008); *Oberstein v. Oberstein*, 217 Ark. 80, 228 S.W.2d 615 (1950).

#### **I. Condonation Abolished**

1. The defense of condonation to an action for absolute divorce or divorce from bed and board was abolished in Arkansas by Act 182 of 2005.
2. Abolition of condonation does not affect the defenses of collusion, consent, or equal guilt of the parties.

Ark. Code Ann. § 9-12-325 (Repl. 2008).



**J. Maintenance and Attorney Fees**

1. The court may grant either party maintenance and reasonable attorney fees:
  - a. during the pendency of an action for absolute divorce, divorce from bed and board, separate maintenance, or alimony; or
  - b. during the enforcement of alimony, maintenance, or support action.
2. All child support due and unpaid shall accrue interest at the rate of 10% per annum.
3. The court shall award a minimum of 10% of support amount due as attorney's fees in actions for enforcement of payment of alimony, maintenance, and support provided in decree, judgment, or order. See, also, Ark. Code Ann. § 9-14-233 (b) (Repl. 2008).

Ark. Code Ann. § 9-12-309 (Repl. 2008); *Burns v. Burns*, 312 Ark. 61 (1993)(awarding attorney's fees is at the discretion of the trial court and will not be reversed absent an abuse of discretion); *Scroggins v. Scroggins*, 302 Ark. 362 (1990)(disparity of parties' income alone cannot justify award of attorney fees); *Lytle v. Lytle*, 266 Ark. 124 (1979)(award of attorney's fees is within the sound discretion of the chancellor).

**K. Parenting Classes**

1. Court may order divorcing parents, before or after entering a decree of divorce, to complete a minimum of 2 hours of parenting classes concerning issues for divorced parents; or
2. Court may order parents to submit to mediation regarding issues of parenting, custody, and visitation;
3. Parties bear own costs.

Ark. Code Ann. §9-12-322(Repl. 2008).

**L. Enforcement of Separation Agreements**

1. Courts [of equity] may enforce the performance of written agreements between husband and wife made and entered into while contemplating separation or divorce and decrees or orders for alimony and maintenance by sequestration of

either's property, or other lawful means, including equitable garnishments or contempt proceedings.

Ark. Code Ann. § 9-12-313 (Repl. 2008); *Rutherford v. Rutherford*, 81 Ark. App. 122, 98 S.W.3d 842 (2003)(trial court is not bound by parties' stipulation; court has the discretion to approve, disapprove, or modify parties' separation agreement); *Sutton v. Sutton*, 28 Ark. App. 165 (1989).

#### **M. Divorce Decree**

1. A 30-day waiting period is required from the date a complaint is filed before any divorce can be granted, regardless of grounds.

Ark. Code Ann. §9-12-307(a)(1)(B) (Repl. 2008).

2. The decree shall be followed by an order containing provisions for:

- a. alimony;

Ark. Code Ann. § 9-12-312 (Repl. 2008).

- b. child support, custody, visitation and dependent health care;

Ark. Code Ann. § 9-12-312 (Repl. 2008).

- c. division of property;

Ark. Code Ann. § 9-12-315 (Repl. 2008); *Abbott v. Abbott*, 79 Ark. App. 413 (2002)(award to wife ten months after decree of divorce was an interpretation and enforcement of the decree, necessary because decree's reference to "retirement" was latently ambiguous). See, also, Ark. Code Ann. § 9-12-323 (Repl. 2008)(Joint Credit Card Accounts).

- d. dissolution of an estate by entirety ; or

Ark. Code Ann. § 9-12-317(a) (Repl. 2008)(automatic dissolution unless court orders otherwise); *Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003)(error to award marital home and corresponding debt to former wife).

- e. restoration of the wife's previous name.

Ark. Code Ann. § 9-12-318 (Repl. 2008).

3. In divorce decree dissolving a covenant marriage, the court shall enter a finding that the marriage being dissolved is a covenant marriage.

Ark. Code Ann. § 9-12-324 (Repl. 2008).

## **N. Causes of Action for Divorce**

### 1. Causes distinguished:

- a. "An absolute divorce, or divorce from the bonds of matrimony or divorce a vinculo matrimonii, is a statutory action based on the grounds set out in [Ark. Code Ann. § 9-12-301]. Property must be divided upon granting an absolute divorce. [Ark. Code Ann. § 9-12-315]. Corroboration is required in contested cases." [Ark. Code Ann. § 9-12-306].
- b. "A limited divorce, or a divorce from bed and board, or a divorce a mensa et thoro, is a statutory action based on the same grounds as those specified for an absolute divorce. ...Property must be divided upon the granting of a divorce....Corroboration is required...."
- c. "An independent cause of action will lie for alimony.... Reference is made to the action by [Ark. Code Ann. § 9-12-302 (Repl. 2008)] but it is maintained under the broad power of equity....There are no meaningful distinctions between the action for alimony and...[an]...action for separate maintenance....In an action for separate maintenance it is unnecessary to establish statutory grounds, all that must be established are a separation and an absence of fault....In a suit for separate maintenance there is no statutory requirement for corroboration....Property cannot be divided in a separate maintenance proceeding although possession may be awarded. Child custody actions between parents are actions derivative of divorce or separate maintenance. There is no independent cause of action by one parent against the other solely for child custody...."

*Spencer v. Spencer*, 275 Ark. 112, 115 (1982)(concurring opinion of Justice Dudley)(citations omitted); *Jones v. Earnest*, 307 Ark. 294 (1992)(a divorce from bed and board is not a final decree of divorce for purposes of dissolving a tenancy by the entirety under Ark. Code Ann. § 9-12-317(a)).

### III. SEPARATE MAINTENANCE

#### A. Authority

1. Until *Lytle v. Lytle*, 266 Ark. 124 (1979), a decree of separate maintenance as a separate cause of action unrelated to a decree from bed and board did not exist.
2. No statutory authority; separate maintenance is maintained under the broad powers of equity. *Kesterson v. Kesterson*, 21 Ark. App. 287 (1987).

#### B. Grounds

1. For separate maintenance, a spouse must prove only separation, absence of fault on his or her part, and financial need. The spouse is not required to prove any other grounds as listed in Ark. Code Ann. § 9-12-301.

*Spencer v. Spencer*, 275 Ark. 97 (1982); *Hill v. Rowles, Chancellor*, 223 Ark. 115 (1954); *Kesterson v. Kesterson*, 21 Ark. App. 287 (1987).

#### C. Scope

1. Property cannot be divided in a separate maintenance proceeding although *possession* may be awarded.

*Spencer v. Spencer*, 275 Ark. 193 (1982); *Coleman v. Coleman*, 7 Ark. App. 280 (1983).

2. Child custody actions between parents are actions derivative of divorce or separate maintenance or domestic abuse actions.

*Kesterson v. Kesterson*, 21 Ark. App. 287 (1987).

3. Trial court did not err in granting an absolute divorce upon wife's filing a Complaint for Separate Maintenance only where:
  - (1) neither party raised the issue;
  - (2) both parties agreed to a divorce;
  - (3) both parties treated the Complaint for separate maintenance as a complaint for divorce;
  - (4) both parties stipulated to an equal division of marital property, and

husband waived corroboration of grounds for divorce; and

- (5) both parties consented to the hearing being one for absolute divorce.

*Hiatt v. Hiatt*, 86 Ark. App. 31, 158 S.W.3d 720 (2004).

## IV. PROPERTY AND DEBT DIVISION

### A. Division of Property, Ark. Code Ann. § 9-12-315 (Repl. 2008)

1. All marital property shall be divided in half (50/50) unless the court finds that division inequitable.

Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 2008); *Bank v. Evans*, 347 Ark. 383 (2002); *Hale v. Hale*, 307 Ark. 480 (1995); *Coombe v. Coombe*, 89 Ark. App. 114 (2005) (mathematical precision not required, simply that marital property be distributed equitably); *Cole v. Cole*, 82 Ark. App. 47 (2003), *after remand*, 89 Ark. App. 134 (2005); *Mitchell v. Meisch*, 22 Ark. App. 321 (1987)(except when parties enter agreement to postpone division of marital property or when divorce is granted by a foreign court that lacks jurisdiction to divide Ark. marital property, all marital property should be divided at the time of divorce); *Warren v. Warren*, 11 Ark. App. 58 (1984)(Code provision is not applicable to property held as tenants by the entirety); *Bachman v. Bachman*, 274 Ark. 22 (1981).

2. The court *must* state its basis and reasons for an unequal distribution in the order.

Ark. Code Ann. § 9-12-315(a)(1)(B) (Repl. 2008); *Hadden v. Hadden*, 320 Ark. 480 (1995); *Copeland v. Copeland*, 84 Ark. App. 303(2003)(trial court must articulate whether it is making an equal or unequal division and, if unequal, reasons why such division is equitable); *Keathley v. Keathley*, 76 Ark. App. 150 (2001)(trial court properly considered fault--fraudulent conduct--in unequal division).

3. When an equal division of marital property is found inequitable, the court shall make some other division it finds equitable, taking into consideration the following:
  - a. the length of the marriage;
  - b. age, health, and station in life of the parties;
  - c. occupation of the parties;
  - d. amount and sources of income;
  - e. vocational skills;
  - f. employability;

- g. estate, liabilities, and needs of each party;
- h. opportunity of each party for further acquisition of capital assets and income, including:
- i. the services of a homemaker; and
- j. the federal income tax consequences of the court's division of property.

Ark. Code Ann. § 9-12-315(a)(1)(A) (Repl. 2008); *Stuart v. Stuart*, 280 Ark. 546 (1983); *Bachman v. Bachman*, 274 Ark. 23 (1981); *Hoover v. Hoover*, 70 Ark. App. 215 (2000)(purpose of property division statute); *Smith v. Smith*, 32 Ark. App. 175 (1990) (court is given broad powers under Ark. Code Ann. § 9-12-315 to distribute all property in divorce, marital and nonmarital, to reach an equitable division); *Forsgren v. Forsgren*, 4 Ark. App. 286 (1982).

- 4. All other property shall be returned to the party who owned it before the marriage.

Ark. Code Ann. § 9-12-315(a)(2) (Repl. 2008).

- 5. Final orders shall name the specific real and personal property each party will receive.

Ark. Code Ann. § 9-12-315(a)(3)(A) (Repl. 2008).

- 6. The court shall order the sale of real property if the court finds that the real property is not divisible without great prejudice.

Ark. Code Ann. § 9-12-315(a)(3)(B) (Repl. 2008).

- 7. Proceedings for enforcing these orders require 10 days notice to the other party.

Ark. Code Ann. § 9-12-315(a)(3)(C) (Repl. 2008).

- 8. When stocks, bonds, or other securities are part of the marital property, the court shall name the specific property each party is entitled to receive. The court may order all of a security to one party on the condition that the party pay the fair market value to the other party. This rule includes stock options.

Ark. Code Ann. § 9-12-315(a)(4) (Repl. 2008); *Moore v. Moore*, 21 Ark. App. 165 (1987) (court has no authority to dispose of property rights awarded in a separate maintenance action); *Dunavant v. Dunavant*, 66 Ark. App. 1 (1988).

9. Court should only consider potential taxes in valuing marital property in limited circumstances, including that tax liability can be reasonably predicted.

*Grace v. Grace*, 326 Ark. 312 (1996).

## **B. Marital Property**

1. For the purposes of property division, marital property means all property acquired by either spouse following the marriage except for:
  - a. property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable-on-death or a transfer-on-death arrangement;

*Powell v. Powell*, 82 Ark. App. 17 (2003)(premarital funds deposited into a joint account and held jointly during the marriage were marital property).

- b. property acquired in exchange for property acquired prior to marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- c. property acquired by a spouse after a decree of divorce from bed and board;
- d. property excluded by valid agreement of the parties;
- e. the increase in value of property acquired prior to marriage or by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable-on-death or a transfer-on-death arrangement, or in exchange therefor;
- f. benefits received or to be received from a worker's compensation claim, personal injury claim, or social security claim when those benefits are for any degree of permanent disability or future medical expenses; and

*Collins v. Collins*, 347 Ark. 240 (2001)(FELA benefits awarded for permanent disability



and thus exempt from division as marital property).

- g. income from property owned prior to the marriage or from property acquired by gift or by reason of the death of another, including, but not limited to, life insurance proceeds, payments made under a deferred compensation plan, or an individual retirement account, and property acquired by right of survivorship, by a trust distribution, by bequest or inheritance, or by a payable-on-death or a transfer-on-death arrangement, or in exchange therefor.

Ark. Code Ann. § 9-12-315(b) (Repl. 2008 ); *Clayton v. Clayton*, 297 Ark. 342 (1988)(except for those benefits for permanent disability or future medical expenses, remaining benefits are subject to division as marital property under § 9-12-315(a)(1)(A)); *Wilson v. Wilson*, 294 Ark. 194 (1987)(if a husband's bonus accrued during the marriage, then it was marital property); *Meeks v. Meeks*, 290 Ark. 563 (1986)(accounts receivable are marital property); *Addis v. Addis*, 288 Ark. 205 (1986)(when dividing a partnership interest, the Court cannot divide a partnership, but the Court may determine the fair value of the interest and award one-half the interest); *Meinholtz v. Meinholtz*, 283 Ark. 509 (1984)(test for determining eligibility of an enhanced business career as marital property is when there is no accumulated marital property, the spouse who supported the degree is ineligible for maintenance, and the court considers the extent the spouse has already benefitted from the spouse's increased earning capacity); *Southerland v. Southerland*, 75 Ark. App. 386 (2001)(stock-option agreement was akin to marital assets rather than to bonus income; not a bonus for child-support purposes).

2. An agreement to divide future Social Security benefits cannot be enforced because federal law (42 U.S.C.A. §407(a)) prohibits transfer or assignment of such benefits.

*Gentry v. Gentry*, 327 Ark. 266 (1997).

3. In considering whether property is marital, the determining factor is the time that the right to the property is acquired.

*McDermott v. McDermott*, 336 Ark. 557 (1999) (property was attorney-husband's contingency fee agreements); *Dial v. Dial*, 74 Ark. App. 30 (2001)(money accumulated in DROP account during marriage was marital property); *O'Neal v. O'Neal*, 55 Ark. App. 57 (1996)(advance on future compensation from employer); *Dunn v. Dunn*, 35 Ark. App. 89 (1991)(long-term disability insurance plan).

4. Business goodwill is marital property and divisible as such if it is a business asset with value independent of the presence or reputation of a particular individual, an

asset which may be sold, transferred, conveyed or pledged.

*Tortorich v. Tortorich*, 50 Ark. App. 114 (1995); *see, also, Meinholtz v. Meinholtz*, 283 Ark. 509 (1984) (“enhanced business career” as property discussed); *Addis v. Addis*, 288 Ark. 205 (1986) (division of partnership assets--three basic methods for disposing of vested but non-matured retirement interest upon divorce: (1) assign the whole interest in the plan to the employee, and assign assets of equal value to the other spouse; (2) divide the interest in the plan itself on a percentage formula; or (3) reserve jurisdiction until retirement to divide the actual monetary benefit when received); *Williams v. Williams*, 82 Ark. App. 294 (2003) (medical clinic and surgery center, including “goodwill”).

5. Military retirement pay is marital property to be divided proportionately according to number of years of marriage that coincided with military service.

*Cherry v. Cherry*, 55 Ark. App. 178 (1996); *Holaway v. Holaway*, 70 Ark. App. 240 (2000) (only vested military retirement is a divisible asset upon divorce). *See, also, Pender v. Pender*, 57 Ark. App. 305 (1997) (personal jurisdiction over member to divide military retirement); *Surratt v. Surratt*, 85 Ark. App. 267 (2004) (Property-settlement agreement provided for division of military retirement benefits, which husband later forfeited for 100% disability payments. He argued that his former wife could not receive a portion of his disability benefits. Court found that her payments should continue because they were not in the nature of alimony, but were periodic distributions of marital property pursuant to a settlement agreement).

6. When a husband and wife purchase property as a tenancy by the entirety, a presumption arises of a gift from the party furnishing the greater part of the consideration to the other party, which although rebuttable, is strong and can be overcome only by clear and convincing evidence.

*McKay v. McKay*, 340 Ark. 171 (2000) (disability income placed in joint checking account and used to purchase a houseboat; found to be marital property); *Mulling v. Mulling*, 323 Ark. 88 (1996); *Dennis v. Dennis*, 70 Ark. App. 13 (2000) (presumption of gift rebutted); *Dunavant v. Dunavant*, 66 Ark. App. 1 (1999).

7. When property is placed in the names of both husband and wife without specifying the manner in which they take, it is presumed to be held as tenants by the entirety, and clear and convincing evidence is required to overcome that presumption.

*Jablonski v. Jablonski*, 71 Ark. App. 33 (2000); *Thomas v. Thomas*, 68 Ark. App. 196 (1999) (presumption not overcome for stock certificates and CDs).

8. Retirement benefits acquired during the marriage are ordinarily divisible by one-half.

*Gray v. Gray*, 352 Ark. 443 (2003)(marital property includes payments made under deferred compensation plan and IRA accounts as well as survivor benefits); *Skelton v. Skelton*, 339 Ark. App. 227 (1999)(husband's fireman's pension plan is marital property; private pension plans are contractual between employer and employee—they become a property interest); *Mathis v. Mathis*, 52 Ark. App. 155 (1996); *Cate v. Cate*, 35 Ark. App. 79 (1991)( a profit sharing plan fully vested before the marriage was not a divisible marital asset).

9. Spouse was entitled to benefit from post-marital salary raise where worker did not retire for seven years after divorce.

*Brown v. Brown*, 332 Ark. 235 (1998); *Askins v. Askins*, 288 Ark. 333 (1986).

10. Funds acquired and deposited into joint account during legal separation are marital property.

*Schumacher v. Schumacher*, 66 Ark. App. 9 (1999).

11. Disability income protection policy, which protected against loss of the husband's income should he become unable to perform in his occupation as a doctor, was marital property.

*Frigon v. Frigon*, No. CA 02-298 (4-2-03).

12. Valuation of marital property.

*Cole v. Cole*, 82 Ark. App. 47, 110 S.W.3d 310 (2003)(error in basing valuation of husband's interest in surgery center upon his buy-sell agreement rather than fair market value), *after remand*, 89 Ark. App. 134 (2005); *Crismon v. Crismon*, 72 Ark. App. 116 (2000)("fair market value" standard for valuing closely held business has been approved by the Supreme Court and is used in Ark. Code Ann. 9-12-315(a)(4)).

### **C. Dissolution of Estates by the Entirety or Survivorship**

1. Upon divorce, an estate by the entirety or survivorship in real or personal property is automatically dissolved, and parties are treated as tenants in common unless the court order specifically provides otherwise.

Ark. Code Ann. § 9-12-317(a) (Repl. 2008); *Creson v. Creson*, 53 Ark. App. 41 (1996);

*White v. White*, 50 Ark. App. 240 (1995).

2. However, in an absolute divorce or divorce from bed and board, the court may distribute real and personal property according to Ark. Code Ann. §9-12-315, provided the court sets out its reasons in writing for making an unequal distribution.

Ark. Code Ann. §9-12-317(c) (Repl. 2002); *Harvey v. Harvey*, 295 Ark. 102 (1988).

3. The court may award the property to the party who did not benefit from a felony committed by the other party if complaint for divorce is filed within three (3) years of a finding or plea of guilty. Court also may award to both parties as court deems equitable.

Ark. Code Ann. §9-12-317(b) (Repl. 2008).

#### **D. Property Settlement Agreements**

1. As a part of divorce decree.

*Meadors v. Meadors*, 58 Ark. App. 96 (1997)(two types of agreements defined).

2. As an independent contract.

*Houston v. Houston*, 67 Ark. App. 286 (1999).

- a. not set aside absent fraud or unconscionable advantage;

*Mow v. Mow*, 66 Ark. App. 374 (1999); *Ward v. McCord*, 61 Ark. App. 271 (1998)(intrinsic and extrinsic fraud defined and distinguished); *Riley, Jr. v. Riley*, 61 Ark. App. 74 (1998); *Bishop v. Bishop*, 60 Ark. App. 164 (1998)(unilateral mistake alleged).

- b. statute of limitations runs against each installment as due and unpaid;

- c. agreement to provide post-majority support was binding;

*Van Camp v. Van Camp*, 333 Ark. 320 (1998).

- d. court has authority to enforce in action for separate maintenance.

*Nielsen v. Berger-Nielsen*, 347 Ark. 996 (2002)(attorney who was sued for his divorce client's failure to enter into property settlement agreement was immune under Ark. Code

Ann. §16-22-310; an attorney may not be sued for non-fraudulent acts committed during the course of his representation of his client because he is not in privity with a third party); *Grider v. Grider*, 62 Ark. App. 99 (1998).

3. Within court's discretion to approve, disapprove, or modify an agreement entered into before a divorce is granted.

*Rutherford v. Rutherford*, 81 Ark. App. 122 (2003)(court's authority to accept or reject an agreement of disputing parties is not limited by Ark. Code Ann. 9-12-313(separation agreements), but court must consider the factors set out in Ark. Code Ann. 9-12-315(providing that marital property must be distributed at the time a divorce decree is entered)(case involved a separation agreement).

## **E. Debt**

1. Court has authority to consider allocation of debt in a divorce case.

*Williams v. William*, 82 Ark. App. 294 (2003)(although division of marital debt is not addressed in A.C.A. § 9-12-315, the trial court has authority to consider allocation of debt in a divorce case); *Boxley v. Boxley*, 77 Ark. App. 136 (2002)(allocation of debt is a question of fact; no authority to determine husband's and wife's obligations as to his mother); *Dalrymple v. Dalrymple*, 74 Ark. App. 372(2001)(two bank notes were corporate, not marital debts).

2. Judge has discretion to divide debts.

*Ellis v. Ellis*, 75 Ark. App. 173 (2001).

3. Court has authority to determine tax liability between the parties to a divorce.

*Killough v. Killough*, 72 Ark. App. 62 (2000).

4. Credit card debt acquired during separation but prior to divorce is marital debt.

*Schumacher v. Schumacher*, 66 Ark. App. 9 (1999).

5. Joint credit card accounts: Ark. Code Ann. 9-12-323 (Repl. 2008).
  - a. sets out a process for a nonresponsible party to notify the issuer of a credit card, once a court has determined or approved a property settlement agreement establishing the party responsible for any joint credit card debt in a divorce action;

- b. absolves nonresponsible party from any liability on the credit card for any new charges after notification is made;
- c. nonresponsible party is responsible for any charges he or she makes on the credit card;
- d. nonresponsible party remains liable on the balance due before the date the notice is processed and for all interest and late fees on the balance;
- e. sets out responsibilities of issuer of credit card;
- f. does not prohibit issuer of credit card from issuing a new credit card to the responsible party.

Ark. Code Ann. 9-12-323 (Repl. 2008).

## V. TEMPORARY ORDERS

### A. Authority

1. During the pendency of an action for absolute divorce, divorce from bed and board, separate maintenance, or alimony, the court may grant either party temporary maintenance and reasonable attorney fees.

Ark. Code Ann. § 9-12-309 (Repl. 2008); *Scroggins v. Scroggins*, 302 Ark. 362 (1990)(court has authority to award attorney fees during pendency of an action under § 9-12-309(a) and to award attorney fees for enforcement of orders under § 9-12-309(b)).

2. A preliminary injunction or a temporary restraining order (TRO) may be granted without written or oral notice to the adverse party or his attorney where it appears by affidavit or verified complaint that irreparable harm or damage will or might result to the applicant if such preliminary injunction or TRO is not granted.

Ark. R. Civ. Pro. 65.

### B. Notice

1. Except in cases involving irreparable harm or damage absent a preliminary injunction or TRO granted without notice, reasonable notice must be given to the adverse parties or their attorney of the application for a preliminary injunction or a TRO, and an opportunity for hearing must be given.

Ark. R. Civ. Pro. 65.

### C. Hearing

1. When a preliminary injunction or TRO has been issued without notice against a party, upon application by that party to the Court, the Court shall hold a hearing as soon as possible to determine whether the preliminary injunction or TRO should be dissolved.

Ark. R. Civ. Pro. 65.

### D. Duration

1. A preliminary injunction or TRO shall remain in effect until a final judgment or

9/09

decree is entered, unless it has been dissolved earlier.

*Bone v. Bone*, 10 Ark. App. 347 (1984)(*per curiam*).

2. Upon motion and showing good cause, the preliminary injunction or TRO may be made permanent upon final hearing of the cause.

Ark. R. Civ. Pro. 65

#### **E. Temporary Support**

1. For the purpose of calculating temporary support only, a dependent custodian may be awarded 20% of the net take-home pay for his or her support, in addition to any child support awarded.
2. For final hearings, the Court should consider all relevant factors, including the chart, in determining the amount of any spousal support to be paid.

Administrative Order No. 10 § III(e). See Appendix.

#### **F. Temporary Order of Protection**

1. May be granted when petition alleges an immediate and present danger of domestic abuse or that the respondent is scheduled to be released from incarceration within 30 days and upon release an immediate and present danger of domestic abuse will exist, and circuit court finds evidence sufficient to support the petition, the court shall grant a temporary order of protection pending a full hearing.

Ark. Code Ann. § 9-15-206(a) (Supp. 2009).

2. Ex parte temporary order of protection shall be effective until the date of the final hearing as described in Ark. Code Ann. 9-15-204 (Supp. 2009).

Ark. Code Ann. § 9-15-206(c) (Supp. 2009).

3. When a petition is filed, the court shall order a hearing on the petition for the order of protection not later than 30 days from the date on which the petition is filed or at the next court date, whichever is later.



Ark. Code Ann. § 9-15-204(a)(1) (Supp. 2009).

4. A denial of an ex parte temporary order of relief does not deny the petitioner the right to a full hearing on the merits.

Ark. Code Ann. § 9-15-204(a)(2) (Supp. 2009).

5. A copy of ex parte temporary order, if issued, shall be served, with copy of the petition, with notice of the date and place set for final hearing, upon the respondent:
  - a. at least 5 days before the date of the hearing;
  - b. in accordance with applicable Rules of Civil Procedure governing service.

Ark. Code Ann. § 9-15-204(b)(1) (Supp. 2009).

6. If service cannot be made upon the respondent, the court may set a new date for the hearing.
7. An ex parte temporary order of protection may include any or all orders provided for in Ark. Code. Ann. § 9-15-203 (Form of petition) and § 9-15-205 (Relief generally).

Ark. Code Ann. § 9-15-206(b) (Supp. 2009).

**VI. ANNULMENT**  
**Ark. Code Ann. §9-12-201 - 202 (Repl. 2008)**

**A. Venue for Annulment**

1. An action for annulment shall be an equitable action, filed in the county where the plaintiff resides.

Ark. Code Ann. §9-12-202 (Repl. 2008).

**B. Conflict of Laws**

1. The validity of a marriage is determined by the law of the state where the marriage was contracted.

*Feigenbaum v. Feigenbaum*, 210 Ark. 186 (1946).

**C. Grounds for Annulment**

1. The court shall declare a marriage void when either of the parties to the marriage:
  - a. is incapable of consenting to marriage because of lack of age or understanding; or
  - b. is incapable of entering in the marriage due to a physical causes; or
  - c. gave consent that was obtained by fraud or force.

Ark. Code Ann. §9-12-201 (Repl. 2008); *Fryar v. Roberts*, 346 Ark. 432 (2001)(failure to file a marriage license within 60 days, as required by Ark. Code Ann. §9-11-218, does *not* render a marriage void); *Worden v. Worden*, 231 Ark. 858 (1960)(to annul a marriage, fraud must be established by clear and convincing evidence); *State of Ark. v. Graves*, 228 Ark. 378 (1957)(an underage marriage is only voidable, not void, and is valid unless declared void by a court); *Warner v. Warner*, 221 Ark. 939 (1953). *See, also, Hooten v. Jensen*, 94 Ark. App. 130 (2006)(voidable marriage can only be inquired into during the lives of both parties; a son, as special administrator of his father's estate, could not challenge the validity of his father's marriage); *Jessie v. Jessie*, 53 Ark. App. 188 (1996)(parties estopped from denying validity of marriage).

**D. Child Custody and Support in Connection with Annulment**

1. A court of equity entering an annulment decree has authority to award custody of

children and provide for their support.

Ark. Code Ann. §9-12-312 (Repl. 2008); *Kibler v. Kibler*, 180 Ark. 1152 (1930) (“maintenance” of the child).

**E. Marriage Before Entry of Divorce Decree**

1. All marriages deemed void because the parties had entered into an otherwise valid marriage after the rendition of a valid divorce decree of either party, but before the entry for the record of the decree, are declared valid for all purposes.
2. Legislative intent was to validate marriages deemed void as a result of *Standridge v. Standridge*, 298 Ark. 494, 769 S.W.2d 12 (1989).
3. All children born to any marriage deemed valid by this section are legitimate for all purposes.
4. Provision applies to all marriages occurring both before and after November 14, 1989, date of *Standridge* decision.

Ark. Code Ann. § 9-11-706 (Repl. 2008).

**VII. ALIMONY**  
**Ark. Code Ann. 9-12-312(a)(1)(Repl. 2008)**

**A. Award of Alimony**

1. Authority and Constitutionality

When a decree is entered, the court shall make such orders concerning the alimony of the wife or the husband and care of the children, if any, as are reasonable from the circumstances of the parties and the nature of the case.

Ark. Code Ann. §9-12-312 (Repl. 2008); *Hatcher v. Hatcher*, 265 Ark. 681 (1979)(gender-based statute allowing alimony to a wife, but not a husband, was declared unconstitutional).

2. Court's jurisdiction to grant a divorce is distinct from its jurisdiction to award alimony and child support.

*Rogers v. Rogers*, 80 Ark. App. 430 (2003)(trial court has power and duty to enter orders regarding support of individuals regardless of its power to terminate the marriage).

**B. Maintenance and Attorney Fees**

1. The court may grant either party maintenance and reasonable attorney fees:

- a. during the pendency of an action for absolute divorce, bed and board divorce, separate maintenance, or alimony; or

Ark. Code Ann. § 9-12-309(a) (Repl. 2008).

- b. during the enforcement of alimony, maintenance, or support action.

Ark. Code Ann. § 9-12-309(b) (Repl. 2008); *Hatcher v. Hatcher*, 265 Ark. 681 (1979)(the duty of support is not the sole obligation of the husband but is allocated between the spouses according to their needs and ability to contribute).

**C. Factors in Awarding Alimony**

1. An award of alimony lies within the sound discretion of the court, whose decision will not be reversed absent a clear abuse in the exercise of that discretion.

*Myrick v. Myrick*, 339 Ark. 1 (1999); *Wilson v. Wilson*, 294 Ark. 194 (1987).

2. The purpose of alimony is to rectify economic imbalance in earning power and standard of living according to the facts of each case.
3. The primary factors for awarding alimony are the need of one spouse and the ability of other spouse to pay.
4. Factors to consider when determining whether to award alimony are:
  - a. financial circumstances of both parties;

*Hiatt v. Hiatt*, 86 Ark. App. 31 (2004) (trial court considered factors and properly found that ex-wife entitled to lifetime award of alimony); *Holaway v. Holaway*, 70 Ark. App. 240 (2000)(while the court may consider disparate levels of parties' earning abilities and sources of income, court cannot set alimony at a rate and for a time based upon the court's inability by law to divide husband's non-vested military retirement benefits).

- b. the financial needs and obligations of both the couple's past standard of living;
- c. the value of jointly owned property;
- d. the income, current and anticipated, of the parties;
- e. the resources and assets of each that are spendable;
- f. the amounts which will be available, after entry of the decree, to each of the parties for the payment of living expenses;
- g. the earning ability and capacity of both husband and wife;
- h. property awarded or given to one of the parties, either by the court or the other party;
- i. the disposition made of the homestead or jointly owned property;
- j. the condition of health and medical needs of both parties;
- k. the duration of the marriage; and

*Bolan v. Bolan*, 32 Ark. App. 65, 68 (1990); *Franklin v. Franklin*, 25 Ark. App. 287, 290 (1988).

1. the amount of child support.

*Boyles v. Boyles*, 268 Ark. 120 (1980); *Ellis v. Ellis*, 75 Ark. App. 173 (2001); *Holaway v. Holaway*, 70 Ark. App. 240 (2000); *Mearns v. Mearns*, 58 Ark. App. 42 (1997); *Aldridge v. Aldridge*, 28 Ark. App. 175 (1989).

5. The relative fault of the parties is not a factor in awarding alimony unless it meaningfully relates to need or ability to pay.

*McKay v. McKay*, 340 Ark. 171 (2000); *Russell v. Russell*, 275 Ark. 193 (1982); *Jones v. Jones*, 22 Ark. App. 267 (1987).

6. In awarding temporary spousal support only, the court may award 20% of net take-home pay plus child support. For a final hearing, the court should consider all relevant factors, including the Child Support Chart, to determine the amount of any spousal support to be paid.

Supreme Court Administrative Order No. 10 (See Appendix); *Cole v. Cole*, 82 Ark. App. 47 (2003).

#### **D. Rehabilitative Alimony**

1. Rehabilitative alimony has been defined as alimony payable for short but specific and terminable period of time, which will cease when the recipient is, in the exercise of reasonable efforts, able to support himself or herself.

*Myrick v. Myrick*, 339 Ark. 1 (1999)(rehabilitative alimony for 5 years); *Bolan v. Bolan*, 32 Ark. App. 65 (1990).

#### **E. Agreements of Parties**

1. The trial court is not bound by a property settlement agreement regarding alimony because the court has the authority to make an initial award of alimony when the divorce is entered.

*Womack v. Womack*, 16 Ark. App. 108 (1985).

2. When the record reflected that the parties entered into an agreement concerning the division of marital property which was incorporated into the divorce decree, and although the payments were less than one-half the military retirement, it was clear that the lesser amount was accepted in consideration for the parties' overall property settlement.

*Hapney v. Hapney*, 37 Ark. App. 100 (1992).

**F. Enforcement of Alimony**

1. The income from a spendthrift trust may be reached by means of equitable garnishment or other available means in the hands of the trustee to satisfy the judgment for an arrearage in alimony.

*Council v. Owens*, 28 Ark. App. 49 (1989).

2. Bankruptcy does not discharge obligation to pay alimony.

11 U.S.C. §523(a)(5); *Barker v Barker*, 271 Ark. 956 (1981).

**G. Modification of Alimony**

1. An award of alimony may be modified upon application by either party.

Ark. Code Ann. § 9-12-314 (Repl. 2008); *Hunt v. Hunt*, 341 Ark. 173 (2000)(alimony award may be modified); *Holaway v. Holaway*, 70 Ark. App. 240 (2000)(court erred in awarding “lifetime” alimony, which violates both statutory and case law; alimony is always subject to modification).

2. A modification, either increase or decrease, must be based on a change in circumstances of the parties.

*Hass v. Hass*, 80 Ark. App. 408 (2003)(modification of alimony must be based on changed circumstances of the parties); *McKiever v. McKiever*, 305 Ark. 321 (1991); *Benn v. Benn*, 57 Ark. App. 190 (1997).

3. The burden of showing the change is on the party seeking the change.

*Grady v. Grady*, 295 Ark. 94 (1988).

4. If a spouse shows a need for alimony, and the other spouse is shown to have the ability or earning capacity to pay alimony except for a circumstance at the time the parties' decree is entered, the chancellor may reserve jurisdiction, without assigning a nominal amount. This procedure would permit the spouse requesting alimony to petition for its payment after showing a change in circumstance.

*Mulling v. Mulling*, 323 Ark. 88 (1996), overruling *Ford v. Ford*, 272 Ark. 506 (1981).

5. When a decree of alimony is based on an independent contract between the parties which is incorporated into the decree and approved by the Court as an independent contract, it does not merge into the court's award and is not subject to modification except upon consent of the parties.

*Rockefeller v. Rockefeller*, 335 Ark. 145 (1998); *Kersh v. Kersh*, 254 Ark. 969 (1973); *Kennedy v. Kennedy*, 53 Ark. App. 22 (1996).

## **H. Termination of Alimony**

1. Unless otherwise ordered or agreed, alimony shall cease automatically upon:
  - a. the death of either party;
  - b. the date of remarriage of the person who was awarded the alimony; or
  - c. the establishment of a relationship that produces a child and results in a court order directing another person to pay support to the recipient of alimony, which circumstances shall be considered the equivalent of remarriage; or
  - d. the establishment of a relationship that produces a child and results in a court order directing the recipient of alimony to provide support of another person who is not a descendant by birth or adoption of the payor of the alimony, which circumstances shall be considered the equivalent of remarriage.
2. Subsections “c,” and “d” above apply to payments of alimony due after July 27, 1995.

Ark. Code Ann. § 9-12-312(a)(1) & (b)(Repl. 2008); *Estate of Carpenter v. Nita Carpenter*, 93 Ark. App. 441(2005); *Rockefeller v. Rockefeller*, 335 Ark. 145 (1998); *Herman v. Herman*, 335 Ark. 36 (1998); *Ford v. Ford*, 30 Ark. App. 147 (1990).



## VIII. CHILD SUPPORT

Ark. Code Ann. § 9-14-101, et seq. (Repl. 2008); § 9-12-312 (Repl. 2008);  
Supreme Court Administrative Order No. 10 (2007)

### A. Jurisdiction

1. Circuit courts have exclusive jurisdiction in all civil cases and matters relating to support of a minor child or continuing support of a dependent over 18 years old.

Ark. Code Ann. § 9-14-105(a)(Repl. 2008); *Boren v. Boren*, 318 Ark.378 (1994); *OCSE v. Tyra*, 71 Ark. App. 330 (2000)(automatic termination at 18 or graduation unless court orders otherwise); *OCSE v. Calbert*, 70 Ark. App. 520(2000)(support terminated for 18-year-old still in high school as a result of parent's earlier decision to have him repeat a grade—parent cannot prevent graduation and then complain about the result, but child spent majority of time outside of custodial parent's home).

2. A person who has left Arkansas leaving a dependent child and who has failed to support the child is deemed to have consented and submitted to the jurisdiction of the Arkansas courts as to any cause of action for support and maintenance of a dependent child if that person:
  - a. established or acquired a marital domicile in Arkansas;
  - b. contracted marriage in this state; or
  - c. became a resident of this state while legally married.

Ark. Code Ann. § 9-14-101(a) (Repl. 2008); *Bunker v. Bunker*, 261 Ark. 851 (1977)(court had personal jurisdiction over a husband who left the state and failed to support his child when Arkansas was the last matrimonial domicile).

3. Paternity: A person is deemed to have consented to the jurisdiction of the courts in an action for paternity if:
  - a. the person engaged in sexual intercourse with the mother in Arkansas during the time of conception;
  - b. the person resides or has resided with the child in this state.

Ark. Code Ann. § 9-14-101(b) (Repl. 2008).

4. Service of process upon anyone who is deemed by this section to have consented and submitted to the jurisdiction of the courts of this state may be according to Rule 4 of the Rules of Civil Procedure.

Ark. Code Ann. § 9-14-101(c) (Repl. 2008).

5. Generally, a trial court has continuing jurisdiction over support orders.

*Rogers v. Rogers*, 80 Ark. App. 430 (2003).

6. A court's jurisdiction to grant a divorce is distinct from its jurisdiction to award child support and alimony.

*Rogers v. Rogers*, 80 Ark. App. 430 (2003).

7. A court has continuing jurisdiction to enforce its orders for child support despite the pendency of an appeal.

*Rogers v. Rogers*, 80 Ark. App. 430 (2003) (filing of supersedeas did not make the court's contempt orders unenforceable).

## **B. Transfer of Cases Between Local Jurisdictions**

1. More than six months after final adjudication, a case may be transferred to another county outside the original judicial district if one or both parties have established residence there.
  - a. must be showing of best interests of the parties; and
  - b. initial presumption is for transfer to county where physical custodian of child resides.
2. Person requesting transfer must file motion, affidavit, notice, and pay refiling fee.
  - a. affidavit must state that parent(s), physical custodian, and OCSE (as appropriate) have been notified in writing of the request.
  - b. notice must be given that objection must be filed within 20 days from date

of receipt of affidavit and motion.

3. Once notice provision has been complied with, court shall enter transfer order directing the clerk to transfer the refiling fee and certified copies of the file to the clerk where the case has been transferred.
4. The clerk receiving the file shall establish a case file and docket the case within 14 days and afford the matter full faith and credit.

Ark. Code Ann. § 9-14-108 (Repl. 2008).

### **C. Petition and Order for Support**

1. A petition to require the noncustodial parent(s) of a minor child to provide support may be filed by:
  - a. any parent having physical custody of a minor child;
  - b. any other person or agency having physical custody of a child;
  - c. a minor child by and through his guardian or next friend; or
  - d. the Office of Child Support Enforcement when the parent or person to whom physical custody has been relinquished or awarded is receiving assistance in the form of Aid to Families with Dependent Children, Medicaid, Title IV-E of the Social Security Act--Foster Care, or has contracted with the OCSE for the collection of support.

(1) State of Arkansas is the real party in interest for purposes of seeking support when public aid is provided, or a contract and assignment has been entered into, or pursuant to UIFSA.

Ark. Code Ann. §9-14-210 (Supp. 2009); *Maxwell v. OCSE*, 70 Ark. App. 249 (2000)(state had no authority to continue to prosecute child support collection for *former* AFDC recipient who entered into private agreement with obligor); *OCSE v. Harnage*, 322 Ark. 461, 464 (1995).

(2) attorney employed by OCSE represents the interests of that office and does not represent the assignor.

Ark. Code Ann. § 9-14-105 (Repl. 2008); Ark. Code Ann. §9-14-210(e)(2) (Supp. 2009); *OCSE v. Terry*, 336 Ark. 310 (1999); *Vanzant v. Purvis*, 54 Ark. App. 384 (1996).

2. Any person 18 years or older to whom support was owed during his minority may file a petition for a judgment against the nonsupporting parent. After a hearing, a judgment may be entered upon proof by a preponderance of the evidence for the amount of unpaid support.

Ark. Code Ann. §9-14-105(c) (Repl. 2008); *Fonken v. Fonken*, 334 Ark. 637 (1998).

3. A person has 5 years from his eighteenth birthday to file a petition for owed support.

Ark. Code Ann. §9-14-105(e) (Repl. 2008).

4.
  - a. Parties to a case must provide the clerk of the appropriate circuit court with the following information: names, residential and mailing addresses, social security numbers, telephone numbers, drivers' license numbers, and names and addresses of employers, where applicable.
  - b. This information shall be filed on a form provided by the AOC and maintained separately by the clerk from the file of the case. The information is considered confidential and is open to inspection only by OCSE, attorneys in the case and pro se parties, and anyone authorized access by the circuit court in which the form is filed.

Ark. Code Ann. § 9-14-205 (Repl. 2008).

5. A "child support order" or "support order" is a temporary or final judgment, subject to modification, issued by a court or administrative agency for the support and maintenance of a child, including a child who has reached the age of majority, or of the parent with whom the child is living, that provides for the following:
  - a. monetary support;
  - b. health care, including health insurance or cash medical support;
  - c. arrearages; or
  - d. reimbursement;

- e. and may include related costs and fees, interest and penalties, income withholding, attorney's fees, and other relief.

Ark. Code Ann. § 9-14-201 (Supp. 2009).

#### **D. Child Support Guidelines**

- 1. Authority: The Guidelines are authorized by both federal and state law.

Family Support Act of 1988, Pub. L. No. 100-485 (1988); Ark. Code Ann. § 9-12-312 (Repl. 2008); Ark. Code Ann. § 9-14-106 (Repl. 2008); Administrative Order No. 10 § I.

- 2. Scope: The Guidelines are to be used in proceedings for divorce, separation, paternity, or support.

Ark. Code Ann. § 9-12-312(Repl. 2008); § 9-14-106 (Repl. 2008); § 9-10-109 (Repl. 2008); Administrative Order No. 10 § I; *Allen v. Allen*, 82 Ark. App. 42 (2003)(reference to the child support chart is mandatory).

- a. Rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded.

Ark. Code Ann. § 9-12-312 (Repl. 2008); Administrative Order No. 10 § I; *Taylor v. Taylor*, 369 Ark. 31 (2007)(presumption that chart amount is correct amount to be awarded).

- b. Deviation from Chart

- (1) Consider all relevant factors, including best interests of the child.
- (2) Make written findings that chart amount is unjust or unreasonable, and state:
  - (a) an amount of support that would have been required under the guidelines, and

*Williams v. Williams*, 82 Ark. App. 294 (2003)(allegation that court erred in setting child support in accordance with the chart because chart amount allegedly exceeded child's needs and "no child, no matter how wealthy the parents, needs to be provided more than

three ponies.” Court affirmed trial court’s award in accordance with the presumptive amount derived from the family support chart); *Brown v. Brown*, 76 Ark. App. 494 (2002); *Wagner v. Wagner*, 74 Ark. App. 135 (2001); *OCSE v. Pittman*, 70 Ark. App. 487 (2000)(error in figuring net income; expense deducted could be considered for deviation); *Guest v. San Pedro*, 70 Ark. App. 389 (2000)(deviation from chart appropriate); *Mearns v. Mearns*, 58 Ark. App. 42 (1997).

- (b) include justification for why order varies from the guidelines.

Guidelines, Administrative Order No.10 §I; *Alfano v. Alfano*, 77 Ark. App. 62 (2002)(deviation from the chart requires specific written findings, after considering all relevant factors set out in § 5 of Admin. Ord. No. 10); *Weir v. Phillips*, 75 Ark. App. 208 (2001)(deviation from chart requires written findings); *Killough v. Killough*, 72 Ark. App. 62 (2000); *Lonigro v. Lonigro*, 55 Ark. App. 253 (1996).

- (3) In applying the deviation factors, they may be considered for both the custodial and the noncustodial parents.

Guidelines, Administrative Order No. 10 §V(c)(2007).

c. Spousal Support

- (1) For the purposes of calculating *temporary* support only, a dependent custodian may be awarded 20% of net take-home pay, in addition to any child support awarded.
- (2) At a final hearing, the court should consider all relevant factors, including the chart, in determining the amount of any spousal support to be paid.

Administrative Order No. 10 §III(e).

d. Guide for Using the Chart

- (1) There are four charts, one weekly, one biweekly, one semimonthly, and one monthly. All are based upon a payor's take-home (net) pay to determine support for 1-5 dependents.
- (2) A month consists of 4.334 weeks.

- (3) Biweekly means payor is paid every two weeks or 26 times a calendar year.
- (4) Semimonthly means payor is paid twice a month or 24 times a calendar year.
- (5) Use the lower figure on the chart for take-home pay which falls between two chart amounts.
- (6) For income that exceeds the chart amount, calculate the dollar amount of support by using the following percentages for 1-6 dependents: 15%; 21%; 25%; 28%; 30% and 32%.
- (7) Administrative costs payable to the Circuit Clerk or the Arkansas Clearinghouse are separate from the amount of child support ordered.

Ark. Code Ann. § 9-12-312(e)(3); § 9-10-109(b)(3)(B); Administrative Order No. 10, §III(a) & (b).

e. Definition of Income

- (1) Income means any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest, less proper deductions.

Administrative Order No. 10 §II; Ark. Code Ann. §9-14-201(4); *Evans v. Tillery*, 361 Ark. 63 (2005); *Davie v. OCSE*, 349 Ark. 187 (2002)(federal law prohibits state courts from ordering child support payments from SSI benefits); but see *Jones v. Billingsley*, 363 Ark. 96 (2005)(judgment rendered for past-due child support arrearages was based on an order that has never been modified, altered, or set aside. Trial court's order was not an attempt to levy or execute on SSI benefits, as appellant claimed; that issue was not before the trial court or the appellate court. The order was simply one to reduce the past-due child support to judgment.); *Ford v. Ford*, 347 Ark. 485 (2002) (an inheritance is not income under the Child Support Guidelines; however, interest or income derived from an inheritance is income; definition of "income" is very broad; all prior decisions of Arkansas Court of Appeals that are inconsistent with this opinion are overruled); *McWhorter v. McWhorter*, 346 Ark. 475 (2001)(gambling winnings are "income" for

child support purposes, but gambling losses must be subtracted for determining the amount), *after remand*, 351 Ark. 408 (2003)(failed to prove gambling losses so the trial court refused to adjust his income to give him credit for those losses—Supreme Court affirmed); *Davis vs. OCSE*, 341 Ark. 349 (2000), reversing 68 Ark. App. 88, 5 S.W.3d 58 (1999) (federal SSI benefits are not income under the Child Support Guidelines); *Paschal v. Paschal*, 82 Ark. App. 455 (2003)(definition intentionally broad enough to encompass widest range of sources consistent with state’s policy to benefit the child); *Southerland v. Southerland*, 75 Ark. App. 386 (2001)(stock-option payments were not a bonus for child-support purposes); *Frigon v. Frigon*, 66 Ark. App. 343 (1999)(withdrawal from pension under 1993 Guidelines); *OCSE v. Longnecker*, 67 Ark. App. 215 (1999) (sources of income).

- (2) Deductions are proper for:
  - (a) federal and state income tax;
  - (b) social security (FICA), Medicare, and railroad retirement;
  - (c) medical insurance paid for dependent children; and
  - (d) presently paid support for other dependents by court order.

*Montgomery v. Bolton*, 349 Ark. 460 (2002)(Tier-II railroad-retirement withholdings are a part of “railroad retirement” deductions, and do not form part of disposable income under Adm. Ord. No. 10); *Moreland v. Hortman*, 72 Ark. App. 363(2001)(trial court failed to deduct from his “income” the presently paid support for other dependents).

Administrative Order No. 10 §II.

- f. Income for non-salaried payors.
  - (1) Court shall consider for each of the following,:
    - (a) for Social Security disability recipients, SSI is not income, but any separate award to spouse or children on account of payor’s disability should be considered;
    - (b) VA disability (considered income);
    - (c) Worker's Compensation (considered income);



- (d) unemployment compensation(considered as income).

Administrative Order No. 10 §III(c).

- (2) Income for military personnel

- (a) consult the latest military pay allocation chart and benefits.
- (b) see Guidelines for full text

See Appendix.

- (3) Commission workers' support should be based on minimum draw plus additional commissions.

- (4) Income for self-employed payors

- (a) See previous two years' federal and state tax returns and quarterly estimates for the current year;
- (b) Includes contributions made to retirement plans, alimony paid, and self-employed health insurance paid;
- (c) Consider capability of earning; or
- (d) Net worth based on property, life-style, etc.

*Tucker v. Office of Child Support Enforcement*, 368 Ark. 481 (2007)(“clarification of the procedure for determining child support by using the net-worth method”); *Gray v. Gray*, 67 Ark. App. 202 (1999)(depreciation of rental property); *Pannell v. Pannell*, 64 Ark. App. 262 (1998)(calculation of income for self-employed payor; decided under previous Guidelines); *Anderson v. Anderson*, 60 Ark. App. 221 (1998) (retained income; Subchapter S corporation).

- g. Imputed Income

- (1) If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor.
- (2) If earnings are reduced as a matter of choice and not for reasonable

cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's life-style.

- (3) Income of at least minimum wage shall be attributed to a payor order to pay child support.

Administrative Order No. 10 §III(d); *Munn v. Munn*, 315 Ark. 494 (1994); *Grady v. Grady*, 295 Ark. 94 (1988); *Allen v. Allen*, 82 Ark. App. 42 (2003)(incarceration does not relieve one of a child-support obligation; income may be imputed, and minimum from the chart has been upheld when there was no evidence of income or whether there was any income, at all); *Irvin v. Irvin*, 47 Ark. App. 48 (1994).

h. Deviation Considerations

- (1) Relevant Factors to Consider:
  - (a) food;
  - (b) shelter and utilities;
  - (c) clothing;
  - (d) medical expenses;
  - (e) educational expenses;
  - (f) dental expenses;
  - (g) child care;
  - (h) accustomed standard of living;
  - (i) recreation;
  - (j) insurance;
  - (k) transportation expenses; and
  - (l) other income or assets available to support the child from whatever source, including custodial parent's income

Administrative Order No. 10 §V(a).

i. Additional Factors that may warrant adjustments to child support:

- (1) procurement and/or maintenance of life insurance, health insurance, dental insurance for the children's benefit;
- (2) provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children;

Ark. Code Ann. § 9-14-232 (Repl. 2008)(health care coverage); § 9-14-501 et seq. (Repl. 2008 & Supp. 2009); Administrative Order No. 10, Appendix.

- (3) creation or maintenance of a trust fund for the children;
- (4) provision or payment of special education needs or expenses of the child;
- (5) provision or payment of day care for a child;
- (6) extraordinary time spent with the non-custodial parent, or shared or joint custody arrangements;
- (7) support required and given by a payor for dependent children, even in the absence of a court order;
- (8) When the chart amount of child support is less than the normal costs of child care, the court shall consider whether a deviation is appropriate.

Administrative Order No. 10 §V(b) (Section V(c) provides that the deviation factors may be considered for both the custodial and the noncustodial parents).

j. Health Insurance

- (1) In addition to child support, the Court shall order provision for child's health care needs, which normally would include health insurance if available to either parent at reasonable cost.

Administrative Order No. 10 § III(g); Ark. Code Ann. § 9-14-501, et seq. (Repl. 2008 & Supp. 2009).

- (2) Income withholding is authorized to pay premium for health care coverage.

Ark. Code Ann. § 9-14-502 (Repl. 2008).

- (3) Health care coverage is not a direct offset to support but can be considered in determining net take-home pay when setting child support. (See definition of income tax.)

Ark. Code Ann. § 9-14-505 (Repl. 2008).

- (4) OCSE can garnish wages and withhold state tax refunds if one who is required to provide health care coverage receives and pockets an insurance payment which should have been forwarded to another person.

Ark. Code Ann. § 9-14-502 (Repl. 2008).

- (5) A change in a parent's ability to provide health insurance constitutes a material change in circumstances sufficient to petition for modification in child support.

Ark. Code Ann. § 9-14-107(b) (Supp. 2009).

k. Abatement of Support During Extended Visitation

- (1) The Guidelines allow for abatement or reduction of support when a child is with noncustodial parent more than 14 consecutive days.

Administrative Order No. 10 § VI; Ark. Code Ann. § 9-14-106 (Repl. 2008); *see Carlton v. Carlton* 316 Ark. 618 (1994)(Guidelines do not require an increase in child support if parent does not exercise minimum visitation).

- (2) Reduction may be prorated annually so the amount of monthly support remains consistent.
- (3) Any abatement should not exceed 50% of regular obligation for the

extended period of visitation (more than 14 consecutive days).

- (4) When considering a reduction, the court shall take into account the fixed obligations of a custodial parent that are attributable to the child, the increased expense of the child's visit to the noncustodial parent, and the relative incomes of both parents.
- (5) The noncustodial parent shall provide written notification of the reduction of child support payments within 10 days of the visit to the clerk of the court responsible for the receipt of payment, to the noncustodial parent's employer if income withholding is in effect, and to the Child Support Enforcement Unit, when applicable.

Administrative Order No. 10 § VI; Ark. Code Ann. § 9-14-106(a)(2)(D)(Repl. 2008).

- (6) In Title IV-D cases, support shall be redirected to a person who has physical custody of child in excess of eight consecutive weeks, excluding court-ordered visitation.

Ark. Code Ann. § 9-14-234(d)(Repl. 2008).

l. Tax consideration

- (1) Allocation of dependents belongs to the custodial parent pursuant to the Internal Revenue Code.
- (2) Court has discretion to grant dependency allocation, or any part of it, to the noncustodial parent if the benefit of the allocation to the noncustodial parent substantially outweighs the benefit to the custodial parent.

Administrative Order No. 10 § III(f); *Dumas v. Tucker*, 82 Ark. App. 173 (2003); *Fontenot v. Fontenot*, 49 Ark. App. 106 (1995); *Jones v. Jones*, 43 Ark. App. 7 (1993).

m. Affidavit of Financial Means

- (1) The Court shall require each party to complete and exchange this affidavit prior to hearings for family support.

Administrative Order No. 10 § IV; Appendix.

## **E. Enforcement Provisions**

### **1. Income Withholding**

- a. The use of income withholding does not constitute an election of remedies and does not preclude the use of other enforcement remedies.

Ark. Code Ann. § 9-14-218(a)(1)(B)(Repl.2008); *Stewart v. Norment*, 328 Ark. 133 (1997).

- b. In determining good cause, a court may take into consideration a payor's past financial responsibility, credit references, credit history, and other matters the court deems relevant in determining the likelihood of payment in accordance with the support order.

Ark. Code Ann. § 9-14-102(b)(2) (Repl. 2008).

- c. Orders of income withholding for support have priority over all other legal processes under state law against the money, income, or periodic earnings of the noncustodial parent.

Ark. Code Ann. § 9-14-219 (Repl. 2008); See, also, Consumer Credit Protection Act, Sec. 303(b) for federal priority over other creditors.

- d. Where there is more than one income notice or order for income withholding for current support and the total requested exceeds the limits imposed by the Consumer Credit Protection Act, payment is made pro rata, not first-come, first-served.

Ark. Code Ann. § 9-14-228(c)(1); (Repl. 2008); see *Bitzer v. Bitzer*, 65 Ark. App. 162 (1999).

- e. For support orders entered or modified after August 2, 1985, without including an income withholding provision, it may be initiated in accord with A.C.A. § 9-14-221 whenever a payor is in arrears for 30 days.

Ark. Code Ann. § 9-14-218(f) (Repl. 2008).

### **2. Real Property**

- a. A decree for child support becomes a lien upon all real property not otherwise exempt by the Arkansas Constitution, owned by the noncustodial parent or acquired by the noncustodial parent before the lien expires.

Ark. Code Ann. § 9-14-230(a)(1)(A) (Repl. 2008).

- b. A lien which originates in another state shall be afforded full faith and credit.

Ark. Code Ann. § 9-14-230(a)(1)(B) (Repl. 2008).

### 3. Personal Property

- a. Overdue support shall become a lien upon all personal property owned by the payor, wherever it may be found and is not limited to the confines of the county where the circuit court is sitting.

Ark. Code Ann. § 9-14-231(a)(1)(A) (Repl. 2008).

- b. A lien originating in another state shall be afforded full faith and credit.

Ark. Code Ann. § 9-14-231(a)(1)(B) (Repl. 2008).

### 4. Arrearage

- a. Definitions

- (1) “Accrued arrearage” is a delinquency owed under court order or administrative order for support that is past due and unpaid. It may include past due support which has been reduced to judgment if the obligation under order has not been terminated.

Ark. Code Ann. §9-14-201(1) (Supp. 2009); *Hendrickson v. OCSE*, 77Ark. App. 103 (2002)(trial court erred in not considering applicability of the doctrine of equitable estoppel on the issue of arrearages).

- (2) “Overdue support” is a delinquency pursuant to a court-ordered obligation or an administrative-process obligation under the laws of another state for support and maintenance of a minor child.

Ark. Code Ann. §9-14-201(9) (Supp. 2009).

- (3) “Past due support” is the total amount of support determined under a court order established under state law which remains unpaid.

Ark. Code Ann. §9-14-201(10) (Supp. 2009).

- b. Arrearages accrue interest at a rate of 10% per year, unless the owner of the judgment requests before the accrual of the interest that the judgment shall not accrue interest.

Ark. Code Ann. § 9-14-233(a) (Repl. 2008).

- c. In all decrees or orders which provide for payment of child support, the court shall include a provision directing a payor to deduct from money due the noncustodial parent an amount sufficient to meet the periodic child support payments imposed by the court, plus an additional amount of not less than 20% of the child support payment to be applied toward liquidation of any accrued arrearage due under the order, and from any lump-sum payment, the full amount of the arrearage owed up to 50% of the lump-sum payment.

Ark. Code Ann. § 9-14-218(a)(1)(A)(Repl. 2008).

- d. Where custodial parent or child receives Temporary Assistance for Needy Families (TANF), court may order obligated parent to participate in work activity which may be excused if parent is enrolled in job training.

Ark. Code Ann. § 9-14-233(d)(2) (Repl. 2008).

- e. Any able-bodied person who is not incapacitated and who refuses the court's work order may be ordered incarcerated with temporary release as appropriate to work.

Ark. Code Ann. § 9-14-233(e)&(f) (Repl. 2008).

- f. Child support orders shall be a final judgment subject to writ of garnishment or execution as to any installment which has accrued until either party moves to modify the order.



Ark. Code Ann. § 9-14-234(b) (Repl. 2008); *Darr v. Bankston*, 327 Ark. 723 (1997); *Martin v. Martin*, 79 Ark. App. 309 (2002).

- g. Arrearage must be satisfied even after duty to support ceases.

Ark. Code Ann. § 9-14-235 (Repl. 2008); *Malone v. Malone*, 338 Ark. 20 (1999); *Lovelace v. OCSE*, 59 Ark. App. 235 (1997).

- h. An action for arrearage may be brought at any time up to and including 5 years beyond the child reaches age 18.

Ark. Code Ann. § 9-14-236(c) (Repl. 2008); *Clemmons v. Office of Child Support Enforcement*, 345 Ark. 330 (2001); *Nason v. OCSE*, 55 Ark. App. 164 (1996)(ordering retrospective support).

- i. No cause of action can be had for child support arrearage which accrued prior to March 29, 1986.

*King v. OCSE*, 58 Ark. App. 298 (1997)(Act 870 of 1991 cannot be retroactively applied beyond March 29, 1986, citing *Branch v. Carter*, 326 Ark. 748 (1996)).

- j. There is no statute of limitations for seeking arrearages when an obligor leaves or remains outside the state of Arkansas with the purpose of avoiding payment of child support.

Ark. Code Ann. §§ 9-14-236(d), & 9-14-237(c) (Repl. 2008 & Supp. 2009).

- k. Personal service under Ark. R. Civ. P. 4 is unnecessary where court has continuing personal jurisdiction over the obligor, and the obligee asserts no new or additional claims for relief.

*OCSE v. Ragland*, 330 Ark. 280 (1997).

- l. Equitable estoppel may be a defense to payment of arrearages.

*OCSE v. Burger*, 80 Ark. App. 119 (2002)(elements of equitable estoppel were not satisfied so estoppel did not apply to bar collection of accrued arrearage).

- m. Res judicata applied to child support is a “modified res judicata,” which is subject to changed circumstances and the best interest of the child.

*Office of Child Support Enforcement, et al. v. King*, 81 Ark. App. 190 (2003)(Any past-due child support accrues and is a judgment until altered prospectively by proper motion and order of the court. Here, no court order modifying earlier order, so “modified res judicata” did not come into play).

- n. The Office of Child Support Enforcement is to provide monthly reports to circuit clerks detailing payment of arrearage made in child support cases by persons convicted of the crime of nonsupport under Ark. Code Ann. § 5-26-401. When a clerk receives a report, the clerk shall deduct the reported amounts from the outstanding balance owed by the individual.

Ark. Code Ann. § 9-14-242 (Supp. 2009).

#### 5. Suspension of License

- a. Where payor is in arrears for 3 months or more, OCSE can notify the appropriate licensing authority to suspend the payor's professional and/or any type of commercial driver's licenses where arrangements have not been made for payment.

- (1) Appeal is to circuit court, de novo.

- (2) Attorney licenses are not covered in these sections.

- b. Court can use contempt powers to suspend license plate or license for nonpayment of support.

Ark. Code Ann. §9-14-239 (Repl. 2008); (driver’s license, or occupational, professional, or business license); Ark. Code Ann. § 27-23-125 (Repl. 2008)(commercial driver’s license).

#### **F. Modification of Support**

- 1. A change in gross income of the payor of 20% or more, or more than \$100.00 per month, shall constitute a material change of circumstances sufficient to petition for modification of child support.

Ark. Code Ann. § 9-14-107 (Supp. 2009).

- 2. A material change of circumstances is required before the Court will modify a support order. An inconsistency between the current amount of support and the

application of the guidelines creates a material change unless the inconsistency does not amount to more than 20% or \$100.00 per month, or unless the current amount was the result of a rebuttal of the guidelines.

Ark. Code Ann. § 9-14-107 (Supp. 2009); *McWhorter v. McWhorter*, 346 Ark. 475 (2001); *Munn v. Munn*, 315 Ark. 494 (1994); *Brown v. Brown*, 76 Ark. App. 494 (2002); *Shroyer v. Kauffman*, 75 Ark. App. 267 (2001); *Woodson v. Johnson*, 63 Ark. App. 192 (1998); *Ritchey v. Frazier*, 57 Ark. App. 92 (1998); *Yell v. Yell*, 56 Ark. App. 176 (1997); *Schwarz v. Moody*, 55 Ark. App. 6 (1996); *Heflin v. Bell*, 52 Ark. App. 201 (1996).

3. A change in a parent's ability to provide health insurance is a material change of circumstances sufficient to petition for modification of child support.

Ark. Code Ann. § 9-14-107(b) (Supp. 2009).

4. Support can only be modified based upon a change in gross income of the noncustodial parent as of the date the motion for increase or decrease is filed, unless otherwise ordered by the court.

Ark. Code Ann. § 9-14-107(d)(Supp. 2009)(child support payments); Ark. Code Ann. § 9-14-234 (Repl. 2002)(child support arrearages); *Martin v. Martin*, 79 Ark. App. 309 (2002)(error to reduce child support absent a motion/petition for modification); *Brown v. Brown*, 76 Ark. App. 494(2002)(error to modify as of a date before motion for modification was filed); *Shroyer v. Kauffman*, 75 Ark. App. 167 (2001)(although retroactive modification of child support is clearly prohibited, retroactive enforcement in collection of arrearage is a recognized exception to the rule).

5. A court shall order a noncustodial parent to provide proof of income for the previous year to a custodial parent and, when applicable, to OCSE, and upon request, not more than once a year.

Ark. Code Ann. §9-14-107(a)(2)(A)(i)(a)(1)&(2)&(b)(Supp. 2009).

6. A noncustodial parent's failure to provide proof of income as ordered by the court will subject him or her to contempt and to payment of reasonable fees and costs.

Ark. Code Ann. §9-14-107(2)(A)(ii)(B)&(C)(Supp. 2009).

7. A court may order periodic drafts of a noncustodial parent's bank account for child support.

Ark. Code Ann. §9-14-107(e)(Supp. 2009).

8. A petitioner may show all relevant changes in financial circumstances since the support rate was last set, without being limited to the date of any unsuccessful interim proceeding seeking modification.

*Payton v. Wright*, 63 Ark. App. 33 (1998).

9. The Court may not set aside, alter, or modify any order that has accrued unpaid support before the filing of the motion, but the Court may offset against future support for periods during which the noncustodial parent had physical custody of the child with knowledge and consent of custodial parent.

Ark. Code Ann. § 9-14-234(c) (Repl. 2008).

10. Regardless of whether provisions are in a divorce decree or in a property settlement contract, the court always retains jurisdiction to modify child support obligations.

*Williams v. Williams*, 253 Ark. 842 (1973); *Warren v. Kordsmeier*, 56 Ark. App. 52 (1997).

11. Equity will not aid one who of own volition commits crime and suffers consequences (prison) which affect ability to pay child support.

*Shroyer v. Kauffman*, 75 Ark. App. 167 (2001)(equitable defenses); *Reid v. Reid*, 57 Ark. App. 289 (1997).

12. Private agreements modifying the amount of child support are not recognizable by the courts.

*Shroyer v. Kauffman*, 75 Ark. App. 167 (2001).

## **G. Expedited Hearings**

1. Child support and paternity cases brought pursuant to Title IV-D shall be heard within a reasonable period of time following service.
2. Title IV-D cases, including paternity, have specific time periods within which they must be heard.
3. The Chief Justice may direct redistribution of caseload or may appoint other trial judges to a district to insure compliance with state and federal law in meeting time requirements of IV-D cases.

9/09

4. Sheriff must make return of service or nonservice within 10 days in Title IV-D cases.
5. Court clerk must file or docket IV-D papers on the date received but no later than the close of business the day after papers are received in the clerk's office.

Ark. Code Ann. § 9-14-204 (Repl. 2008).

#### **H. Termination of Duty to Support**

1. Unless a court order specifically extends child support after these circumstances, the duty to support automatically terminates by operation of law:
  - a. (1) at age 18 unless the child is still attending high school;  
  
(2) if the child is still in high school, when the child graduates from high school or at the end of the school year after the child reaches age 19, whichever is earlier; or

Ark. Code Ann. § 9-14-237(a)(1) (Supp. 2009).

- b. when the child is emancipated by the Court, marries or dies, unless the Court specifically extends the time of support after these circumstances (such as for a child who remains in school and support is conditional upon that, or for an individual with a disability which affects the ability to live separately from the custodial parent);
- c. upon the marriage of the child's parents to each other; or
- d. when a final decree of adoption is entered or an interlocutory decree that has become final and thereby relieves the obligor of all parental rights and responsibilities.

Ark. Code Ann. § 9-14-237(a)(1) (Supp. 2009); Ark. Code Ann. § 9-12-312(a)(5)(A) & (B) (Repl. 2008) (authority to extend support for child remaining in school or an individual with a disability); *Aikens v. Lee*, 53 Ark. App. 1 (1996) (special circumstances beyond majority); *Kimbrell v. Kimbrell*, 47 Ark. App. 56 (1994) (child with disability; child support extended).

2. Unpaid support must still be satisfied.

Ark. Code Ann. § 9-14-237(a)(2) (Supp. 2009); *Laroe v. Laroe*, 48 Ark. App. 192 (1995).

3. For the remaining minor children, support shall be determined:
  - a. by the court upon a motion filed within 30 days after expiration of the 10-day provision to notify of termination of support; or
  - b. by operation of law after the 30-day period expires, using the most recent version of the family support chart; or
  - c. by the court if the most recent order was entered prior to adoption of the guidelines or if the most recent order deviated from the family support chart.

Ark. Code Ann. §9-14-237(b) (Supp. 2009).

- 4.. Deviations from the chart shall be noted in the Order or on the record as appropriate.

Ark. Code Ann. §9-14-237(b)(4)(B) (Supp. 2009).

5. Provides an administrative procedure for terminating income withholding when the duty to support terminates.

Ark. Code Ann. § 9-14-240(Repl. 2008).

## **I Bankruptcy**

1. Bankruptcy does not discharge obligation to pay child support.

11 U.S.C. §523(a)(5); *In re Ellis R. Lewis*, 227 B.R. 886 (W.D. Ark. 1998); *Barker v. Barker*, 271 Ark. 956 (1981); *Riley v. Riley*, 61 Ark. App 74 (1998).

## **J. Qualified Domestic Relations Orders**

1. A “domestic relations order” means any judgment, decree, or order, including approval of a property settlement agreement, that relates to the provisions for child support, alimony payment, or marital property rights to a spouse, former spouse, child, or other dependents of a participant under Arkansas law. A “participant” means any person or member of a retirement plan.

Ark. Code Ann. § 9-18-101(2) & (3)(Repl. 2008).

2. A qualified domestic relations order (aka QDRO) means a domestic relations

9/09

order:

- a. which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant's retirement plan; and

Ark. Code Ann. § 9-18-101(4)(A) (Repl. 2008).

- b. which clearly specifies the names and last known address of a participant and each alternate payee covered by the order, the amount or percentage of the participant's benefits to be paid by the plan to each alternate payee or the manner in which the amount or percentage is determined, the number of payments or period of time to which the order applies, and each retirement plan to which the order applies; and

Ark. Code Ann. § 9-18-101(4)(B) (Repl. 2008).

- c. which does not require the retirement plan to provide any type or form of benefit, or pay options not otherwise available under the plan, does not require the plan to provide increased benefits, and does not require the payments of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO.

Ark. Code Ann. § 9-18-101(4)(C) (Repl. 2008).

3. The circuit courts of Arkansas are empowered to enter QDROs to reach any and all retirement annuities and benefits of any retirement plan. The QDRO can specify that a designated percent of a fractional interest on any retirement benefit payment may be paid to an alternate payee.

Ark. Code Ann. § 9-18-102 (Repl. 2008); *Abbott v. Abbott*, 79 Ark. App. 413 (2002)(Court of Appeals remanded for entry of an order for a QDRO to be executed).

4. State-supported retirement systems shall comply with any QDROs as defined in the Code.
5. The board of trustees of the retirement systems shall promulgate rules and regulations to implement this Code section and shall adopt a uniform legal form approved by Legislative Council for use in preparing QDROs for each retirement plan.

Ark. Code Ann. § 9-18-103 (Repl. 2008).

9/09

**IX. UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA)**  
**Ark. Code Ann. §§ 9-17-101 through -902 (Repl. 2008)**

**A. Jurisdiction under UIFSA**

1. Provides for extended long-arm jurisdiction over non-residents.
2. Provides for continuing exclusive jurisdiction once an order of support is entered by one state.
3. Provides jurisdiction to modify support orders of another state when individual parties reside in Arkansas and notice to issuing tribunal of modification.

Ark. Code Ann. § 9-17-201, et seq. (Repl. 2008); Ark. Code Ann. §9-17-613-14 (Repl. 2008). See *Clemmons v. OCSE*, 345 Ark. 330 (2001)(Arkansas recognized collection orders from Missouri); *Jefferson County OCSE v. Hollands*, 327 Ark. 456 (1997); *OCSE v. Troxel*, 326 Ark. 524 (1996); *Tyler v. Talburt*, 73 Ark. App. 260 (2001)(no subject matter jurisdiction; Texas had continuing, exclusive jurisdiction over its own spousal support order).

**B. Recognition of Controlling Order under UIFSA**

1. If only one tribunal has issued a child support order, the order of that tribunal controls and must be recognized.
2. If two or more child support orders have been issued by tribunals of this State or another state with regard to the same obligor and child, a tribunal of this State shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction:
  - a. If only one of the tribunals would have continuing, exclusive jurisdiction, the order of that tribunal controls and must be recognized.
  - b. If more than one of the tribunals would have continuing, exclusive jurisdiction, an order issued by a tribunal in the current home state of the child controls and must be so recognized, but if an order has not been issued in the current home state of the child, the order most recently issued controls and must be recognized.
  - c. If none of the tribunals would have continuing, exclusive jurisdiction, the tribunal of the state having jurisdiction over the parties shall issue a child support order, which controls and must be recognized.



3. If two or more child support orders have been issued for the same obligor and child and if the obligor or the individual obligee resides in this state, a party must request a tribunal of this state to determine which order controls and must be recognized under subsection (2). The request must be accompanied by a certified copy of every support order in effect. The requesting party shall give notice of the request to each party whose rights may be affected by the determination.
4. The tribunal that issued the controlling order under subsection (1), (2) or (3) is the tribunal that has continuing, exclusive jurisdiction under Ark. Code Ann. §9-17-205.
5. A tribunal of this state which determines by order the identity of the controlling order or which issues a new controlling order shall state in that order the basis upon which the tribunal made its determination.
6. Within 30 days after issuance of an order determining the identity of the controlling order, the party obtaining the order shall file a certified copy of it with each tribunal that issued or registered an earlier order of child support. A party who obtains the order and fails to file a certified copy is subject to appropriate sanctions by a tribunal in which the issue of failure to file arises. The failure to file does not affect the validity or enforceability of the controlling order.
7. See also Full Faith and Credit Act, a Judge's Benchcard in pocket of Appendix.

Ark. Code Ann. §9-17-207 (Repl. 2008); 28 U.S.C. 1738(b); *Clemmons v. OCSE*, 345 Ark. 330 (2001)(Arkansas recognized collection orders from Missouri; determination of applicable statute of limitation).

### **C. Civil Proceedings under UIFSA**

1. Proceedings include establishment, enforcement, modification, and registration of orders of support as well as determinations of paternity.

Ark. Code Ann. § 9-17-301 (Repl. 2008).

2. Except where otherwise noted, as a responding tribunal, Arkansas procedural and substantive law applies.

Ark. Code Ann. § 9-17-303 (Repl. 2008).

3. Duties of initiating and responding tribunal.

Ark. Code Ann. § 9-17-304 & -305 (Repl. 2008).

- a. Responding tribunal should not address collateral matters such as visitation or setoff.

*Chaisson v. Ragsdale*, 323 Ark. 373 (1996)(trial court erroneously considered a setoff of debt and visitation); *OCSE v. Clemmons*, 65 Ark. App. 84 (1999)(trial court erroneously considered visitation).

- b. If a responding state has not enacted UIFSA or a law or procedure substantially similar, a tribunal of this state may issue a certificate or other document and make findings required by the law of the responding state. If the responding state is a foreign jurisdiction, the tribunal may specify the amount of support sought and provide other documents necessary to satisfy the requirements of the responding state.

4. If an Arkansas tribunal is inappropriate, it shall forward the petition to the appropriate tribunal whether in- or out-of-state.

Ark. Code Ann. § 9-17-306 (Repl. 2008).

5. Provides for confidentiality in exceptional circumstances.

Ark. Code Ann. § 9-17-312 (Repl. 2008).

6. Provides for fees and costs to be assessed, except that OCSE or a contract entity shall not be charged fees or costs for actions brought under UIFSA.

Ark. Code Ann. § 9-17-313 (Repl. 2008); Ark. Code Ann. § 9-14-215(a)(1) (Repl. 2008).

7. Nonparentage is not a defense where that issue has been previously litigated.

Ark. Code Ann. § 9-17-315 (Repl. 2008).

8. Provides for certain special rules of evidence and procedure, communication between tribunals, and assistance with discovery.

Ark. Code Ann. §§ 9-17-316, -317, -318 (Repl. 2008); *Davis v. OCSE*, 326 Ark. 677 (1996); *State v. Rogers*, 50 Ark. App. 108 (1995)(affidavit, although admissible, must still be proffered; admission is not automatic).

**D. Establishment of Support Order**

1. If a court has not issued a support order entitled to recognition under UIFSA, a responding tribunal in this state may issue an order for an out-of-state petitioner, provided certain criteria are met.
2. If not previously determined, the burden of proof of parentage is by clear and convincing evidence.

Ark. Code Ann. § 9-17-401(Repl. 2008).

**E. Terms of Withholding Order**

1. The duration and amount of periodic payments of current child support, stated as a sum certain;
2. The person or agency designated to receive payments and the address to which the payments are to be forwarded;
3. Medical support, whether in the form of periodic cash payment, stated as a sum certain, or ordering the obligor to provide health insurance coverage for the child under a policy available through the obligor's employment;
4. The amount of periodic payments of fees and costs for a support enforcement agency, the issuing tribunal, and the obligee's attorney, stated as sums certain; and
5. The amount of periodic payments of arrearages and interest on arrearages, stated as sums certain.

Ark. Code Ann. § 9-17-502 (Repl. 2008).

**F. Direct Enforcement of Another State's Order**

1. An income withholding order from another state may be mailed directly to the obligor's employer in this state without court action in this state.

Ark. Code Ann. § 9-17-501 (Repl. 2008).

2. An obligor may contest the validity or enforcement of an income-withholding order issued in another state in the same manner as if the order had been issued in Arkansas.

Ark. Code Ann. § 9-17-506 (Repl. 2008).

3. An employer who willfully fails to comply with an income-withholding order issued by another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an order issued by a tribunal of this state.

Ark. Code Ann. § 9-17-505 (Repl. 2008).

#### **G. Enforcement and Modification after Registration**

1. Provides for registering and modifying an order from another state.

Ark. Code Ann. §§ 9-17-601, -602, -603 & -611 (Repl. 2008).

2. The law of the issuing state governs except that in a proceeding for arrearages, the law of the state with the longer statute of limitations applies.

Ark. Code Ann. § 9-17-604 (Repl. 2008); *Clemmons v. OCSE*, 345 Ark. 330 (2001); *Clemmons v. OCSE*, 72 Ark. App. 443 (2001)(issue was arrearages; California statute of limitations applied).

3. A hearing to contest the validity or enforcement of a registered order must be requested within 20 days of mailing or personal service.

Ark. Code Ann. § 9-17-605 (Repl. 2008).

4. Sets out defenses to registration or enforcement.

Ark. Code Ann. § 9-17-607 (Repl. 2008); *State of Washington v. Thompson*, 339 Ark. 417 (1999) (constitutionality of Ark. Code Ann. §9-17-606 upheld; presenting defenses under §9-17-607); *OCSE v. Neely*, 73 Ark. App. 198 (2001)(RURESA case–Texas order could not be modified; child support due under Texas decree); *OCSE v. Cook*, 60 Ark. App. 193 (1998).

5. Sets out provisions for modifying an order from another state and for recognizing an order modified by another state which was originally issued by this state.

Ark. Code Ann. §§ 9-17-609-612 (Repl. 2008); *Jefferson County Child Support Enforcement Unit v. Hollands*, 327 Ark. 456 (1997)(effect of an Arkansas Court’s order on the order of a sister state); *OCSE v. Neely*, 73 Ark. App. 198 (2001)(modification of order).

**H. Determination of Parentage**

1. This state may be an initiating or responding tribunal for determining paternity.
2. Arkansas law applies when Arkansas is a responding tribunal in a proceeding to determine parentage.

Ark. Code Ann. § 9-17-701(Repl. 2008).

## X. CHILD CUSTODY

### A. Award of Custody

1. No preference or presumption exists for either gender.

Ark. Code Ann. §9-13-101(Repl. 2008); *Norwood v. Robinson*, 315 Ark. 255 (1993); *Harrington v. Harrington*, 55 Ark. App. 22 (1996); *Fox v. Fox*, 31 Ark. App. 122 (1990).

2. The sole question when considering custody is the welfare and best interests of the child.

*Crosser v. Henson*, 357 Ark. 635 (2004); *Fitzgerald v. Fitzgerald*, 63 Ark. App. 254 (1998).

3. In any contested case, a verbatim record must be made; no exception is made for contested custody cases.

Administrative Order No. 4; Ark. Code Ann. §16-13-510; *McNair v. Johnson*, 75 Ark. App. 261 (2001)(Trial court heard children's testimony in camera and record of their testimony was sealed on appeal. Court of Appeals ordered that transcript be unsealed, relying upon Rule 6(b) of the Rules of Appellate Procedure - Civil, and Rule 4-2(a)(6) of the Rules of the Supreme Court. Court said no method exists to permit children to testify on the record, and then to exempt that testimony from being abstracted with the record on appeal.); *Mattocks v. Mattocks*, 66 Ark. App. 77 (1999).

4. Custody shall be awarded in a manner to assure frequent and continuing contact of the child with both parents.

Ark. Code Ann. §9-13-101(b) (Repl. 2008).

5.
  - (a) Acts of domestic violence must be considered, if proven by a preponderance of the evidence.
  - (b) There is a rebuttable presumption that it is not in the best interest of the child to be placed in the custody of an abusive parent.

Ark. Code Ann. §9-13-101(c) (Repl. 2008).

6.
  - (a) A person who is required to register as a sex offender may not be awarded custody or unsupervised visitation with a child unless the court makes a specific finding that the sex offender poses no danger to the child.

- (b) There is a rebuttable presumption that it is not in the best interest of the child to be placed in the care or custody of a sex offender or to have unsupervised visitation with a sex offender.

Ark. Code Ann. §9-13-101(d) (Repl. 2008).

- 7 The presumption that the mother could best care for a young child ("tender years" doctrine) has been abolished.

*Milum v. Milum*, 49 Ark. App. 3 (1995); *Riddle v. Riddle*, 28 Ark. App. 344 (1989); *Drewry v. Drewry*, 3 Ark. App. 97 (1981).

- 8. Between a parent and a third party, the legal preference for custodian is the parent, unless the parent is incompetent or unfit.

*Lloyd v. Butts*, 343 Ark. 620 (2001)(Supreme Court clarified natural-parent preference rule); *Schuh v. Roberson*, 302 Ark. 305 (1990); *Perkins v. Perkins*, 266 Ark. 957, *cert. denied*, 267 Ark. 112 (1979); *Ideker v. Short*, 48 Ark. App. 118 (1995); but see, *Coffee v. Zollicoffer*, 93 Ark App. 61 (2005)(Held: Preference is for natural parent but polestar is "best interest of the child," which can overcome parent preference when a child is left in the care of a nonparent for a substantial period of time. Here, grandparent maintained custody over fit mother); but see, *Camp v. McNair*, 93 Ark. App. 190(2005)(Long-established case law favors a natural parent over a grandparent, unless the parent is unfit); *Freeman v. Rushton*, 360 Ark. 445(2005)(In spite of the statutory preference in Ark. Code Ann. §28-65-204(a) for a parent to be appointed guardian, it was in the child's best interest to remain with his grandparents).

- 9. Even under circumstances when a child might be better off with a third party, the "State cannot interfere with this right simply to better the moral and temporal welfare of the child."

*Stamps v. Rawlins*, 297 Ark. 370 (1988); *Woodson v. Lee*, 221 Ark. 517 (1953); *In Re: Guardianship of Markham v. Buck*, 32 Ark. App. 46 (1990); but see, *Coffee v. Zollicoffer*, 93 Ark. App. 61 (2005).

- 10. Fault in the divorce is not necessarily the determining factor in awarding custody of the child since an award of custody is neither a reward nor a punishment for a parent.

*Burns v. Burns*, 312 Ark. 61 (1993).

- 11. Newly discovered information which might merely impeach or otherwise test the credibility of a witness is not sufficient to warrant a new trial.

*Lee v. Lee*, 330 Ark. 310 (1997).

12. Granting custody to parent at the temporary hearing does not constitute a final appealable order; thus it is not necessary to show a material change in circumstances to award custody to the other parent at the final hearing.

*Fitzgerald v. Fitzgerald*, 63 Ark. App. 254 (1998), but see, *Hodge v. Hodge*, 97 Ark. App. 217 (2006)(temporary order was held to be a permanent order because of the amount of time that had passed from when it was said to be “temporary”).

13. A parent may petition the court to order a criminal records check of the other parent and the court may so order if it determines that there is reasonable cause to suspect criminal conduct relevant to the issue of custody.

Ark. Code Ann. §9-13-105 (Repl. 2008).

14. An award of custody is a final order for purposes of appeal, even if all other issues, such as property division, have not been resolved.

*Ford v. Ford*, 347 Ark. 476 (2002).

## **B. Best Interest of the Child**

1. Factors for a Court to consider when awarding Custody:

- a. Moral Fitness

- (1) Integrity;
- (2) Character;
- (3) Compassion;
- (4) Habit of sobriety;
- (5) Religious training; and
- (6) Attitude of a newly acquired partner;
- (7) Acts of domestic violence.

See Ark. Code Ann. §9-13-101(c)(Repl. 2008)(rebuttable presumption that it is not in the best interest of a child to be in the custody of an abusive parent).



b. Stability

- (1) Emotional stability;
- (2) Work stability;
- (3) Financial stability;
- (4) Residence - location and room for child;
- (5) Health;
- (6) Partner stability; and
- (7) Parent most likely to allow frequent and continuing contact with noncustodial parent and noncustodial grandparent who meets specified criteria.

See Ark. Code Ann. §9-13-101(b)(2) (Repl. 2008).

c. Love and affection

- (1) Attention given to child;
- (2) Discipline;

*Brown v. Brown*, 76 Ark. App. 494 (2002)(corporal punishment is not *per se* child abuse in Arkansas).

- (3) Attitude towards education; and
- (4) Social attitudes.

d. The Child

- (1) Stated preference;

Ark. Code Ann. §9-13-101(a)(1)(A)(ii)(Repl. 2008)(In determining the best interest of a child, the court may consider the preferences of the child if the child is of a sufficient age and capacity to reason, regardless of chronological age).

- (2) Age;

- (3) Sex;
- (4) Health;
- (5) Testing and evaluation of the child; and
- (6) Child care arrangements.

*Note: The above factors were presented at the 1980 Fall Legal Institute on the Arkansas Domestic Relations Law and System by then-Arkansas Supreme Court Associate Justice Robert H. Dudley. His remarks were reprinted in their entirety in The Arkansas Domestic Relations System at § 9.30, "A Chancellor Looks at Child Custody, Support and Visitation." Judge Dudley cited and quoted from "Child Custody and the Rule of Common Sense: Subjecting Your Custody Case to Realistic Analysis," 2 FAMILY LAW REPORTER 4051 (1976). See, also, Rector v. Rector, 58 Ark. App. 132 (1997); James v. James, 29 Ark. App. 226 (1989); Anderson v. Anderson, 18 Ark. App. 284 (1986). The Supreme Court also used the factors in Administrative Order No. 15, its rules establishing attorneys ad litem in domestic relations and guardianship cases.*

## 2. Guardianship of a Minor

- a. Standard to be applied in determining guardianship is the best interest of the child. *Jones v. Scott*, 92 Ark. App. 85(2005)(trial court's using the standard "material change in circumstances" in a guardianship case was erroneous because the standard applies in a custody case; best interests applies to guardianships).
- b. For guardianship of a child, the statutory natural-parent preference is subservient to the best interest of the child. *Smith v. Thomas*, 373 Ark. 427 (2008). See, also *Freeman v. Rushton*, 360 Ark. 445 (2005)(parent's preferential status is only one factor for a court to consider in a guardianship. The best interest of the child is the paramount consideration).

## C. Child's Preference for Custody and Sibling Relationships

1. The Court may consider a child's preference for custody, but is not bound by the child's wishes.

Ark. Code Ann. § 9-13-101(a)(1)(A)(ii) (Repl. 2008)(if the child is of a sufficient age and capacity to reason, regardless of chronological age); *Watson v. Watson*, 271 Ark. 294 (1980); *Hollinger v. Hollinger*, 65 Ark. App. 110 (1999); *Kimmons v. Kimmons*, 1 Ark. App. 63 (1981).

2. Siblings have a right to maintain a relationship with each other, and the Court should not divide their custody absent exceptional circumstances.

Ark. Code Ann. 9-13-102 (Repl. 2008)(visitation rights of children whose parents have denied such access); *Middleton v. Middleton*, 83 Ark. App. 7 (2003)( prohibition against dividing custody does not apply equally to half-siblings, especially when they have never lived together); *Atkinson v. Atkinson*, 72 Ark. App. 15 (2000)(awarding custody on rule that siblings should be kept together would be basing custody determination on impermissible presumption, contrary to law; basis should be best interest of children); *Eaton v. Dixon*, 69 Ark. App. 9, (2000)(general prohibition against dividing custody does not apply equally to half-siblings); *Ark. Dept. of Human Services v. Couch*, 38 Ark. App. 165 (1992); *Ketron v. Ketron*, 15 Ark. App. 325 (1985).

#### **D. Modification of Custody Order**

1. A judicial award of custody should not be modified unless the record reflects changed circumstances and when modification would be in the best interests of the child.

*Taylor v. Taylor*, 353 Ark. 69 (2003)(appearances and the potential for future harm are not sufficient to constitute changed circumstances); *Lloyd v. Butts*, 343 Ark. 620 (2001); *Walker v. Torres*, 83 Ark. App. 135 (2003); *Mason v. Mason*, 82 Ark. App. 133 (2003)(changed circumstances found); *Carver v. May*, 81 Ark. App. 292 (2003); *Yen My Tran VO v. Hoa Van VO*, 78 Ark. App. 134 (2002) (courts require more rigid standard for custody modification than for initial custody determinations); *Word v. Remick*, 75 Ark. App. 390 (2001)(discord between parties with joint custody constituted a material change in circumstances sufficient to award custody to father); *Pierce v. Pierce*, 73 Ark. App. 339 (2001)(high-conflict custody disputes may be a form of child abuse and maltreatment); *Barnes v. Newton*, 69 Ark. App. 115(2000)(trial court's order that custody would be placed with mother in the future depending on her health was a final, appealable order, but mother failed to prove changed circumstances to warrant change); *Hepp v. Hepp*, 61 Ark. App. 240 (1998); *Schwarz v. Moody*, 55 Ark. App. 6 (1996); *Riley v. Riley*, 45 Ark. App. 165 (1994).

2. Courts may look at parental misconduct in the context of whether it has a direct adverse impact on the child.

*Respalie v. Respalie*, 25 Ark. App. 254 (1988).

3. The preference of the child is a consideration, but the best interests of the child is the primary consideration.

*Hepp v. Hepp*, 61 Ark. App. 240 (1998); *Turner v. Benson*, 59 Ark. App. 108 (1997).

4. Generally, only post-order circumstances are considered relevant for granting a modification, but a court may consider material facts not known to the court when the original order was made, except that when a parent fails to produce evidence available to him at one hearing, he cannot rely upon that evidence in a subsequent hearing.

*Digby v. Digby*, 263 Ark. 813 (1978); *Rogers v. Rogers*, 46 Ark. App. 136 (1994). See, also, *Swadley v. Krugler*, 67 Ark. App. 297 (1999).

5. The general rule is that a trial court retains jurisdiction to modify its orders.

*Moore v. Richardson*, 332 Ark. 255 (1998); *Slusher v. Slusher*, 73 Ark. App. 303 (2001)(no jurisdiction to amend original decree which did not mention a child, custody, visitation or support); *Fitzpatrick v. Fitzpatrick*, 29 Ark. App. 38 (1989).

#### **E. Examples of Change in Custody Granted**

1. Custodial parent openly cohabiting with another in presence of the child. Custodial parent had a "promiscuous lifestyle" which included overnight visitors while child was in the home.

*Walker v. Walker*, 262 Ark. 648 (1978); see *Hamilton v. Barrett*, 337 Ark. 460 (1999)(violation of non-cohabitation clause).

2. When the custodial parent moved four times within the school year, and the child failed a school grade, the modification was granted.

*Scherm v. Scherm*, 12 Ark. App. 207 (1984); *Newnum v. Keenzel*, 254 Ark. 243 (1973).

3. The custodial parent denied the other parent even the barest information about the child's health and well-being, concealed the child's whereabouts, and the new spouse of the custodial parent was extremely hostile to the noncustodial parent.

*Swindle v. Swindle*, 242 Ark. 790 (1967). See Ark. Code Ann. § 9-13-301-302 (Repl. 2008)(noncustodial parent's right to child's scholastic records and penalty for denial).

4. The custodial parent's ongoing relationship with a married individual was immoral and did not set a proper example for a child.

*Nix v. Nix*, 17 Ark. App. 219 (1986); *Hoing v. Hoing*, 28 Ark. App. 340 (1989); *Anderson v. Anderson*, 18 Ark. App. 284 (1986).

5. Joint custody changed to sole custody. Both parties were cohabiting but father

quit first by getting married. Court described his increased maturity.

*Word v. Remick*, 75 Ark. App. 390 (2001). See, also, *Taylor v. Taylor*, 345 Ark. 300 (2001) (non-cohabitation rule a major factor in custody decisions.).

6. It was a reflection on appellant's morality that she allowed persons of questionable reputation and character to be around child, as reflected in their misdemeanor convictions.

*Stone v. Steed*, 54 Ark. App. 11 (1996).

7. Custody changed from mother to father after the court found that allowing the mother to retain custody of the children and returning them to her home in Washington would be tantamount to terminating the father's custodial rights, based upon the mother's intentional alienation and interference with visitation.

*Carver v. May*, 81 Ark. App. 292 (2003).

#### **F. Examples of Change in Custody Denied**

1. Custodial parent's conduct that was designed to alienate the child from the other parent could not be condoned and noncustodial parent's refusal to pay child support could not be ignored.

*Kerby v. Kerby*, 31 Ark. App. 260 (1990); but see *Turner v. Benson*, 59 Ark. App. 108 (1997).

2. Insufficient evidence to support noncustodial parent's charge that the custodial parent was intentionally trying to prevent the child from seeing the noncustodial parent.

*Carter v. Carter*, 19 Ark App. 242 (1986).

3. Custodial mother subsequently married the man living in the home with the her and the child.

*Anderson v. Anderson*, 18 Ark. App. 284 (1986).

4. When the custodial mother had a man living with her and the children, parental misconduct was not parental unfitness absent a showing of an adverse effect on the welfare of the child. Evidence was presented that father's treatment of the children was adverse to their welfare.

*Respalie v. Respalie*, 25 Ark. App. 254 (1988).

5. No material change in circumstances found to warrant a change in custody.

*Campbell v. Campbell*, 336 Ark. 379 (1999); *Presley v. Presley*, 66 Ark. App. 316 (1999); *Rush v. Wallace*, 23 Ark. App. 61 (1988); *Sweat v. Sweat*, 9 Ark. App. 326 (1983).

6. Noncustodial parent had a greater ability to provide the child with more material items, and the child preferred to live with the noncustodial parent because of a stressful relationship with a step-parent.

*Malone v. Malone*, 4 Ark. App. 366 (1982).

**G. Relocation as a Factor in Custody--*Hollandsworth v. Knyzewski*, 353 Ark. 470 (2003)**

1. Relocation of a primary custodian and his or her children alone is not a material change in circumstances sufficient to change custody.
2. A presumption exists in favor of relocation for custodial parents with primary custody, with the burden to rebut the presumption on the noncustodial parent.
3. A custodial parent in Arkansas no longer has to prove a real advantage to himself or herself and the children in relocating (the former rule from *Hickmon v. Hickmon*, 70 Ark. App. 428 (2000)).
4. Five factors for courts to take into consideration when deciding a relocation issue:
  - a. reason for relocation;
  - b. educational, health, and leisure opportunities available in the place of relocation;
  - c. visitation and communication schedule for the noncustodial parent;
  - d. the effect of the move on extended family relationships; and
  - e. preference of the child.

*Hollandsworth v. Knyzewski*, 353 Ark. 470 (2003). For application of the factors, see *Benedix v. Romeo*, 94 Ark. App. 412 (2006); *Sill v. Sill*, 94 Ark. App. 211 (2006); *Hurt v. Hurtt*, 93 Ark. App. 37 (2005).

**H. Joint Custody**

1. When in the best interests of a child, custody shall be awarded in such a way as to assure the frequent and continuing contact between a child and both parents; to

this effect, the court may consider awarding joint custody to parents.

Ark. Code Ann. §9-13-101(b)(i)&(ii)(Repl. 2008).

2. Case law (both before and after adoption of Code provision above) indicates that joint custody is not favored unless circumstances clearly warrant such action.

*Gray v. Gray*, 95 Ark. App. 155 (2006); *Word v. Remick*, 75 Ark. App. 390 (2001).

3. Joint custody must be in the best interests of the child and the parents must demonstrate the ability to cooperate.

*Gray v. Gray*, 95 Ark. App. 155 (2006); *Word v. Remick*, 75 Ark. App. 390 (2001)(decided under prior law); *Hobbs v. Hobbs*, 75 Ark. App. 187(2001)(relationship between parents who share joint custody must be harmonious)(decided under prior law).

4. If no support is ordered, specific findings must be made.

*Lonigro v. Lonigro*, 55 Ark. App. 253 (1996)(child support when joint custody was ordered).

## **I. Stepparent Custody**

1. A stepparent may be awarded custody in a proper case.

*Stamps v. Rawlins*, 297 Ark. 370 (1988).

## **J. Attorneys' Fees**

1. Court has inherent authority to award attorneys' fees in custody modification cases.

*Jones v. Jones*, 327 Ark. 195 (1997).

2. Ark. Code Ann. §9-12-309(a)(Repl. 2008), which authorizes award of attorneys' fees in divorce actions, is construed to permit fees in child custody modifications.

*Finkbeiner v. Finkbeiner*, 226 Ark. 165, 288 (1956).

3. The courts' authority to award attorneys' fees applies to contempt proceedings arising from custody cases, too.

*Payne v. White*, 1 Ark. App. 271 (1981).

**K. Transfer of Custody on School Property**

1. The transfer of a child from a custodial parent to a noncustodial parent is prohibited on the real property of a public school on normal school days during school hours.
2. This does not prevent one parent from taking a child to school and the other parent from picking the child up.

Ark. Code Ann. § 9-13-104 (Repl. 2008).

**L. Attorneys Ad Litem in Disputed Custody Cases–  
Domestic Relations & Guardianship Cases**

1. Director of AOC authorized to establish attorney ad litem program for representation of children in circuit court cases when custody is an issue.

Ark. Code Ann. §9-13-101(e)(1) (Repl. 2008).

2. Circuit judge authorized to appoint private attorney to represent a child when he or she determines that appointment will facilitate a case in which custody is in issue and to further protect the rights of the child.

Ark. Code Ann. §9-13-101(e)(2) (Repl. 2008).

- a. Arkansas Supreme Court, with advice of circuit judges, authorized to adopt standards of practice and qualifications for service for attorneys who seek to be appointed to provide legal representation for children in custody cases.

Ark. Code Ann. §9-13-101(e)(3)(A) (Repl. 2008); Administrative Order No. 15, see Appendix.

- b. In extraordinary cases, an attorney may be appointed who does not meet the required standards and qualifications for service, but may not be appointed to subsequent cases until making efforts to meet the standards and qualifications.

Ark. Code Ann. §9-13-101 (e)(3) (B)(i) & (ii) (Repl. 2008).

3. When attorneys are appointed according to these provisions, fees for services and



reimbursable expenses shall be paid from funds appropriated for that purpose to the AOC.

Ark. Code Ann. §9-13-101(e)(4) (Repl. 2008).

- a. When a circuit judge orders payment as authorized by these provisions, the judge shall transmit a copy of the order to the AOC, which is authorized to pay the funds.

Ark. Code Ann. §9-13-101(e)(5)(A) (Repl. 2008).

- b. The circuit court may require the parties to pay all or a part of the expenses of the attorney ad litem, according to their ability to pay.

Ark. Code Ann. §9-13-101(e)(5)(B) (Repl. 2008).

4. The AOC shall establish guidelines for maximum expenses and fees per hour and per case.
  - a. Maximum rate is \$90.00 per hour. If any state money is used for payment, maximum hourly rate applies to entire attorney fee. If no state money is used, the trial court may approve an attorney fee at any reasonable hourly rate. See *Guidelines for Reimbursement for Attorneys Ad Litem in Domestic Relations and Probate Cases*, Appendix.
  - b. Maximum total is \$1,250.00 per case (fees and expenses). If the case closes and is reopened and the attorney ad litem is reappointed, fees may be awarded, with the same maximums. See *Guidelines*, Appendix.
  - c. Out-of-pocket expenses may also be reimbursed. See *Guidelines*, Appendix.

Ark. Code Ann. §9-13-101(e)(6) (Repl. 2008); *Guidelines for Reimbursement for Attorneys Ad Litem in Domestic Relations and Probate Cases*, Appendix.

5. Funds appropriated for ad litem representation in custody cases shall be apportioned among the judges according to a formula developed by the AOC and approved by the Arkansas Judicial Council and the Regulations Subcommittee of the Arkansas Legislative Council.

Ark. Code Ann. §9-13-101(e)(7) (Repl. 2008). See *Guidelines*, Appendix.

6. The AOC shall develop a statistical survey for each attorney ad litem to complete

at the conclusion of a case. Statistics shall include:

- a. ages of children served;
- b. whether custody issue arose at divorce or post divorce;
- c. whether psychological services were ordered; and
- d. any other relevant information.

Ark. Code Ann. §9-13-101 (e)(8)(A) & (B) (Repl. 2008). See *Attorney Ad Litem Report Form*, Appendix.

7. Supreme Court Administrative Order Number 15–Attorney Ad Litem Qualifications, Section 4

- a. To qualify as an attorney ad litem, an attorney shall be licensed and in good standing with the Supreme Court;
- b. Before appointment, attorney shall have initial legal education:
  - (1) not less than 10, AOC-approved hours, within 2 years before date attorney qualifies for appointment, in
    - (a) child development;
    - (b) attorney ad litem roles and responsibilities, including ethical considerations;
    - (c) relevant substantive state, federal, and case law;
    - (e) custody and visitation; and
    - (f) family dynamics, including substance abuse, domestic abuse, and mental health issues.
- c. After initial qualification, attorney ad litem shall have:
  - (1) 4 hours of continuing education;
  - (2) each year, between July 1 and the following June 30;
  - (3) in any of the 5 subject-matter areas set out above, or in other areas affecting the child and family;
  - (4) subject to CLE Rules and Regulations.
- d. An attorney ad litem who fails to obtain 4 hours of qualified CLE by July 1 of any year:

- (1) may sign an acknowledgment of deficiency in accordance with Rule 5.(D) of the Ark. Rules and Regulations for Minimum Continuing Legal Education; and
    - (2) shall complete the 4-hour CLE requirement by December 1;
  - e. An attorney ad litem who fails to obtain the 4 hours of qualified CLE by December 1:
    - (1) is no longer qualified as an attorney ad litem; and
    - (2) his or her name shall be removed from the list of qualified attorneys ad litem that is maintained and distributed by the AOC; and
    - (3) he or she can become qualified again only by completing initial qualification of 10 hours.
- 8. Supreme Court Administrative Order Number 15–Standards of Practice--Section 5
  - a. An attorney ad litem shall conduct an independent investigation. Upon entry of a final order, an attorney ad litem’s obligation to represent the child shall end, unless the court directs otherwise.
  - b. An attorney ad litem shall determine the best interest of a child by considering such custody criteria as:
    - (1) Moral fitness factors;
    - (2) Stability factors;
    - (3) Love and affection factors;
    - (4) Other relevant information.
  - c. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court; if the child’s wishes differ from the ad litem’s determination of the child’s best interest, the ad litem shall communicate both the wishes and the ad litem’s recommendations to the court.
  - d. An attorney ad litem shall file pleadings, call witnesses, participate in the examination of witnesses, present relevant evidence, and advocate for

timely hearings.

- e. An attorney ad litem shall explain to the child the court proceedings and the role of the ad litem in terms the child can understand.
- f. An attorney ad litem shall make recommendations to the court for specific and appropriate services for the child and the child's family, and to communicate those recommendations to the attorneys for the parties or to pro se parties.
- g. An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child.
- h. An attorney shall not accept appointment to any case for which he or she cannot devote the requisite amount of time to comply with the standards of conduct and with the Rules of Professional Conduct.

## **XI. VISITATION**

### **A. All Parties**

1. Acts of domestic violence by party seeking visitation must be considered if act has been proven by a preponderance of the evidence.

Ark. Code Ann. §9-13-101(c)(1) (Repl. 2008).

2. Persons required to register as sex offenders may not be awarded custody of or unsupervised visitation with a child unless the court makes a specific finding that the sex offender poses no danger to the child. There is a rebuttable presumption that it is not in the best interest of a child to be placed in the care or custody of or to have unsupervised visitation with a sex offender.

Ark. Code Ann. §9-13-101(d) (Repl. 2008).

### **B. Visitation Rights of Brothers and Sisters**

1. A brother or sister may petition the Court to visit any brother or sister whose parents have denied such access.

Ark. Code Ann. § 9-13-102 (Repl. 2008).

### **C. Visitation Rights of Grandparents**

1. When a child is in the custody of a parent:
  - a. Upon petition by a person properly before it, a circuit court may consider the reasonable visitation rights of grandparents and great-grandparents to their grandchild(ren) or great-grandchild(ren), if:
    - (1) marital relationship between parents of child(ren) has been severed by death, divorce, or legal separation; or
    - (2) the child is illegitimate, and the petitioner is a maternal grandparent of the illegitimate child; or
    - (3) the child is illegitimate, the petitioner is a paternal grandparent of the illegitimate child, and paternity has been established in court.

Ark. Code Ann. § 9-13-103(b)(Supp. 2009).

See *Troxel v. Granville*, No. 530 U.S. 57 (2000) (grandparent visitation case interpreting a much boarder visitation provision than Arkansas's); *Seagrave v. Price* 349 Ark. 433 (2002)(Ark.'s grandparent visitation statute unconstitutional as applied; Court said the entire Act has been held unconstitutional except for one clause that applies when grandparents petition for visitation when someone other than a parent has custody); *Linder v. Linder*, 348 Ark. 322 (2002)(Ark.'s grandparent visitation statute unconstitutional as applied). Act 652 of 2003 was passed to address the Court's declarations that Arkansas's provisions were unconstitutional).

See, also, *Tate v. Bennett*, 341 Ark. 829 (2000)(grandparent visitation rights are derived only from statute); *Boothe v. Boothe*, 341 Ark. 381 (2000)(grandparent's standing to bring action); *Ellis v. Bennett*, 69 Ark. App. 922 (2000)(child was legitimate and did not fit within the statute); *Hendershot v. Hendershot*, 30 Ark. App. 184 (1990)(great-aunt does not qualify for visitation under Ark. Code Ann. § 9-13-103).

- b. A rebuttable presumption exists that a custodian's decision denying or limiting visitation to the petitioner (grandparent) is in the best interest of the child.

Ark. Code Ann. § 9-13-103(c)(1) (Supp. 2009).

- c. To rebut the presumption, the petitioner must prove by a preponderance of the evidence the following:
  - (1). significant and viable relationship between grandparent and child;
  - (2) visitation is in the best interest of the child.

Ark. Code Ann. § 9-13-103(c)(2) (Supp. 2009).

- d. To establish a significant and viable relationship, petitioner must prove, by a preponderance:
  - (1) child resided with petitioner for at least 6 consecutive months with or without current custodian present; or
  - (2) petitioner was caregiver to child on a regular basis for at least 6 consecutive months; or
  - (3) petitioner had frequent or regular contact with child for at least 12 consecutive months; or
  - (4) any other facts to establish that loss of relationship between

petitioner and child is likely to harm the child.

Ark. Code Ann. § 9-13-103(d) (Supp. 2009).

- e. To establish that visitation is in the best interest of the child, petitioner must prove by a preponderance:
  - (1) petitioner has capacity to give child love, affection, and guidance;
  - (2) loss of relationship is likely to harm the child; and
  - (3) petitioner will cooperate with custodian if visitation is allowed.

Ark. Code Ann. § 9-13-103(e) (Supp. 2009).

- f. Order granting or denying visitation
  - (1) shall be in writing; and
  - (2) shall state any and all factors considered by court in its decision.

Ark. Code Ann. § 9-13-103(f)(1) (Supp. 2009).

- g. If the court grants visitation to the petitioning grandparents or great-grandparents, the visits may occur regardless of which parent has physical custody of the child. Visits with a paternal grandparent may occur even if the child is in the custody of the mother; visits with a maternal grandparent may occur even if the child is in the custody of the father.

Ark. Code Ann. § 9-13-103(f)(2) (Supp. 2009).

- h. If granted, visitation shall be exercised in a manner consistent with all orders regarding custody of or visitation with child unless court specifically finds otherwise.

Ark. Code Ann. § 9-13-103(f)(3)(A) (Supp. 2009).

- h. For restricted or limited visitation, court shall include restrictions or limitations in order granting visitation.

Ark. Code Ann. § 9-13-103(f)(3)(B) (Supp. 2009).

- i. Order granting or denying visitation is a final order for purposes of appeal.

Ark. Code Ann. § 9-13-103(f)(4) (Supp. 2009).

- j. Order granting or denying visitation under this section is
  - (1) enforceable by contempt proceedings;
  - (2) subject to modification for changed circumstances or to address restrictions or limitations in the order.

Ark. Code Ann. § 9-13-103(f)(5) (Supp. 2009).

- k. Court may order mediation or counseling to resolve a visitation issue under this section if
  - (1) mediation or counseling services are available;
  - (2) both parties agree to participate; and
  - (3) one or both parties agree to pay for services.

Ark. Code Ann. § 9-13-103(g) & (h)(Supp. 2009).

- 2. When a parent does not have custody of a child
  - a. Visitation may be granted to a grandparent or great-grandparent if the court determines it is in the best interest and welfare of the child.

Ark. Code Ann. § 9-13-107(c) (Repl. 2008).

- b. Order shall be in writing and shall state factors considered in granting or denying.
  - (1) If granted, visitation shall be exercised in a manner consistent with all orders for custody of or visitation with the child, unless court specifically finds otherwise.
  - (2) Any restrictions or limitations shall be set out in the order granting visitation.
  - (3) Order is final for purposes of appeal.

Ark. Code Ann. § 9-13-107(d) (Repl. 2008).



- (4) Order is subject to proceedings for contempt and modification based upon changed circumstances.

Ark. Code Ann. § 9-13-107(d)(4) (Repl. 2008).

Decided under prior law: Grandparents are not restricted to bringing their suits in the court which entered the final decree, but may bring such action in the county where the custodial parent and the child reside. *Sanders v. Sanders*, 297 Ark. 621 (1989).

#### **D. Visitation Rights of Stepparents**

1. A stepparent may be awarded visitation in a divorce case.

*Robinson v. Ford-Robinson*, 362 Ark. 232 (2005)(Held: a circuit court may award visitation to a stepparent standing *in loco parentis* over the natural parent's objection when the trial court determines it is in the best interest of the child); *Blackwood v. Floyd*, 342 Ark. 498 (2000)(stepmother did not request visitation with stepson at divorce hearing and did not claim *in loco parentis*; child was not mentioned in divorce proceeding; therefore, no jurisdiction to modify decree more than 90 days after entry); *Young v. Smith*, 331 Ark. 525 (1998).

#### **E. Denial of Visitation**

1. The same evidence that warrants a finding that a parent is unfit to have custody supports a denial of visitation.

*Lumpkin v. Gregory*, 262 Ark. 561 (1977) (affirming denial of a parent's visitation rights); *Buckley v. Buckley*, 73 Ark. App. 410 (2001)(best interest of the child is the polestar for decisions regarding visitation; this father's behavior more egregious than the father's in *Lumpkin* and visitation was denied).

#### **F. Modification of Visitation**

1. Grounds for modification—generally, a change in circumstances pertinent to visitation—must be shown to justify a modification of visitation privileges.

*Stellpflug v. Stellpflug*, 70 Ark. App 88 (2000)(error to reduce summer vacation with children when no material change of circumstances was found); *Tillery v. Evans*, 67 Ark. App. 43 (1999); *Leonard v. Stidman*, 59 Ark. App. 5 (1997).

2. If a generic visitation schedule is not workable, the Court must set out specific visitation periods to correct the problem.

*Haller v. Haller*, 234 Ark. 984 (1962).

3. Courts are reluctant to deprive a noncustodial parent of all visitation rights, but at times, that denial is justified.

*Buckley v. Buckley*, 73 Ark. App. 410 (2001); *Marler v. Binkley*, 29 Ark. App. 73 (1989).

4. A parent's threatening not to return to the state is not grounds for refusing permission for visitation. However, the court may order the custodial parent to post bond to insure compliance with the custody/visitation orders.

*Ryan v. Baxter*, 253 Ark. 821 (1973).

5. Primary consideration in visitation cases is welfare and best interest of child.

*Ishmael vs Ismail*, 66 Ark. App. 232 (1999)(continuation of supervised visitation); *Johns v. Johns*, 53 Ark. App. 90 (1996)(noncustodial parent ordered to see that children attended Sunday School and church during periods of visitation).

6. Upon a parent's petition, a Court may order a criminal records check of the other parent if the Court determines there is reasonable cause to suspect criminal conduct relevant to the issue of visitation.

Ark. Code Ann. §9-13-105 (Repl. 2008).

## XII. UNIFORM ACTS FOR CUSTODY AND VISITATION

### A. **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) Act 668 of 1999; Ark. Code Ann. §9-19-101 et seq. (Repl. 2008)**

*Note: This section of the Benchbook was written primarily by the Honorable John Lineberger, retired chancellor from the Fourth Judicial Circuit. Judge Lineberger is a judicial educator who teaches the UCCJEA and the PKPA to judges and other lawyers, not only in Arkansas, but around the country, as well. The outline is essentially his, with any changes or additions made with his permission. Thanks to Judge Lineberger for his generosity in sharing his work product for the Benchbook.*

*The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is the successor to the Uniform Child Custody Jurisdiction Act (UCCJA) in Arkansas. The UCCJA was repealed in Arkansas when the UCCJEA was adopted in 1999. Many of Arkansas's cases on interstate custody were decided under the UCCJA.*

#### 1. **Purpose**

- a. UCCJEA is now consistent with the Parental Kidnaping Prevention Act (PKPA); provides for continuing jurisdiction and clarifies custody modification jurisdiction; provides a remedial process to enforce interstate child custody and visitation determinations.

*Seamans. v. Seamans*, 73 Ark. App. 27 (2001)(does not apply to purely intrastate custody disputes; no authority to award attorney fees under the Act).

#### 2. **Priority**

- a. Upon the request of a party, questions that arise in child custody proceedings regarding the existence or exercise of jurisdiction under the UCCJEA must be given priority on the calendar and handled expeditiously.

Ark. Code Ann. §9-19-107 (Repl. 2008).

#### 3. **Child Custody Jurisdiction**

- a. Subject matter jurisdiction cannot be waived; territorial jurisdiction can be waived.

*McBride v. McBride*, 23 FLR 1182 (Ala. App. 1997); *B.J.P. v. R.W.P.*, 637 A.2d 74 (App.

D.C. 1994); *Crump v. Crump*, 821 P.2d 1172 (Utah Ct. App. 1991).

b. Parties may not agree to jurisdiction where none exists.

*In Re Mosier*, 18 FLR 1447 (Kan. 1992); *Steele v. Steele*, 978 S.W.2d 835 (Mo. App. 1998).

c. When jurisdiction is lacking in original action, the decree is not enforceable.

*Xenide v. Calif. Superior Court*, 27 Cal. Rptr. 703 (Cal. App. 1994); *Glanzner v. Missouri*, 835 S.W.2d 386 (Mo. App. 1992).

d. Act applies to many types of proceedings when child custody or visitation is at issue:

- (1) Divorce
- (2) Separation
- (3) Neglect

*Kasper v. Kasper*, 792 P. 2d 118 (Utah App. 1990).

- (4) Abuse
- (5) Dependency
- (6) Guardianship

*Ark. Dept. of Human Services v. Cox*, 349 Ark. 205 (2002) (UCCJEA applied to guardianship case; error for DHS to seize child under Fla. *ex parte* order that was *void ab initio*; Fla. had no jurisdiction).

- (7) Paternity

*Greenhough v. Goforth*, 354 Ark. 502 (2003)(UCCJEA applied to mother's paternity action against alleged father, as petition included issues of paternity, child support, and custody); *Little v. Daggett*, 858 S.W.2d 368 (Tex. 1993).

- (8) Termination of Parental Rights

*Ark. Dept. of Human Services v. Cox*, 349 Ark. 205 (2002); *G.B. v. Arahoe County Court*, 21 FLR 1236 (Colo. 1995); *In Re L.C.*, 19 FLR 1465 (Kan. App. 1993); *In Re Termination of Parental Rights over M.C.S.*, 19 FLR 1487 (S.D. 1993); *Brus C. v. Shawn D.*, 486 N.W.2d 572 (Wis. 1992).

(9) Visitation

(10) Domestic Violence

Ark. Code Ann. § 9-19-102(4) (Repl. 2002); *Zappitello v. Moses*, 458 N.W.2d 784 (S.D. 1990).

e. Act does not apply to:

(1) Adoptions

(2) Juvenile Delinquency

(3) Emergency Medical Care

Ark. Code Ann. §9-19-103 (Repl. 2008); Ark. Code Ann. § 9-19-102(4) & -103 (Repl. 2008); *Fox v. Fox*, 68 Ark. App. 281, 7 S.W.3rd 339 (1999) (decided under the UCCJA; no jurisdiction to amend child support or to amend alimony).

f. Act applies to interstate actions only.

*Seamans v. Seamans*, 73 Ark. App. 27 (2001)(no authority to award attorney fees under the Act).

#### **4. Verified Complaint or Affidavit Must Set Out Certain Required Information**

a. Child's present address or whereabouts;

b. Places where child has lived during the past five years;

c. Names and present addresses of persons with whom child has lived during that period;

d. Whether a party has participated in any capacity in any other proceeding concerning custody or visitation with the child, and if so, the particulars;

- e. Details of any proceedings that could affect the current action, including the particulars;
- f. Names and addresses of persons not parties who have or claim custody or visitation rights.

Ark. Code Ann. § 9-19-209 (Repl. 2008); *Ark. Dep't of Human Servs. v. Cox*, 349 Ark. 205 (2002).

## 5. Home State Defined (Jurisdiction)

- a. State where child lived with a parent or person acting as parent for at least six (6) consecutive months immediately before commencement of child custody proceeding.

Ark. Code Ann. §§ 9-19-102(7) & -201 (Repl. 2008); *Weesner v. Johnson*, 89 Ark. App. 203 (2005); *Dorothy v. Dorothy*, 88 Ark. App. 358 (2004); *Greenhough v. Goforth*, 354 Ark. 502 (2003)(Ark. not home state of child).

- b. For child less than 6 months old, state where child has lived from birth with a parent or person acting as parent. Period of temporary absence of any of the mentioned persons is part of the period.

Ark. Code Ann. §9-19-102(7) & -201(Repl. 2008).

- c. Temporary visit not sufficient to vest jurisdiction.

*In Re Custody of Sagan*, 396 A.2d 450 (Pa. 1978).

- d. If child is snatched, more than six months may be required.

*In Re Marriage of Hopson*, 168 Cal. Rptr. 345 (Calif. App. 1980)(clean hands doctrine applied); *Freeman v. Freeman*, 547 S.W.2d 437, 441 (Ky. 1977); *Nehra v. Uhlar*, 402 A. 2d 264 (N.J. Super. Ct. App. Div. 1979), cert. denied, 408 A.2d 807; *Matter of Custody of Ross*, 630 P.2d 353 (Or. 1981); *Matter of Marriage of Settle*, 556 P.2d 962(Or. 1976);.

- e. Use of subterfuge or unjustifiable conduct in removing a child may cause court to decline to exercise jurisdiction.

*Stokes v. Stokes*, 751 P. 2d 1363 (Alaska 1988).

- f. Child or mother hospitalized in foreign state for six months or more does not cause foreign state to become home state.

*Joselit v. Joselit*, 544 A.2d 59 (Pa. 1988).

- g. “State,” “territory,” or “possession” includes an Indian reservation.

*Martinez v. Arizona Superior Ct. ex rel Martinez*, 731 P.2d 1244 (Ariz. App. 1987).

- h. There is no home state or the home state has declined to exercise jurisdiction on the grounds that this State is the more appropriate forum.

- (1) The child and the child’s parents, or the child and at least one parent or a person acting as a parent, have a significant connection with this State other than mere physical presence; and
- (2) Substantial evidence is available in this State concerning the child’s care, protection, training, and personal relationships; and
- (3) No court in any other state would have jurisdiction.

Ark. Code Ann. § 9-19-201(Repl. 2008).

## **6. Emergency (Temporary) Jurisdiction**

- a. Comports with PKPA definition of emergency, which does not include neglect as a basis for emergency jurisdiction.

- (1) Child is present in state; and

*P.E.K. v. J.M.*, 27 FLR 1314 (Tenn. App. 2001).

- (2) Child has been abandoned, or a sibling or a parent is subjected to or threatened with mistreatment or abuse.

- b. A court may take emergency jurisdiction to protect a child even though it is neither home state nor has a significant connection.

- c. When there is no existing custody determination and no custody proceeding is filed in a state with jurisdiction, a temporary order entered under this section can become a final order:

- (1) if the order so provides; and
  - (2) if this state becomes the home state of the child.
- d. Requires communication between courts, each of which is exercising jurisdiction.

Ark. Code Ann. § 9-19-204 (Repl. 2002).

## **7. Home State Priority**

- a. UCCJEA grants exclusive and continuing jurisdiction to the home state and other bases for exercise of jurisdiction are secondary.

*Arbogast v. Arbogast*, 327 S.E.2d 675 (W.Va. 1984).

- b. Except for emergency jurisdiction, the court making an initial custody determination has exclusive, continuing jurisdiction until:
- (1) It determines that neither the child nor a parent has a significant connection with the state and that substantial evidence is no longer available in the state concerning the child's care, protection, training and personal relationships; or
  - (2) It or a court in another state determines that neither the child nor a parent presently resides in the state.

- c. The Parental Kidnaping Prevention Act (PKPA) has priority over the UCCJEA.

*Torres v. Torres*, 73 Cal. Rptr. 2d 344 (Calif. App. 1998); *Archambault v. Archambault*, 555 N.E.2d 201 (Mass. 1990); *Justis v. Justis*, 691 N.E.2d 264 (Ohio 1998).

## **8. Notice Requirements to Obtain Jurisdiction Over Absent Parent**

- a. Reasonable notice and an opportunity to be heard must be given to the contestants, any parent whose parental rights have not been previously terminated, and any person who has physical custody of a child.

Ark. Code Ann. § 9-19-205, and 9-19-108 (Repl. 2008).

- (1) Notice provisions must be followed fully.



*Copeland v. Copeland*, 314 S.E.2d 297 (N.C. App. 1984); *In Re Thompson*, 46 Wash. App. 493, 730 P.2d 1380 (1987); *Larry R.W. v. Alan F.S.*, 537 N.W.2d 30 (Wis. App. 1995).

- (2) *Ex-parte orders* are not entitled to full faith and credit.

*Arkansas Department of Human Services v. Cox*, 349 Ark. 205 (2002).

- (3) Personal jurisdiction of both parents is not required under the Act.

## **9. Communication Between Courts**

- a. May allow party participation.
- b. If parties do not participate:
  - (1) Make record and give parties access;
  - (2) Give parties the opportunity to present facts and argument;
  - (3) Exception: Communication between courts on schedules, calendars, court records, and similar matters may occur without the parties being informed and without a record being made.

Ark. Code Ann. §9-19-110 (Repl. 2008).

## **10. What a Court in This State May Request A Court In Another State To Do**

- a. Hold an evidentiary hearing;
- b. Order anyone having physical custody of a child to appear;
- c. Order a person to produce or to give evidence;
- d. Order an evaluation with respect to custody;
- e. Forward a transcript, evidence otherwise presented, and evaluations prepared;
- f. When requested by a court in another state, local judges must reciprocate.

Ark. Code Ann. §9-19-112 (Repl. 2008).

## 11. Court May Decline to Exercise Jurisdiction

- a. Court may decline jurisdiction if it is an inconvenient forum and other state has jurisdiction.

*Barclay v. Exkert*, 743 A.2d 1259 (Me. 2000); *Miley v. Miley*, 25 FLR 1495 (S.D. 1999).

- b. After declining jurisdiction, a court must designate a state that is more convenient.

Ark. Code Ann. §9-19-207 (Repl. 2008); *Waller v. Richardson*, 757 P. 2d 1036 (Alaska 1988).

- c. Court may decline jurisdiction if petitioner is guilty of unjustifiable conduct unless:

- (1) Parents acquiesce in exercise of jurisdiction; and
- (2) Court determines it is a more appropriate forum; or
- (3) No other Court would have jurisdiction.

*Blosser v. Blosser*, 2 Ark. App. 37, 617 S.W.2d 29 (1981); *Marcus v. Marcus*, 993 S.W. 2d 596 (Tenn. 1999).

- d. If court declines to exercise jurisdiction because of unjustifiable conduct, it may:

- (1) Fashion appropriate remedy to ensure safety of child and prevent a repetition of the unjustifiable conduct;
- (2) Assess reasonable and necessary expenses and costs.

Ark. Code Ann. §9-19-208 (Repl. 2008).

## 12. Cost of Proceedings

- a. Forum court may award costs when:

- (1) Action was commenced in a clearly inappropriate forum; or
- (2) Jurisdiction was declined because of unjustifiable conduct of a party;

- b. Costs include necessary and reasonable expenses including communication expenses, attorney's fees, investigative fees, travel expenses, witness expenses, and child care during the course of the proceedings.

Ark. Code Ann. §9-19-208 (Repl. 2008).

### 13. Inconvenient Forum

- a. Factors for the Court to consider—section contains new factors that were not in the UCCJA:
  - (1) Whether domestic violence has occurred and is likely to continue in the future; and which state can best protect the parties and the child(ren);
  - (2) The length of time the child has resided outside this state;
  - (3) The distance between the court in this state and the court in the state that would assume jurisdiction;
  - (4) The relative financial circumstances of the parties;
  - (5) Any agreement of the parties regarding which state should assume jurisdiction;
  - (6) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
  - (7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
  - (8) The familiarity of the court of each state with the facts and issues in the pending litigation.

When a court determines that it is an inconvenient forum and that a court of another state is a more appropriate forum, it shall stay the proceedings upon condition that a custody proceeding be promptly commenced in another designated state; court may impose any other condition it finds just and proper. Ark. Code Ann. §9-19-207 (Repl. 2008). *Rice v. Rice*, (not designated for publication)(No. CA 02-1303)(Sept. 24, 2003)(Ark. was inconvenient forum where minor child had lived in Missouri since the summer of 1994); *Gray v. Gray*, 69 Ark. App. 277, 12 S.W.3d 648 (2000)(“inconvenient forum” case decided under the UCCJA, predecessor to UCCJEA).

**14. Recognition of Out-of-State Decree**

- a. Mandatory recognition if decree entered pursuant to UCCJEA or PKPA; and
- b. Not all UCCJA (Uniform Child Custody Jurisdiction Act—predecessor to UCCJEA) decrees are entitled to recognition.

**15. Evidence Admissible at Trial**

- a. Includes depositions (by telephone and audiovisual) of witnesses, parties, and children living in another state (may be admissible), as well as documents sent by technological means.

**16. Enforcement**

- a. Original court may enforce its own decree even if it has lost jurisdiction to modify the decree;
- b. Courts shall enforce other state’s decree entered pursuant to the UCCJEA and PKPA;

Ark. Code Ann. §9-19-313 (Repl. 2008).

- c. Emergency jurisdiction still exists even though a child custody order entitled to enforcement is in effect. If emergency jurisdiction is exercised, court communication is required to resolve the emergency, protect the safety of the parties and the child(ren), and determine the period of duration of the order.

Ark. Code Ann. §9-19-204(c)-(d) (Repl. 2008).

**17. Registration of Out-of-State Order**

- a. Registration requirements:
  - (1) An order from another state may be registered in Arkansas with or without a request for enforcement.

Ark. Code Ann. §9-19-305 (Repl. 2008); *Ark. Dep’t of Human Servs. v. Cox*, 349 Ark. 205 (2002).

- (2) Upon receipt of a document requesting registration and two copies,

including one certified copy of the order sought to be registered, and an affidavit that the order has not been modified, as well as names and addresses of the parties, the Arkansas court shall:

- (a) cause the order and one copy of the accompanying documentation to be filed as a foreign judgment; and
  - (b) serve notice on the parties and provide an opportunity to contest within 20 days after service of notice.
- (3) At the hearing requested under this section, the court shall confirm the registered order unless:
- (a) the issuing court did not have jurisdiction;
  - (b) the order sought to be registered has been changed in some way by a court with jurisdiction; or
  - (c) the person contesting registration did not receive notice as entitled and in accordance with this Act.
- (4) If no timely request for hearing is made, registration is confirmed as a matter of law with notice to all parties, and this precludes further contest of the order with respect to any matter that could have been asserted at registration.

Ark. Code Ann. §9-19-305( Repl. 2008); *Ark. Dep't of Human Servs. v. Cox*, 349 Ark. 205 (2002).

## **18. Enforcement Hearing**

- a. Enforcement hearing:
  - (1) Produce certified copy of custody determination to be enforced; and
  - (2) Show evidence of violation; and
  - (3) Ask for relief; and
  - (4) If a party exercises 5<sup>th</sup> Amendment rights, the court may draw an adverse inference from the refusal to testify about the subject; and

- (5) The spousal communication privilege and a defense of spousal or parental immunity may not be invoked.
- b. The enforcement court may issue an order to take physical custody of a child if the court is concerned that a physical custodian may flee or harm the child(ren).

Ark. Code Ann. §9-19-310 (Repl. 2008); *Ark. Dept. of Human Services v. Cox*, 349 Ark. 205 (2002)(Fla. order at issue was not a “child-custody determination” that was enforceable pursuant to the UCCJEA. It was an *ex parte* order; the required notice and opportunity to be heard were not provided in the Fla. *ex parte* proceedings).

## 19. Expedited Enforcement

- a. This section provides for the production of the child in a summary, remedial process based on habeas corpus.

See Ark. Code Ann. §9-19-308 (Repl. 2008).

## 20. Modification

- a. A foreign decree may be modified when:
  - (1) The forum court has jurisdiction; and
  - (2) The original court no longer has jurisdiction or has declined jurisdiction; or
  - (3) The decree was not entered pursuant to the UCCJEA or PKPA.

Ark. Code Ann. §9-19-203 (Repl. 2008).

- b. The state of initial custody jurisdiction retains exclusive jurisdiction when one parent remains a resident no matter how long the child and the other parent have been away.

Ark. Code Ann. §9-19-202 (Repl. 2008); *West v. West*, 364 Ark. 73 (2005)(Arkansas had exclusive, continuing subject-matter jurisdiction to determine modification of Arkansas custody order); *Bridges v. Bridges*, 93 Ark. App. 358 (2005)(Arkansas had jurisdiction under PKPA and UCCJEA); *McDow v. McDow*, 908 P.2d 1049 (Alaska 1996); *Bock v. Bock*, 824 P.2d 723 (Alaska 1992); *Murphy v. Woerner*, 748 P.2d 749 (Alaska 1988); *McArthur v. Santa Clara Co. Superior Ct.*, 1 Cal. Rptr2d 296 (Cal. App. 1991); *Nielson*

*v. Irwin*, 15 FLR 1622 (Co. App. 1989); *Butler v. Grant*, 24 FLR 1525 (Del. 1998); *Bello v. Kruzel*, 732 So. 2d 1113 (Fla. App. 1999); *Yurgel v. Yurgel*, 572 So. 2d 1327 (Fla. 1990); *Cabanaw v. Cabanaw*, 648 N.E.2d 694 (Ind. App. 1995)(even after eight years); *Harris v. Harris*, 552 A.2d 38 (Md. App. 1988); *Brown v. Brown*, 676 S.W.2d 519 (Mo. 1984); *Connolly v. Connolly*, 680 P.2d 568 (Mont. 1984); *Adams v. Adams*, 820 P.2d 752 (Nev. 1991); *Wilson v. Wilson*, 465 S.E.2d 44 (N.C. 1996); *G.S. v. Ewing*, 786 P.2d 65 (Okla. 1990); *Knoth v. Knoth*, 377 S.E.2d 340 (S.C. 1989); *Fuerstenberg v. Fuerstenberg*, 591 N.W.2d 798 (S.D. 1999)(after 10 years); *Rush v. Stanbury*, 668 S.W.2d 690 (Tex. 1984); *Curtis v. Curtis*, 789 P.2d 717 (Utah App. 1990); *Greenlaw v. Smith*, 869 p.2d 1024 (Wash. 1994); *Michalik v. Michalik*, 476 N.W.2d 586 (Wis. App.1991).

## **21. Application of UCCJEA to Indian Tribes**

- a. A custody proceeding that pertains to an Indian child as defined in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq., is not subject to the UCCJEA to the extent that it is governed by the Indian Child Welfare Act.
- b. An Arkansas court shall treat a tribe as if it were a state for the purposes of applying this Act.
- c. A child custody determination made by an Indian tribe under factual circumstances in substantial conformity with the jurisdictional standards set out in this Act is entitled to full faith and credit and is recognizable and enforceable under Subchapter 3 of the UCCJEA.

Ark. Code Ann. 9-19-104 (Repl. 2008).

## **22. Application of UCCJEA to Orders of Foreign Countries**

- a. A foreign country is treated as if it were a state of the United States for the purposes of applying Subchapters 1 and 2 of the Act;
- b. Except as provided by “c” below, a foreign country’s child custody determination is recognizable and enforceable under this Act;
- c. The Act does not apply to a foreign country if its child custody laws violate fundamental principles of human rights.

Ark. Code Ann. 9-19-105 (Repl. 2008).

**23. Appeal**

- a. Final order is appealable under Arkansas Rules of Appellate Procedure - Civil.
- b. Absent a temporary emergency order under this Act, an enforcing court may not stay an order enforcing a custody determination pending appeal.

Ark. Code Ann. §9-19-314 (Repl. 2008).



**B. Federal Parental Kidnaping Prevention Act (PKPA)**

1. PKPA prohibits a court from exercising jurisdiction if another court is already exercising jurisdiction consistent with provisions of the PKPA.

28 U.S.C. §1738A(g); *Moore v. Richardson*, 332 Ark. 255 (1998); *Murphy v. Danforth*, 323 Ark. 482 (1996); *Gray v. Gray*, 69 Ark. App. 277 (2000)(Arkansas judge correctly refused to exercise jurisdiction because Texas was the appropriate forum).

2. Emergency orders are permitted when child is physically present and there is a genuine emergency such as abandonment or abuse.

28 U.S.C. §1738A(c)(2)(c); *Murphy v. Danforth*, 323 Ark. 482 (1996).

- a. Emergency jurisdiction should not be used to modify a custody order permanently.
- b. Use only long enough to give time to take child to the proper forum to seek permanent modification (generally home state).

*Moore v. Richardson*, 332 Ark. 255 (1998).

3. Each sister state shall enforce custody determinations that a sister state made that were consistent with PKPA.

*Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513 (1988); *Perez, Jr. v. Tanner*, 332 Ark. 356 (1998); *Smith v. Cotton*, 50 Ark. App. 100 (1995).

4. The provisions of the PKPA take precedence over the state's version of the UCCJEA.

*Norsworthy v. Norsworthy*, 289 Ark. 479 (1986)(case decided under UCCJA).

5. The PKPA always gives the home state priority over the other factors in determining which state may exercise its jurisdiction.

28 USC 1738A(b)(4); *Bridges v. Bridges*, 93 Ark. App. 358 (2005)(Arkansas had jurisdiction as the home state under PKPA and UCCJEA); *Garrett v. Garrett*, 292 Ark. 584 (1987); *Snisky v. Whisenhunt*, 44 Ark. App. 13 (1993); *Slusher v. Slusher*, 31 Ark. App. 28 (1990).

6. Continuing jurisdiction under the PKPA exists until the child and all parties have moved to another state, regardless of when a new home state is established.

*O'Daniel v. Walker*, 14 Ark. App. 210 (1985).

### **XIII. PATERNITY**

#### **A. Jurisdiction**

An action to establish paternity shall be brought and shall proceed under the Arkansas Rules of Civil Procedure applicable in circuit court.

#### **B. Limitation Periods and Venue**

1. a. An action to establish paternity may be brought at any time.
- b. Actions brought before August 1, 1985, but dismissed because of a statute of limitations in effect before that date may be brought for any person for whom paternity has not yet been established.
2. Venue of paternity actions shall be in the county in which the plaintiff resides or, in cases involving a juvenile, in which the juvenile resides.

Ark. Code Ann. § 9-10-102(a)-(c) (Repl. 2008); *Rager v. Turley*, 342 Ark. 223 (2000)(paternity issue within the context of a child's participation in a wrongful death recovery for the death of his putative father; paternity does not have to be brought within 180 days of the death as required for filing a claim against the estate); *Overton v. Jones*, 74 Ark. App. 122 (2001)(After child's mother died, venue to determine child's custody was not proper in county in which father resided, but in county in which child had lived with his mother and in which he continued to live with his grandparents after her death).

#### **C. Transfer Between Local Jurisdictions**

1. More than six months after final adjudication, a case may be transferred to another county outside the original judicial district if each party has established residence elsewhere in the state.
2. There must be a showing that transfer is in best interests of the parties.
3. There is an initial presumption for transfer to county of residence of the physical custodian of the child.
4. Person requesting transfer must file motion, affidavit, notice, and pay refiling fee.

- (a) Affidavit must state that parent(s), physical custodian, and OCSE (as appropriate) have been notified in writing of the request.
  - (b) Notice must be given that any objection must be filed within 20 days from date of receipt.
5. If the court of final adjudication agrees to transfer the case, the court shall enter transfer order directing the clerk to transfer the refiling fee and certified copies of the file to the clerk where the case has been transferred
  6. The clerk receiving the file shall establish a case file and docket the case within 14 days and afford the matter full faith and credit.

Ark. Code Ann. §9-10-102(f) (Supp. 2005).

**D. Petitions to Establish Paternity**

1. Who may file:
  - (a) a biological mother;
  - (b) a putative father;
  - (c) a person for whom paternity is not presumed or established by court order, including a parent or grandparent of a deceased putative father; or
  - (d) the Office of Child Support Enforcement.

Ark. Code Ann. § 9-10-104 (Supp. 2009); *McAdams v. McAdams*, 353 Ark. 494 (2003)(adoptive father was not an individual upon whom the adoption statutes confer standing to challenge paternity); *OCSE v. Willis*, 347 Ark. 6(2001); *R.N. v. J.M. and B.M.*, 347 Ark. 203 (2001)(standing of putative father to bring paternity action when mother was married during conception and birth of child); *Hall v. Freeman*, 327 Ark. 148 (1997)(child born of a marriage and presumed to be child of marital partners has no standing to bring paternity action); *Maxwell v. OCSE*, 70 Ark. App. 249 (2000)(OCSE has standing as a party and should have received notice of a subsequent support action that flowed from a paternity action that OCSE filed originally).

2. A rebuttable presumption arises that a child conceived, but not born, during the marriage is a legitimate child.

*R.N. v. J.M. and B.M.*, 347 Ark. 203 (2001); *Willmon v. Hunter*, 297 Ark. 358 (1988);

*Leach v. Leach*, 57 Ark. App. 155 (1997)(Ark. Code Ann. §16-43-901 abolished Lord Mansfield's Rule); *DHS ex rel Davis v. Seamster*, 36 Ark. App. 202 (1991).

3. The major purpose of Arkansas's filiation law is to identify the putative father so he may assume his equitable share of the responsibility for his child.

*Davis v. OCSE*, 322 Ark. 352, 356 (1995).

4. The legislature has not excluded minor parents from responsibility for paternity and support.

*Hamm v. OCSE*, 336 Ark. 391 (1999).

5. The burden of proof is by a preponderance of the evidence.

*Erwin L.D. v. Myla Jean L.*, 41 Ark. App. 16 (1993).

6. When a name change is requested in a paternity action, the determining factor is the child's best interests, and the burden of proof is on the moving party to demonstrate that name change is in child's best interests. To determine the child's best interests, the court is required to consider:

- (a) the child's preference;
- (b) the effect of change of the child's surname on preservation and development of child's relationship with each parent;
- (c) length of time child has borne a given name;
- (d) degree of community respect associated with the present and proposed surnames;
- (e) difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and
- (f) the existence of any parental misconduct or neglect.

*Huffman v. Fisher*, 343 Ark. 737 (2001); *Matthews v. Smith*, 80 Ark. App. 396, 97 S.W.3d 418 (2003); *Carter v. Reddell*, 75 Ark. App. 8 (2001); *Bell v. Wardell*, 72 Ark. App. 94(2000)(factors); *Moon v. Marquez*, 65 Ark. App. 78 (1999).

7. Divorce decree in which the biological father is not a party is not binding on the

mother when the true father defends support proceedings.

*Office of Child Support Enforcement v. Willis*, 347 Ark. 6 (2001).

#### **E. Temporary Orders**

1. The court may hear evidence and enter temporary orders before the birth of the child.
2. In all IV-D cases, upon sworn statement of a party, OCSE shall issue an administrative order for paternity testing. OCSE bears initial cost, to be assessed against the putative father if paternity is established or the applicant if the putative father is excluded.
3. Where results of tests show a 95% or more probability of paternity, OCSE may file a complaint for paternity and child support.
4. Results of tests obtained pursuant to an administrative order shall be admissible as evidence for the purposes of adjudicating paternity.
5. Where there is clear and convincing genetic evidence of paternity, upon motion by a party, the court shall issue a temporary support order when paternity is disputed and a judicial or administrative determination is pending.
6. If the mother dies before a final order, her testimony from the temporary hearing can be introduced at the final hearing.

Ark. Code Ann. § 9-10-103 (Repl. 2008).

#### **F. Paternity Test**

1. Upon motion to the trial court, the court shall order the putative father, mother, and child to submit to scientific testing for paternity.

Ark. Code Ann. § 9-10-108 (a)(1) (Repl. 2008); *Helton v. Ark. Dep't of Human Servs.*, 309 Ark. 268 (1992)(order for blood test is not appealable order).

2. A prima facie case of paternity results from a paternity test that establishes a 95% or more probability of inclusion and corroborating testimony from the mother.

Ark. Code Ann. § 9-10-108 (a)(6)(B) (Repl. 2008); *In re Adoption of SCD*, 358 Ark. 51 (2004); *Blankenship v. OCSE*, 58 Ark. App. 260 (1997).

3. Refusal to submit to blood tests will be disclosed during trial and that person may be considered in civil contempt of court.

Ark. Code Ann. § 9-10-108 (a)(7) (Repl. 2008).

4. Genetic testing can, with a high degree of certainty, identify the father of a child, and thus, be viewed as conclusive by the fact-finder in a paternity suit.

Ark. Code Ann. § 9-10-108 (a)(6)(A) (Repl. 2008); *Ross v. Moore*, 30 Ark. App. 207 (1990); but see *OCSE v. Rogers*, 50 Ark. App. 108 (1995)(Despite a 99.9% finding, the defendant presented evidence to rebut the proof and was declared not the father).

5. Since a putative father's physical liberty was not in jeopardy when he was ordered to submit to a blood test, he was not guaranteed the right to counsel in a paternity action.

*Burrell v. State, Dept. of Human Servs.*, 41 Ark. App. 140 (1993).

6. Sixth Amendment right to confrontation does not apply as paternity is not a criminal matter.

*Davis v. OCSE*, 326 Ark. 677 (1996).

7. Order for blood tests is not a final, appealable order.

*Smith v. Smith*, 337 Ark. 583 (1999).

## **G. Lying-In Expenses**

1. If a court finds a person to be the father of a child, it shall render judgment against him for lying-in expenses, payable to the mother, or the person or agency incurring the expenses, if claimed.

Ark. Code Ann. §9-10-110(a) (Repl. 2008); *Eaves v. Dover*, 291 Ark. 545 (1987) (awarding lying-in expenses is constitutional; is in the discretion of the trial court).

2. Bills and invoices for pregnancy, childbirth and paternity testing are admissible without foundation testimony if regular on their face.

Ark. Code Ann. §9-10-110(c)(1) (Repl. 2008).

3. Such bills and invoices constitute prima facie evidence of amounts incurred for

such services and for testing on behalf of the child.

Ark. Code Ann. §9-10-110(c)(2) (Repl. 2008).

## **H. Custody and Visitation in Paternity Cases**

1. When a child is born to an unmarried mother, she has custody until the child is 18 unless a court orders the child into the custody of another.

Ark. Code Ann. § 9-10-113(a) (Repl. 2008); *Hicks v. Cook*, 103 Ark. App. 207 (2008)(Custody was changed from mother to father. No paternity action was ever filed, but court found that father, whose name was on birth certificate, had met all criteria. He had voluntarily paid child support, had liberal visitation, and acknowledged the child as his own. Custody was awarded based upon the best interests of the child.)

2. After establishing paternity, a biological father may petition the court for custody of the child.

Ark. Code Ann. § 9-10-113(b) (Repl. 2008); *Norwood v. Robinson*, 315 Ark. 255 (1993).

3. Custody may be awarded to the biological father upon a showing that:
  - (a) he is a fit parent to raise the child;
  - (b) he has assumed the responsibility of providing, protecting, and financially supporting the child; and
  - (c) it is in the best interest of the child to award custody to the biological father.

Ark. Code Ann. § 9-10-113(c) (Repl. 2008); *Hicks v. Cook*, 103 Ark. App. 207 (2008); *Freshour v. West*, 334 Ark. 100 (1998), *aff'ing* 61 Ark. App. 60 (1998); *Norwood v. Robinson*, 315 Ark. 255(1993)(showing of changed circumstances required); *Sheppard v. Speir*, 85 Ark. App. 481(2004)(court properly awarded custody to father after paternity was established upon showing that he was fit, had paid child support, and mother was unemployed and had failed to facilitate relationship between father and child); *Hickman v. Culberson*, 78 Ark. App. 96 (2002); *Sory v. Woodall*, 73 Ark. App. 410 (2001)(preference to award custody to biological parent is not absolute; when custodial grandmother was named as a party defendant in paternity action, but neither served nor notified, judgment was void *ab initio*; although paternity decision would not have been altered, decision regarding custody may have been).



4. When a court makes a determination of paternity of a child and orders the father to make child support payments, the court may order reasonable visitation rights to the father.

Ark. Code Ann. §§9-10-109(a) & 9-10-114(Repl. 2008); *Rudolph v. Floyd*, 309 Ark. 514 (1992)(grandparent visitation, also); see, also, *Rogue v. Frederick*, 272 Ark. 392 (1981)(decided under prior law).

5. A step-parent may stand *in loco parentis* to a child.

*Golden v. Golden*, 57 Ark. App. 143 (1997).

6. Paternity must be properly established before paternal grandparents may be granted visitation.

*Reed v. Glover*, 319 Ark. 16 (1994).

## **I. Modification of Orders or Judgments**

1. The circuit court may modify any order or judgment which it made earlier, upon notice to the defendant if required, except in regard to the issue of paternity when scientific evidence was used to determine a man the biological father of a child.

Ark. Code Ann. § 9-10-115 (Repl. 2008); *Moon v. Marquez*, 65 Ark. App. 78 (1999).

- (a) This section applies *only* to judicial findings of paternity or voluntary acknowledgment.
- (b) Does not extend to divorce decrees.

*OCSE v. Williams*, 338 Ark. 347 (1999).

2. The court shall not modify or set aside any final decree, order, or judgment of paternity where paternity blood testing, genetic testing, or scientific blood testing was used to determine the paternity.

Ark. Code Ann. § 9-10-115(b) (Repl. 2008).

3. Either party may rescind a voluntary acknowledgment by completing a form to be filed with the Division of Vital Records before hearing date or within 60 days of executing a voluntary acknowledgment, whichever date comes first.

Ark. Code Ann. §9-10-115(c) (Repl. 2008).

- (a) Beyond sixty days, acknowledgment may be set aside only upon a filing of a petition and a finding of fraud, duress, or material mistake of fact.

Ark. Code Ann. §9-10-115(d)(1) (Repl. 2008); *OCSE v. Mitchell*, 61 Ark. App. 54 (1998).

- (b) Person challenging paternity has burden of proof.

Ark. Code Ann. §9-10-115(d)(2) (Repl. 2008).

- (c) Except for good cause, which shall be recited in court order, obligations continue while motion is pending.

Ark. Code Ann. §9-10-115(e)(2) (Repl. 2008).

- 4. Any man adjudicated the father of a child or deemed the father through an acknowledgment of paternity without scientific testing and ordered to pay child support is entitled to one paternity test at any time during the period of time he is required to pay child support.

Ark. Code Ann. §9-10-115(e)(1)(A) (Repl. 2008).

- 5. (a) After an adjudication of paternity or an acknowledgment of paternity, if a man is excluded as the biological father through scientific testing and a court so finds, the court shall:
  - (1) set aside the previous finding or establishment of paternity;
  - (2) find there is no future obligation of support;
  - (3) order that any unpaid support owed under the previous order is vacated; and
  - (4) order that any support previously paid is not subject to refund.
- (b) If the name of the father appears on the birth certificate of the child, the court shall order that the birth certificate be amended to delete the name.

Ark. Code Ann. §9-10-115(f)(1) & (2)(Repl. 2008).

6. The court lacks jurisdiction to modify or set aside an earlier finding of paternity where the petitioner failed to comply with a court's order for scientific paternity testing.

*Flemings v. Littles*, 325 Ark. 367 (1996); but see *Littles v. Flemings*, 333 Ark. 476 (1998)(relieved of future duty to support)(decided before 2007 amendment set out in “5” immediately above).

7. Section 9-10-115, as a part of the Paternity Code, does not apply to divorce decrees.

*Martin v. Pierce*, 370 Ark. 53 (2007).

## **J. Res Judicata and Collateral Estoppel**

1. Res Judicata does not apply to bar a name change petition subsequent to the initial paternity determination proceeding.

*Moon v. Marquez*, 338 Ark. 636 (1999).

2. Res judicata does not apply when two actions do not involve the same parties or their privies.

*OCSE v. Willis*, 347 Ark. 6 (2001)(court defined res judicata and collateral estoppel and adopted the principle of collateral estoppel for the first time; collateral estoppel does not apply where the issue of paternity was not litigated in the parties’ first divorce).

## **K. Acknowledgment of Paternity**

1. A man is the father for all intents and purposes if he and the mother execute an acknowledgment of paternity of the child pursuant to Ark. Code Ann. §§ 20-18-408 or -409.
2. By operation of law, an acknowledgment of paternity:
  - (a) constitutes a conclusive finding of paternity;
  - (b) is subject to modification of orders or judgments under Ark. Code Ann. § 9-10-115 (Repl. 2008);
  - (c) shall be recognized by courts as creating parent and child relationship.

3. Acknowledgment forms basis for child support or visitation order without a judicial proceeding to establish paternity.
4. Department of Health shall offer voluntary paternity establishment services in all offices throughout the state.
5. New or amended birth certificate is available based upon acknowledgment of paternity, from Division of Vital Records.
6. Compensation is available to hospitals for forwarding acknowledgments of paternity.

Ark. Code Ann. § 9-10-120 (Repl. 2008); *Bean v. OCSE*, 340 Ark. 286 (2000)(statute not retroactive; before this act (Act 1091 of 1995), signing acknowledgment form was only persuasive, presumptive evidence of paternity).

## **XIV. DOMESTIC ABUSE**

**Ark. Code Ann. § 9-15-201 through -407 (Repl. 2008 & Supp. 2009)**

### **A. General Provisions**

1. The petition shall be filed in and an order of protection can be entered in the county where the petitioner resides, or where the alleged incident of abuse occurred, or where the respondent may be served.

Ark. Code Ann. § 9-15-201(b) (Supp. 2009).

2. “County where the petitioner resides” means the county in which the petitioner physically resides at the time the petition is filed and may include a county where the petitioner is located for a short-term stay in a domestic violence shelter.

Ark. Code Ann. § 9-15-103(1) (Supp. 2009).

3. A petition may be filed by:
  - a. Any adult family or household member for himself or herself;
  - b. Any adult family or household member on behalf of a minor family or household member, including a married minor;
  - c. Any adult family or household member on behalf of another family or household member adjudicated incompetent;
  - d. An employee or volunteer of a domestic-violence shelter or program on behalf of a minor, including a married minor.

Ark. Code Ann. § 9-15-201(d) (Supp. 2009).

4. A petition for relief shall:
  - a. Allege the existence of domestic abuse;
  - b. Disclose existence of any pending litigation between the parties; and
  - c. Disclose any prior filings of a petition for an order of protection under this chapter.

Ark. Code Ann. § 9-15-201(e)(1) (Supp. 2009).

5. The petition must be accompanied by an affidavit made under oath stating specific facts and circumstances of the abuse and stating the specific relief sought.

Ark. Code Ann. § 9-15-201(e)(2) (Supp. 2009).

6. If the court finds sufficient evidence to support the petition alleging an immediate and present danger of domestic abuse or that the respondent is scheduled for release from incarceration within 30 days, which will result in an immediate and present danger of domestic abuse, the court shall issue an ex parte temporary order of protection.

Ark. Code Ann. § 9-15-206 (Supp. 2009).

7. Persons covered by the act include spouses, former spouses, parents and children, persons related by blood within fourth degree of consanguinity (generally through great-great-grandparents, great-great grandchildren, etc.), any children residing in the household, persons who presently or in the past have resided or cohabited together, persons who have or have had a child in common, and persons who presently have or in the past have had a dating relationship.

Ark. Code Ann. § 9-15-103(4) (Supp. 2009).

8. “Dating relationship” means a romantic or intimate social relationship between two individuals that shall be determined after examining the length and type of the relationship and the frequency of interaction between the two people involved.

Ark. Code Ann. § 9-15-103(2)(B) (Supp. 2009); *Pablo v. Crowder*, 95 Ark. App. 268 (2006)(parties’ dating relationship of a couple of months, which appellant characterized as “serious,” came within the definition of the applicable statute).

9. “Dating relationship” does not mean a casual relationship or ordinary fraternization in a business or social context.

Ark. Code Ann. § 9-15-103(2)(B) (Supp. 2009).

10. Petitioner cannot be assessed an initial filing fee or service costs. The court may assess costs at the full hearing. [Note: statute does not say against whom.] The court may also assess costs if the allegations of abuse are determined to be false. [Note: again, the statute does not say against whom].

Ark. Code Ann. § 9-15-202 (Repl. 2008); Ark. Code Ann. § 5-26-310 (Repl. 2006)( filing criminal charges).

11. The court shall not deny relief simply because act of domestic or family violence did not occur within 120 days of filing of petition.

Ark. Code Ann. § 9-15-214 (Repl. 2008).

12. Respondent's incarceration or imprisonment does not bar court's issuing an ex parte temporary order of protection.

Ark. Code Ann. §9-15-206(d) (Supp. 2009).

13. Relief available in a temporary order includes:
  - a. Exclude respondent from shared residence or from petitioner or victim's residence, place of business, employment, school, or other location of petitioner or victim;
  - b. Award temporary custody or set temporary visitation of minor children; temporary child support, and/or temporary spousal support, enforceable in the same manner as other child support or alimony awards;
  - c. Award reasonable attorney's fee to the prevailing party;
  - d. Prohibit abusing party directly or through an agent from contacting the petitioner or victim, except as specifically ordered;
  - e. Order other relief necessary or appropriate for protection of a family or household member, including but not limited to, issuing enjoining and restraining the respondent/abusing party from doing, attempting to do, or threatening to do an act injuring, mistreating, molesting, or harassing the petitioner.

Ark. Code Ann. §9-15-206(b) (Supp. 2009).

14. Relief available in a final order of protection includes:
  - a. Exclude respondent from shared residence or from petitioner or victim's residence, place of business, employment, school, or other location of petitioner or victim;

- b. Award temporary custody or set temporary visitation of minor children.
  - (A) If a previous custody or visitation determination has been made by another court with continuing jurisdiction, a temporary child custody or visitation may be made.
  - (B) The order shall remain in effect until the court with original jurisdiction enters a subsequent order regarding the children.
- c. Award temporary child support, and/or temporary spousal support, enforceable in the same manner as other child support or alimony awards;
- d. Award reasonable attorney's fee to the prevailing party;
- e. Prohibit abusing party directly or through an agent from contacting the petitioner or victim, except as specifically ordered;
- f. Order other relief necessary or appropriate for protection of a family or household member, including but not limited to, issuing enjoining and restraining the respondent/abusing party from doing, attempting to do, or threatening to do an act injuring, mistreating, molesting, or harassing the petitioner.

Ark. Code Ann. §9-15-205(a) (Supp. 2009).

- g. An order of protection shall be granted for a fixed period of time not less than 90 days nor more than 10 years, in the discretion of the court, and may be renewed at a subsequent hearing upon proof and a finding by the court that the threat of domestic abuse still exists.

Ark. Code Ann. § 9-15-205(b) (Supp. 2009).

- 15. In the final order of protection, petitioner's home or business address may be excluded from notice to respondent.

Ark. Code Ann. § 9-15-207(d)(1) (Supp. 2009).

- 16. A court also may order that the petitioner's copy of the order of protection be excluded from any address where respondent resides.

Ark. Code Ann. § 9-15-207(d)(2) (Supp. 2009).



17. A petitioner may omit his or her home or business address(es) from all court documents, but must provide court with mailing address, and court may order disclosure if necessary to determine jurisdiction or consider venue. The court may order disclosure:
  - a. After petitioner consents;
  - b. Orally and in chambers, out of presence of respondent, and a sealed record to be made;
  - c. After a hearing, with the court to consider safety of petitioner and court finds disclosure in the interest of justice.

Ark. Code Ann. §9-15-203(c) (Supp. 2009).

18. A circuit court shall not grant mutual orders of protection to opposing parties. Separate orders of protection may be granted in cases in which each party:
  - a. Has properly filed and served a petition for a protection order;
  - b. Has committed domestic abuse as defined in the Act;
  - c. Poses a risk of violence to the other; and
  - d. Has otherwise satisfied all prerequisites for the type of order and remedies sought.

Ark. Code Ann. §9-15-216 (Repl. 2008).

**B. Time Frames**

1. A hearing on an order of protection must be held not later than 30 days from the date the petition for the order of protection is filed or at the next court date, whichever is later.

Ark. Code Ann. § 9-15-204(a)(1) (Supp. 2009).

2. An ex parte temporary order of protection is effective until the date of the hearing on the petition for the order of protection pursuant to Ark. Code Ann. §9-15-204.

Ark. Code Ann. § 9-15-206(c) (Supp. 2009).

3. A denial of an ex parte temporary order of protection does not deny the petitioner the right to a full hearing on the merits.

Ark. Code Ann. § 9-15-204(a)(2) (Supp. 2009).

4. A full order of protection shall be granted for not less than 90 days nor more than ten (10) years, renewable upon a finding that the threat of domestic abuse still exists.

Ark. Code Ann. § 9-15-205(b) (Supp. 2009).

**C. Service on the Respondent**

1. Service of a copy of the petition, the ex parte temporary order of protection, if issued, and notice of the date and place set for the hearing on the order of protection shall be made upon the respondent:

- A. At least 5 days before the hearing; and
- B. In accordance with applicable rules of service under the Arkansas Rules of Civil Procedure.

2. If service cannot be made on the respondent, the court may set a new hearing date.

Ark. Code Ann. § 9-15-204(b)(Supp. 2009).

**D. Duties of the Clerk of the Court**

1. The clerk shall provide forms to the petitioner.

Ark. Code Ann. § 9-15-203(a) (Supp. 2009).

2. If the petitioner is not represented by counsel, the clerk shall provide clerical assistance to help the petitioner write and file the petition.

Ark. Code Ann. § 9-15-203(a) (Supp. 2009).

3. Petition form is set out in Ark. Code Ann. §9-15-203 (Supp. 2009).
4. Filing and service fees cannot be assessed against the petitioner at the time of filing, but court may assess costs at the full hearing and may assess costs if the allegations of abuse in the petition are found to be false. [Note: statute does not

say against whom the costs may be assessed.]

Ark. Code Ann. § 9-15-202 (Repl. 2008); Ark. Code Ann. § 5-26-310 (Repl. 2006).

**E. Duties of Law Enforcement**

1. Any order of protection is enforceable by any law enforcement agency with proper jurisdiction.

Ark. Code Ann. § 9-15-207 (Supp. 2009).

2.
  - A. The court may order a law enforcement officer with jurisdiction to accompany the petitioner and assist in placing the petitioner in possession of the dwelling or residence or to otherwise assist in execution or service of the order of protection.
  - B. The court also may order a law enforcement officer to assist the petitioner in returning to the residence and obtaining personal effects.

Ark. Code Ann. § 9-15-208 (Repl. 2008).

3. A law enforcement officer may file an affidavit alleging a violation of an order of protection, after which a court may issue an order to respondent to appear and show cause why he or she should not be held in contempt.

Ark. Code Ann. § 9-15-210 (Repl. 2008).

4. A law enforcement officer shall not arrest a petitioner for violation of an order of protection issued against a respondent.

Ark. Code Ann. § 9-15-207 (Supp. 2009).

5. A law enforcement officer with probable cause to believe that a respondent has violated an order of protection and who has verification of the existence of the order of protection, may arrest the respondent without a warrant whether or not the violation occurred in the presence of the officer if the order of protection was obtained according to the Domestic Abuse Act and the Arkansas Rules of Criminal Procedure.

Ark. Code Ann. § 9-15-207 (f) (Supp. 2009).

6. An order of protection issued by a court of competent jurisdiction in any county of

this state is enforceable in every county of this state by any court or law enforcement officer.

Ark. Code Ann. § 9-15-207(g) (Supp. 2009).

7. (a) A law enforcement officer may make a warrantless arrest for domestic abuse, upon probable cause that an act constituting domestic abuse was committed within the preceding 4 hours or the preceding 12 hours when physical injury is involved, even if the incident did not take place in the officer's presence.
- (b) When officer receives conflicting accounts of domestic violence, he or she shall evaluate each account separately to determine if one party was the predominant aggressor. When making determination, officer shall consider the following, based upon his or her observation:
  - (1) statements from parties of domestic violence and from other witnesses;
  - (2) extent of personal injuries of parties;
  - (3) evidence of self-defense;
  - (4) prior complaints of domestic abuse if history is reasonably ascertainable;
  - (5) any other relevant factors.
- (c) When officer has probable cause to believe that a party to an act of domestic abuse is the predominant aggressor, the officer shall arrest that person with or without a warrant, under the circumstances set out in the provision.
- (d) An officer acting in good faith and exercising due care in making an arrest for domestic abuse is immune from civil liability.

Ark. Code Ann. §16-81-113 (Supp. 2009).

**F. Full Faith and Credit**

1. Any protection order from another state, a federally recognized Indian tribe, or a territory shall be afforded full faith and credit and shall be enforced by law

enforcement as if it were issued in this state, if:

- a. Issuing court had jurisdiction over the parties and matters under the laws of the issuing state or Indian tribe; and
  - b. Reasonable notice and opportunity to be heard were given to the person against whom the order is sought sufficient to protect due process rights. For ex parte order, notice and opportunity to be heard must be provided within the time required by state or tribal law and, in any event, within a reasonable time after order is issued sufficient to protect due process.
2. An order of protection issued against both petitioner and respondent by a court of another state, a federally recognized Indian tribe, or a territory shall not be enforceable against petitioner unless:
- a. Respondent filed a cross or counter petition, complaint, or other written pleading seeking an order of protection; or
  - b. Issuing court made specific findings against both petitioner and respondent; and
  - c. Issuing court determined that each party was entitled to an order.

Ark. Code Ann. § 9-15-302(a) & (b) (Supp. 2009).

3. One seeking recognition and enforcement of an out-of-state protection order may present a copy to local law enforcement office in the city or county where enforcement may be necessary.
- a. Local law enforcement shall enter into ACIC Protection Order Registry File;
  - b. No fee shall be charged;
  - c. No notice shall be made to the party against whom the order was issued that the order was entered;
  - d. Entry of out-of-state order of protection in protection order registry file shall not be required for enforcement of order in this state.

Ark. Code Ann. §9-15-302(d) (Supp. 2009).

4. When enforcing an out-of-state order of protection, a law enforcement officer shall determine if there is probable cause that an order exists. The officer may rely on:
  - a. An out-of-state order provided to the officer from any source; or
  - b. Statement of the person protected that the order exists; and
  - c. Verification by the clerk of the court in the other state, the Indian tribe, or the territory in writing, by phone, by fax or other electronic transmission;

Ark. Code Ann. §9-15-302(e)(1) (Supp. 2009).

5. When enforcing an out-of-state order of protection, a law enforcement officer shall determine if there is probable cause to determine that the terms of the order have been violated. The officer may rely on:
  - a. Any events he or she witnessed;
  - b. The statement of any person who claims to be a witness; or
  - c. Any other evidence.

Ark. Code Ann. §9-15-302(e)(2) (Supp. 2009).

6. A law enforcement officer shall not refuse to enforce the terms of an order of protection on the grounds that the order has not been filed with local law enforcement or entered into the protection order registry file unless the officer has a reasonable belief that the order is not authentic on its face.

Ark. Code Ann. §9-15-302(e)(3) (Supp. 2009).

7. A law enforcement officer and law enforcement agencies shall be immune from civil or criminal liability if acting in good faith to comply with this subchapter.

Ark. Code Ann. § 9-15-303 (Repl. 2008).

#### **G. Violation of an Order of Protection**

1. An order of protection shall include a notice to the respondent restrained that:
  - a. Violation of an order of protection is a Class misdemeanor; maximum

penalty of 1 year imprisonment in county jail and up to \$1,000 fine, or both;

- b. Violation of an order of protection within 5 years of a previous conviction for violation of an order of protection is a Class D felony;
  - c. It is unlawful for an individual who is subject to an order of protection or convicted of a misdemeanor of domestic violence to transport or possess a firearm or ammunition pursuant to 18 U.S.C. §922(g)(8) [subject to order of protection] or §922(g)(9) [convicted of a misdemeanor of domestic violence].
2. For respondents 18 years and older or emancipated minors, jurisdiction for the criminal offense of violating an order of protection is in the circuit court or other court having jurisdiction over criminal matters.

Ark. Code Ann. § 9-15-207 (Supp. 2009).

- 3.
  - a. One charged with violating an ex parte order of protection may be ordered by the court having jurisdiction over the charge as a condition of release to be placed under electronic surveillance at his or her expense until the charge is adjudicated.
  - b. One charged with violating a final order of protection may be ordered by the court having jurisdiction over the charge as a condition of release to be placed under electronic surveillance at his or her expense until the charge is adjudicated.

Ark. Code Ann. § 9-15-217(a) (Supp. 2009).

- 4. One found guilty of violating an order of protection may be placed under electronic surveillance at his or her expense as part of his or her sentence for not less than 4 months or more than 1 year.

Ark. Code Ann. § 9-15-217(b) (Supp. 2009)

- 5. Electronic surveillance is defined.

Ark. Code Ann. § 9-15-217(c) (Supp. 2009)

## **H. CASES**

*Claver v. Wilbur*, 102 Ark. App. 53 (2008). The Court of Appeals reversed the trial court's entry of a protective order as erroneous and unsupported by the evidence. The Court found no statutory reason for issuing an order. The appellee's 16-year-old daughter and the 20-year old appellant were dating. The Court said the only proof showed that appellant continued to see the teenager after her parents prohibited contact between them and that the appellant had given the teenager a morning-after pill. No finding was made of sexual conduct that would constitute a crime. No evidence was presented about physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault. Simply maintaining contact with a boyfriend or girlfriend without parental consent does not rise to the level of domestic abuse.

*Chiolak v. Chiolak*, 99 Ark. App. 277 (2007). The trial court did not err in deciding the issue of visitation in a protective order case even though the parties had just divorced in another division of the same circuit. In ordering that visitation would cease, the trial court made it clear that the protective order was subject to modification by the division that had granted the divorce. Visitation was discontinued only until the divorce court could conduct a hearing and rule in light of the child's allegations of abuse against the father. Res judicata did not bar issues raised by the order of protection, according to the Court, which said that custody and visitation orders are always subject to modification for changed circumstances and the best interest of the child.

*Simmons v. Dixon*, 96 Ark. App. 260 (2006). Trial court's granting of an order of protection based upon appellee's petition based upon allegations that appellant threatened her and her dog was affirmed. The Court of Appeals found that the evidence was sufficient to show that appellant sent threatening text messages to appellee and that appellee claimed she was afraid after receiving the messages. That was sufficient to show the infliction of fear of "imminent" physical harm under the domestic abuse statutes.

*Pablo v. Crowder*, 95 Ark. App. 268 (2006). Parties' dating relationship of a couple of months, which appellant characterized as "serious," was long enough to bring it within the definition of the Domestic Abuse Act.

*Davis v. Davis*, 360 Ark.233 (2005). On appellant's petition for order of protection, a temporary order was entered for 30 days. At the subsequent hearing, the trial court dismissed the domestic abuse case because the appellee husband had filed a separate divorce action in which a restraining order had been entered. The circuit court said that questions concerning custody, visitation, and paternity would have to be worked out in a divorce action. See Ark. Code Ann. §9-15-201(f)(petition for order of protection may be filed regardless of whether there is any pending litigation between the parties)(provision not cited in case).

*Clark v. Hendrix*, 84 Ark. App. 106 (2003). The Court of Appeals held that the Circuit



Court in White County erred in issuing a no-contact order for a mother and child (the child was the subject of the petition for order of protection) against the child's father after a hearing on an incident of violence that occurred in White County because, at the time, a Circuit Court of Pulaski County had ongoing jurisdiction of the parties' visitation dispute concerning the same parties and involving the same child. Dealing with the matter as a jurisdictional issue, the Court of Appeals said that the court in White County erred in assuming jurisdiction and should have refrained from exercising jurisdiction. The Court did not cite the applicable domestic abuse statutes.

**XV. ARKANSAS PREMARITAL AGREEMENT ACT**  
**Ark. Code Ann. § § 9-11-401 through -413 (Repl. 2008)**

**A. Requirements**

1. a. A premarital agreement is an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.
- b. “Property” means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.

Ark. Code Ann. § 9-11-401 (Repl. 2008).

2. A premarital agreement must be in writing and signed and acknowledged by both parties. It is enforceable without consideration.

Ark. Code Ann. § 9-11-402 (Repl. 2008).

3. The parties may contract with respect to:
  - a. The rights and obligations of property;
  - b. The disposition of property upon separation, marital dissolution, death, or occurrence or nonoccurrence of any other event;
  - c. The modification or elimination of spousal support;
  - d. The making of a will or trust to carry out the provisions of the agreement;
  - e. The ownership rights in and disposition of the death benefit from a life insurance policy;
  - f. Choice of law governing construction of the agreement; and
  - g. Any other matter not in violation of public policy or statute imposing a criminal penalty.
4. The right of a child to support may not be adversely affected by a premarital agreement.

Ark. Code Ann. § 9-11-403 (Repl. 2008).

5. After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. This is enforceable without consideration.

Ark. Code Ann. §§ 9-11-403 & -405 (Repl. 2008); *Lee v. Lee*, 35 Ark. App. 192 (1991)(parties contemplating marriage may agree to fix the rights of each in the other's property differently than by law so long as the agreement was made contemplating marriage lasting until death and not divorce).

## **B. Enforcement**

1. A premarital agreement will not be enforced if the party against whom enforcement is sought proves that:
  - a. It was not voluntary;
  - b. It was unconscionable and before execution, that party, with respect to the property or financial obligations:
    - (1) was not provided fair and reasonable disclosure;
    - (2) did not voluntarily and expressly waive consultation with legal counsel, in writing; or
    - (3) did not have or could not have had adequate knowledge.

Ark. Code Ann. § 9-11-406 (Repl. 2008); *Stewart v. Combs*, 368 Ark. 121 (2006)(This section does not apply to a post-nuptial agreement); *Banks v. Evans*, 347 Ark. 383 (2002)(Court looked at factors pertinent to enforceability of premarital agreement); *Lee v. Lee*, 35 Ark. App. 192(1991).

2. If a premarital agreement modifies or eliminates spousal support and that causes a person to be eligible for public assistance, the court may require the other party to provide support to the extent necessary to avoid eligibility.

Ark. Code Ann. § 9-11-406(b) (Repl. 2008); *Lee v. Lee*, 35 Ark. App. 192 (1991).

## **C. Cases**

*Rogers v. Rogers*, 90 Ark. App. 321 (2005)(enforceability of agreement).

## XVI. RECONCILIATION AGREEMENTS

### A. Policy

1. Reconciliation agreements are not against public policy since the law encourages the resumption of marital relations.
2. Reconciliation agreements are an exception to the marital property law (Ark. Code Ann. § 9-12-315).

*Ducharme v. Ducharme*, 316 Ark. 482 (1994); *Schichtel v. Schichtel*, 3 Ark. App. 36 (1981) (The law encourages the resumption of marital relations. Since the purpose of a reconciliation agreement is to restore marital relations, it harmonizes with public policy and will be upheld. The Court held that a contract between husband and wife, made when they were separated for just cause, whereby the husband agrees to pay his wife a specified sum if she will resume marital relations, rests upon a valuable consideration and is enforceable.) See, *Raymond v. Raymond*, 343 Ark. 480 (2001) (signing a reconciliation agreement did not constitute an entry of appearance for wife, upon whom service was never perfected; divorce entered without jurisdiction over the wife was void ab initio).

**XVII. MEDIATION AND OTHER TYPES OF ALTERNATIVE DISPUTE  
RESOLUTION IN DIVORCE**

**A. Duty and Authority of Courts**

1. All trial and appellate Courts have authority:
  - a. To encourage settlement of pending cases and controversies:
    - (1) by suggesting the referral of a case or controversy to an appropriate dispute resolution process agreeable to the parties; and
    - (2) upon motion of all parties, the court must make such order of reference and continue the case pending outcome of the selected dispute resolution process.
  - b. To make, at a party's request and at the discretion of the Court, appropriate orders to confirm and enforce the results produced by such dispute resolution process.
2. In addition, each circuit and appellate court has authority to order any civil, juvenile, probate, or domestic relations case or controversy pending before it to mediation.
3. If a case is ordered to mediation, the parties may:
  - a. Choose a mediator from the roster provided by the Commission; or
  - b. Select a mediator not on the roster, if approved by the court.
4. A party may move to dispense with the order to mediate for good cause shown, which includes, but is not limited to, a party's inability to pay the costs of mediation.
5. Each court has the discretion to make, at a party's request, appropriate orders to confirm and enforce the results produced by the dispute resolution process.

Ark. Code Ann. §16-7-202 (Supp. 2009).

## **B. Confidentiality**

1. Communications of a participant in a dispute resolution process are confidential.
  - a. Not subject to disclosure in civil or criminal disputes;
  - b. May not be used in evidence against participant in any judicial or administrative proceeding.
2. Records or writings made at a dispute resolution process are confidential.
  - a. Not subject to testimony;
  - b. Not subject to process requiring disclosure or production of information.
3. If section conflicts with other legal requirements for disclosure, Court having jurisdiction of the proceedings has authority to decide:
  - a. Whether the communications sought to be disclosed warrant a protective order; or
  - b. Whether the communications are subject to disclosure.

Ark. Code Ann. §16-7-206 (Repl. 1999).

## **C. Immunity**

1. Impartial third party administering or participating in a dispute resolution process
  - a. Is not liable for civil damages for any statement or decision in connection with dispute resolution;
  - b. May be liable only if such person exhibited willful or wanton misconduct in his or her actions.

Ark. Code Ann. §16-7-207 (Repl. 1999).

## **D. Options Available to Courts**

1. Prior to or after entering a decree of divorce, the court may require the parties to:

- a. Complete at least two hours of parenting classes; or
- b. Submit to mediation in regard to addressing parenting, custody, and visitation issues.

Ark. Code Ann. §9-12-322(a) (Repl. 2008).

2. Each party shall be responsible for his or her cost of attending parenting classes or mediation.

Ark. Code Ann. §9-12-322(b) (Repl. 2008).

3. The parties may:
  - a. Choose a mediator from a list provided by the judge of those mediators who have met the Arkansas Alternative Dispute Resolution Commission's requirement guidelines for inclusion on a court-connected mediation roster; or

Ark. Code Ann. §9-12-322(c)(1) (Repl. 2008); Establishment of Commission: Ark. Code Ann. §16-7-102 (Supp. 2009); Authority and Responsibility of Commission: Ark. Code Ann. §16-7-104 (Repl.1999); Authority to Develop Guidelines: Ark. Code Ann. §16-7-104(4)(Repl. 1999).

- b. If approved by the judge, choose a mediator not on the roster.

Ark. Code Ann. §9-12-322(c)(2) (Repl. 2008).

4. For good cause shown, a party may move to dispense with the referral to mediation.

Ark. Code Ann. §9-12-322(d) (Repl. 2008).

*Note: The Arkansas Alternative Dispute Resolution Commission is staffed and is housed within the Administrative Office of the Courts. Additional information and printed materials are available through the Commission at 625 Marshall Street, Little Rock, Arkansas 72201, (501) 682-9402.*

## XVIII. NAME CHANGE FOR A CHILD

### A. Best Interest of Child Controls

1. Moving party has the burden to show best interest of child.
2. Clearly erroneous standard of review.

### B. Trial Court to Consider Following Factors:

1. The child's preference;
2. The effect of the change of the child's surname on the preservation and development of the child's relationship with each parent;
3. The length of time the child has borne a given name;
4. The degree of community respect associated with the present and proposed surnames;
5. The difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed surname; and
6. The existence of any parental misconduct or neglect.

*Huffman v. Fisher*, 337 Ark. 58 (1999)(leading case sets out above factors); *Poindexter v. Poindexter*, 360 Ark 538 (2005)(First case involving dispute over child's middle name, rather than surname or entire name. Best interest governs and case was remanded for consideration of factors and court was instructed to substitute "name" for "surname" when considering *Huffman* factors); *Gangi v. Edmonds*, 93 Ark. App. 217 (2005)(Trial court failed to consider all of the *Huffman* factors in granting father's name-change petition; opinion was clearly erroneous); *Boudreaux v. Mauterstock*, 88 Ark. App. 389 (2004)(father failed to prove best interest; decision granting name change was clearly erroneous); *Sheppard v. Speir*, 85 Ark. App. 481 (2004)(Issue of first impression because it involved the change of child's entire name, not just surname).



# PROBATE DIVISION

## I. WILLS

### A. Grant of Administration

#### 1. Venue

- a. The venue of probate matters or administration of a will is in the county:
  - (1) of decedent's residence at his death; or
  - (2) in which greater part, in value, of decedent's property is located if decedent was a nonresident; or
  - (3) in which decedent died if a nonresident and no property within Arkansas; or
  - (4) in which a cause of action may be maintained by decedent's personal representative if none of the above apply or decedent died outside of Arkansas.
- b. The proceedings shall be deemed commenced by the filing of a petition, the issuance of letters, and the qualification of a personal representative.
- c. If probate proceedings are commenced in more than 1 county, then:
  - (1) stay all proceedings but the first one filed;
  - (2) make a final determination of venue in the first action to be commenced;
  - (3) if venue is improper, transfer to another county.
- d. At the court's discretion, if venue is found to be improper at any time before the final distribution, then the court may transfer the case file.

Ark. Code Ann. § 28-40-102 (Repl. 2004); *Lawrence v. Sullivan*, 90 Ark. App. 206 (2005)(venue statute mandates that probate action be where decedent “resided”—here, decedent was arguably domiciled in a county other than where he resided, but venue was not proper there; discussion of “residence” and “domicile”).

#### 2. Statute of Limitations

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

- b. Letters of administration must also be granted within 5 years of the decedent's death.

Ark. Code Ann. §28-40-103 (Repl. 2004); *Delafield v. Lewis*, 299 Ark. 50 (1989); *Horn v. Horn*, 226 Ark. 27 (1956).

### **3. No Will Effectual Until Probated**

- a. A will must be admitted to probate before it is effectual to prove title to or right to possession of real or personal property.

Ark. Code. Ann. § 28-40-104 (Supp. 2009).

### **4. Testimony to Prove Attested Will**

- a. An attested will shall be proved by testimony of at least two witnesses if:
  - (1) living at known addresses within continental United States; and
  - (2) capable of testifying.
- b. If only one or neither of attesting witnesses is available, then the will shall be proven by the testimony of at least two credible disinterested witnesses proving:
  - (1) handwriting of testator; and
  - (2) other facts and circumstances, including handwriting of any unavailable attesting witness, sufficient to prove a controverted issue in equity.
- c. Production of other evidence which will satisfy proof.

Ark. Code Ann. §28-40-117 (Repl. 2004); *Dillard v. Nix*, 345 Ark. 215, 45 S.W.3d 359 (2001); *In re Estate of Sharp*, 306 Ark. 268 (1991)(presumptions that arise once signing of will is proven by two attesting witnesses, and there is no suggestion of fraud or undue influence); *Carter v. Meek*, 70 Ark. App. 447 (2000)(proponent failed to prove the will by either two attesting witnesses or two credible disinterested witnesses).

### **5. Will Subsequently Presented for Probate**

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

- b. A second petition may also be filed and heard even after a will has been admitted or after letters of administration have been granted.
- c. No will shall be admitted unless it is presented to the court before the court orders or approves final distribution of the estate.

Ark. Code Ann. § 28-40-116 (Repl. 2004); but see *Atkinson, et al. v. Knowles*, 82 Ark. App. 224 (2003)(unprobated will admitted as evidence pursuant to A.C.A. § 28-40-104).

## **6. Notice of Hearing**

- a. The court shall fix a time and place for a hearing on the petition if:
  - (1) a petition for probate or for the appointment of a general personal representative is opposed; or
  - (2) a demand for notice has been filed according to A.C.A. § 28-40-108;
  - (3) and, in all other cases, the court may fix a time and place for a hearing.
- b. Notice of the hearing shall be given by one or more of the methods set out in Ark Code Ann § 28-1-112 to each heir and devisee whose name and address is given, including notice other than by publication to each person who has filed demand for notice.
- c. The notice shall be substantially the form contained in this section.

Ark. Code Ann. § 28-40-110 (Repl. 2004).

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

Ark. Code Ann. § 28-1-112(b) (Repl. 2004); *Snowden v. Riggins*, 70 Ark. App. 1 (2000)(no notice to potential heirs of withdrawal of attorney; notice did not comply with Ark.R.Civ.P. 64(b), and appointment of administratrix was set aside, even though two years had passed since appointment).

## **B. Validity of a Will**

### **1. Maker**

- a. Any person over 18 years of age and of sound mind may make a will.

Ark. Code Ann. § 28-25-101 (Repl. 2004).

- b. Complete sanity in the medical sense is not required if the power to think rationally existed at the time the will was made.

*Noland, Shaver & Hooten v. Noland*, 330 Ark. 660 (1997); *Balletti v. Muldoon*, 67 Ark. App. 25 (1999).

## **2. Witnesses**

- a. Any person over 18 years of age and competent to be a witness in this state may act as attesting witness to a will.
- b. No will is invalid because attested by an interested witness, but an interested witness shall forfeit that amount of the bequest that exceeds what would have been received had the testator died intestate, unless the will is attested by two other disinterested witnesses.
- c. Any attesting witness can be compelled to testify with respect to the will.
- d. No attesting witness is interested unless the will gives to him or her some beneficial interest by way of devise.

Ark. Code Ann. § 28-25-102 (Repl. 2004); *Norton v. Hinson*, 337 Ark. 487 (1999)(strict compliance required; requirement of witness being over 18 is unequivocal and leaves no room for judicial interpretation or substantial compliance).

## **3. Execution of a Will**

- a. The execution of a will, other than holographic, shall be by testator who declares to witnesses that it is his/her will, and in the presence of two or more witnesses:
  - (1) signs the will; or
  - (2) acknowledges his/her signature already made; or
  - (3) signs his/her mark near his/her written name, and has a person sign as a witness to the signature; or
  - (4) at the testator's discretion and in his/her presence, has someone else sign the testator's name, then his/her own name with a statement of what and why it was done; and
  - (5) in any of the above, the signature must be at the end of the will and

in the presence of 2 or more attesting witnesses.

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

Ark. Code Ann. § 28-25-103 (Repl. 2004); *In re Estate of Sharp*, 306 Ark. 268 (1991)(once the signing of the will is proven by two attesting witnesses, and there is no suggestion of fraud or undue influence, there is a presumption of statutory compliance); *Dunn v. Means*, 304 Ark. 473 (1991); *Clark v. Nat'l Bank of Commerce*, 304 Ark. 352 (1991); *Shamoon v. Tombridge*, 291 Ark. 222 (1987)(this section is mandatory to validate a non-holographic will); *Walburn v. Law*, 77 Ark. App. 211 (2002); *Morton v. Patterson*, 75 Ark. App. 62 (2001)(codicil not executed by decedent; strict compliance with unambiguous statute is required); *Carter v. Meek*, 70 Ark. App. 447 (2000)(failure to present two attesting witnesses or to present proof of exceptions); *Balletti v. Muldoon*, 67 Ark. App. 25 (1999).

#### **4. Foreign Execution**

- a. A foreign will, one executed outside this state, shall have the same force in Arkansas as if executed in Arkansas:
  - (1) pursuant to the Probate Code, A.C.A. § 28-25-101 through 104; or
  - (2) in manner prescribed by the law of the place of its execution; or
  - (3) in a manner prescribed by the law of the testator's domicile.

Ark. Code Ann. § 28-25-103(Repl. 2004); *Warner v. Warner*, 14 Ark. App. 257 (1985) (formality essential to the execution of a will is to be tested either by the law of the place of execution or the place of the testator's domicile).

#### **5. Revocation of a Will**

- a. A will or any part thereof is revoked by:
  - (1) execution of a subsequent will which either expressly or by inconsistency revokes all or part of the prior will;
  - (2) by being burned, torn, canceled, obliterated, or destroyed, with the intent and purpose of revoking it by testator, or by another person in the testator's presence and at his direction;
  - (3) by divorce or annulment of marriage of testator, which revokes provisions of will as to testator's spouse; or

*Langston v. Langston*, 371 Ark. 404, 266 S.W.3d 716 (2007)(revocation of holographic will that provided that decedent's estate would pass to his former wife was appropriate under subsection (b) of Ark. Code. Ann. § 28-25-109 because the parties' divorce occurred after the execution of the decedent's holographic will and his bequest was revoked by operation of law).

- (4) a spouse taking against the decedent's will.

*Gregory v. Estate of Gregory*, 315 Ark. 187 (1993).

- b. Where only partial revocation, re-attestation of the remainder is not required.
- c. Presumption of revocation can be overcome by preponderance of evidence that decedent did not revoke will during his lifetime.

Ark. Code Ann. § 28-25-109 (Repl. 2004); *Barrera v. VanPelt*, 332 Ark. 482 (1998); *Wells v. Estate of Wells*, 325 Ark. 16 (1996)(subsequent trust does not revoke a will); *Parker v. Mobley*, 264 Ark. 805 (1979)(where 1973 will was revoked by 1976 will and 1976 will was later destroyed, decedent died intestate).

## **6. Revival of Revoked or Invalid Will**

- a. A will, or part thereof, that has been revoked or found invalid, cannot be revived except by:
  - (1) re-execution of the will; or
  - (2) by reference or incorporation in a subsequently executed will.

Ark. Code Ann. § 28-25-110 (Repl. 2004); *Matheny v. Heirs of Oldfield*, 72 Ark. App. 46 (2000)(will that has been revoked can be revived only by re-execution or by execution of another will in which the revoked will is incorporated by reference).

## **7. Affidavit of Attesting Witness**

- a. Any attesting witness to a will may make and sign an affidavit before an officer authorized to take oaths.
- b. The affidavit may be:
  - (1) made upon attesting witness's own initiative or at the request of the testator; or
  - (2) made before or after testator's death.

- c. The affidavit shall be:
  - (1) written on the will, or attached thereto or upon a true copy; and
  - (2) accepted by the court in an uncontested case as if testimony of the witness had been taken before the court.

Ark. Code Ann. § 28-25-106 (Repl. 2004).

## **8. Incorporation of Writing by Reference**

- a. Any writing in existence when the will is made may be incorporated therein by reference if the will:
  - (1) manifests this intent;
  - (2) describes the writing sufficiently to permit its identification;
  - (3) is done in the manner prescribed by the law of the place of execution; and
  - (4) is done in the manner prescribed by the law of the testator's domicile.

Ark. Code Ann. § 28-25-107 (Repl. 2004); *Gifford v. Estate of Gifford*, 305 Ark. 46 (1991)(memorandum in testatrix's handwriting, physically attached to will, alluded to in will—was incorporated by reference); *Deal v. Huddleston*, 288 Ark. 96 (1986)(signed memoranda, made after the execution of a will, can be effective with certain restrictions pursuant to this section); *Jones v. Ellison*, 70 Ark. App. 162 (2000)(signed, handwritten note in jewelry box was incorporated by reference).

## **C. Construction of a Will**

### **1. Construction**

- a. The proper court in which probate or administration is pending has jurisdiction to construe a decedent's will:
  - (1) at any time during the administration;
  - (2) to determine an issue before the court, if necessary; or
  - (3) to construe the will when the personal representative petitions the court.



- b. Proper notice must be given to all interested parties.
- c. Oral evidence shall not be used to supply terms in a writing which are wholly absent. *Burnett v. First Commercial Trust Company*, 327 Ark. 430 (1997).

Ark. Code Ann. § 28-26-101(Repl. 2004); *Dunklin v. Ramsay*, 328 Ark. 263 (1997)(co-executor is not “interested person” as used in this section, and thus cannot request a construction of the will solely in his capacity as an executor).

## **2. Intention of Testator**

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

*Jones, et al. v. Ellison*, 70 Ark. App. 162 (2000)(strict technical construction of statutory requirements avoided in order to give effect to the testatrix’s wishes).

## **3. After-acquired Property**

- a. Property acquired by testator after the will is made passes as if title were vested in him at the time the will was made, unless the will manifests a contrary intention.

Ark. Code Ann. § 28-26-102(Repl. 2004); *Ellis v. Estate of Ellis*, 315 Ark. 475 (1994)(settlement proceeds from personal injury action acquired after death of plaintiff belong to his estate, not to his widow as marital property); *Slavik v. Estate of Slavik*, 46 Ark. App. 74 (1994)(life insurance proceeds passed outside the will, not to co-executors for benefit of estate).

## **4. Failure of a Testamentary Provision**

- a. The term "survivor" refers to the person among the designated class who outlives the others.

*Chlanda v. Estate of Fuller*, 326 Ark. 551 (1996).

- b. When a child or other descendent, devised property by will, dies during the lifetime of the testator, and leaves a surviving child or other descendant, the devise shall not lapse, but the property shall vest in the surviving child or other descendant, except:
  - (1) a devise, other than a residuary devise, which fails for any reason, shall become part of the residue; or

- (2) the residue is devised to two or more persons, and the share of one fails for any reason, it passes to the other residuary devisee, in proportion to their interests.

Ark. Code Ann. § 28-26-104(Repl. 2004); *In Re: Estate of Harp*, 316 Ark. 761 (1994)(will contained two residuary clauses, one specific, dealing with real estate, and the other general).

## **5. Lapse**

- a. “Lapse” is a technical term, meaning that a devise fails or takes no effect.

*Carpenter v. Miller*, 71 Ark. App. 5 (2000)(express declaration that bequests to named individuals would cease if they predeceased her was not ambiguous).

## **6. Partial Intestacy**

- a. Any part of a decedent's estate not disposed of by will passes by the law of descent and distribution as intestate property.

Ark. Code Ann. § 28-26-103 (Repl. 2004); *Harrison, Executor v. Harrison, et al.*, 82 Ark. App. 521 (2003)(presumption against intestacy is subordinate to the presumption against disinheritance); *Cook v. Estate of Seeman*, 314 Ark. 1 (1993)(intestate property passes by law rather than by will, so the statute and not the testator controls the distribution of intestate property, despite testator’s intent to disinherit that he clearly and unambiguously expressed in his will).

## **7. Ademption**

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

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

## **8. Inter Vivos Gift**

- a. Party claiming title to property must prove gift, regardless of who initiated inquiry.
- b. Burden of proof is by clear and convincing evidence that donor:
  - (1) was of sound mind;

- (2) had clear intent to make gift without recall;
- (3) actually delivered gift to donee or agent;
- (4) released all future control over gift.

*O'Fallon v. O'Fallon*, 341 Ark. 138 (2000); *Swaffar v. Swaffar*, 327 Ark. 235 (1997).

## **D. Holographic Wills**

### **1. Defined**

- a. A holographic Will is:
  - (1) written entirely in the testator's handwriting; and
  - (2) signed by the testator; and
  - (3) subject to the proof as the probate code requires, including manifestation of a dispositive intent.

Ark. Code Ann. § 28-25-104 (Repl. 2004); *Edmondston v. Estate of Fountain*, 84 Ark. App. 231 (2003), rev'd, 358 Ark. 302, 189 S.W.3d 427 (2004)(error not to admit holographic will to probate where testamentary intent was reflected in the document); *Craig v. Carrigo, et al.*, 353 Ark. 761 (2003)(holographic will made in Canada); *Dunn v. Means*, 304 Ark. 473 (1991)(no testamentary intent reflected); *Smith v. Nelson*, 227 Ark. 512 (1957)(holographic will should clearly show animus testandi—the intent to make a will).

### **2. Testimony to Prove Holographic Will**

- a. A holographic will shall be proved by the testimony of at least three credible disinterested witnesses proving the signature of the testator.
- b. The witness shall also provide other evidence sufficient to prove a controverted issue in equity.

Ark. Code Ann. §§ 28-25-104 & 28-40-117 (b)(Repl. 2004); *Edmondston v. Estate of Fountain*, 84 Ark. App. 231 (2003), rev'd, 358 Ark. 302, 189 S.W.3d 427 (2004) (witnesses' testimony indicated that they believed they were witnessing decedent's signing his will and that decedent believed he had a will); *In re Estate of Lindsey*, 209 Ark. 596 (1992); *In re Estate of Sharp*, 306 Ark. 268 (1991); *Fischer v. Kinzlow*, 88 Ark. App. 307 (2004)(competency; overreaching; proper execution of holographic will); *Coble v. Sexton*, 71 Ark. App. 122 (2000)(remanded to consider extrinsic evidence on the issue of identity of beneficiary).

## **E. Lost or Destroyed Wills**

### **1. Jurisdiction over Lost or Destroyed Wills**

- a. The circuit court has jurisdiction to establish any will lost or destroyed by accident or design.
- b. The court shall have the same power to take proof of execution of a will and to establish the same as in cases of lost deeds.

Ark. Code Ann. § 28-40-301(Repl. 2004); Ark. Code Ann. § 28-1-104(a)(6)(Repl. 2004).

### **2. Testimony to Prove Lost or Destroyed Will**

- a. A lost or destroyed will shall be established by at least two witnesses, a correct copy or draft being the equivalent to one witness, who give proof of:
  - (1) existence of the will at the time of testator's death; or
  - (2) fraudulent destruction of the will during testator's lifetime; and

Ark. Code Ann. § 28-40-302 (Repl. 2004); Ark. Code Ann. § 28-40-117 (Repl. 2004); *Abdin v. Abdin*, 94 Ark. App. 12, 223 S.W.3d 60 (2006)(court properly denied probate of an Israeli will as a lost will where proponent brother of testator failed to prove by convincing evidence that the testator executed the will; further, testator's widow and a business associate testified that the signature on the Israeli will was not the testator's); (*Thomas v. Thomas*, 30 Ark. App. 152 (1990)(trial judge does not have to determine what became of the lost will); *Conkle v. Walker*, 294 Ark. 222(1988)(proponent of the lost will has the burden of proving execution of the will and its contents by strong, cogent, and convincing evidence); *Remington v. Roberson*, 81 Ark. App. 36 (2003)(proponent failed to rebut presumption that decedent did not revoke will during lifetime); *Matheny v. Heirs of Oldfield*, 72 Ark. App. 46 (2000)(evidence insufficient to prove a lost will); *Gilbert v. Gilbert*, 47 Ark. App. 37 (1994).

### **3. Record of Decree**

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

Ark. Code Ann. § 28-40-303 (Repl. 2004).

#### **4. Restraint of Administrator**

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

Ark. Code Ann. § 28-40-304 (Repl. 2004).

### **F. Petition for Probate of a Will**

#### **1. Who May Petition**

- a. An interested person may petition in the proper county for the:
  - (1) admission of a will to probate although:
    - (a) it may not be in petitioner's possession; or
    - (b) it may be lost, destroyed, or outside the state;
  - (2) appointment of executor;
  - (3) appointment of administrator if:
    - (a) no executor nominated in will; or
    - (b) if person nominated is disqualified, unsuitable, or refuses to serve, or if there is no will.
- b. Petition for probate may be combined with petition for appointment of executor or administrator.
- c. A person who is interested in either the probate of a will or appointment of a personal administrator may petition for both.

Ark. Code Ann. § 28-40-107(Repl. 2004); *Shelton v. Keathley*, 367 Ark. 568, 242 S.W.3d 223 (2006)(executor of decedent's will was not required to deliver will to the proper court under 28-40-105 because he was the named executor of the will; further, an illegitimate child who had never been declared legitimate did not qualify as an interested person within the Probate Code who was required to receive notice); *Burch v. Griffe*, 342 Ark. 615 (2000)(decedent's sister found unsuitable to serve as executrix because she was serving simultaneously as executrix of decedent's late wife's estate).

## **2. Content of Petition**

- a. The petition shall state:
- (1) name, age, residence, and date and place of death of decedent;
  - (2) names, ages, residence addresses and relationship to decedent of heirs and devisees;
  - (3) probable value of real estate;
  - (4) probable value of personal property;
  - (5) if the decedent is not a resident at the time of death, a general description of property in each county of Arkansas and the value;
  - (6) if venue is based on A.C.A. § 28-40-108(a)(4), facts establishing venue;
  - (7) if decedent died testate and will not filed, state contents of the will by:
    - (a) attaching a copy to petition; or
    - (b) if lost, destroyed, or suppressed, by including statement as to known contents;
  - (8) names and residence addresses of nominated executors; and
  - (9) if a personal representative is sought, the name and residence address of that person, his relationship to the decedent, or other necessary facts.

Ark. Code Ann. § 28-40-107 (Repl. 2004).

## **3. Notice and Methods of Service**

- a. Notice—When Given
- (1) Notice shall be given to interested persons or their attorneys of record if any, in probate or administration proceedings only when and as specifically provided by the code or ordered by the court.
  - (2) If no notice is required by code, court may require such notice as it deems desirable.

Ark. Code Ann. § 28-1-112(a) & (e) (Repl. 2004); *Shelton v. Keathley*, 367 Ark. 568 (2006)(decedent's illegitimate child who has never been declared legitimate is not an "interested person" within the Probate Code who was required to receive notice).

b. Kinds of Service

- (1) Unless notice is waived or a mode of service is specified by the court, service may be by:
  - (a) personal service on a party or designated agent of a corporate party at least 10 days before the hearing; or
  - (b) leaving a copy at the party's usual place of abode with a family member over 15 years old at least 10 days before the hearing; or
  - (c) registered or certified mail, return receipt requested, signed by the addressee only, and deposited in U.S. Post Office at least 15 days before the hearing; or
  - (d) publishing once a week for two consecutive weeks in a general circulation newspaper at least 15 days before the hearing, and service by ordinary mail;
  - (e) any combination of two or more of the above; or
  - (f) any method permitted by the Rules of Civil Procedure.

Ark. Code Ann. § 28-1-112(b) (Repl. 2004).

- (2) Unless otherwise provided by statute or court order, notice shall be:
  - (a) in writing or print;
  - (b) prepared by the party with the burden of giving notice;
  - (c) signed by the clerk of the court or the attorney for the party required to give notice.

Ark. Code Ann. § 28-1-112 (c)(1) (Repl. 2004).

- (3) Proof of service, except for by publication, shall be made by filing:

- (a) a copy of the notice with the clerk with a sworn statement by the person who served notice naming:
  - (i) the person(s) upon whom it was served;
  - (ii) the time, place, and manner of service.
- (b) registered mail return receipts.

Ark. Code Ann. § 28-1-112(f)( Repl. 2004).

- (4) Except as otherwise specifically provided, incompetents shall be served by service upon:
  - (a) the guardian of the estate or of the person, if any, according to the nature of the proceedings, and the guardian of the person, if any, if the proceedings affect the control or custody of his or her person; or
  - (b) the incompetent, if there is no guardian, except if the incompetent is:
    - (i) under 14 years old, then service is on a parent;
    - (ii) confined in a mental hospital or institution, then service is on the superintendent of the hospital; or
    - (iii) mentally incompetent but not confined to a hospital, then service is on the spouse or near relative who is in control of the incompetent.
  - (c) When the interests of the guardian are adverse to those of the incompetent, service shall be upon the incompetent.

Ark. Code Ann. § 28-1-112(d) (Repl. 2004);

#### **4. Waiver of Notice**

- a. Notice shall be waived:
  - (1) if the person submits to the jurisdiction of the court;
  - (2) upon execution of a written waiver by an interested person or his or her attorney if such person is:



- (a) legally competent;
- (b) guardian of the estate of an incompetent on behalf of the ward, if there is no conflict of interest;
- (c) an incompetent in his own behalf when his interests are adverse to the guardian's, or if there is no guardian;
- (d) the custodial parent of a child under 14 years old, or a minor in his own behalf who is at least 14 years old;
- (e) a guardian ad litem of an incompetent;
- (f) a trustee in behalf of a beneficiary; or
- (g) a consul or representative of a foreign government on behalf of a resident of such country.

Ark. Code Ann. § 28-1-113 (Repl. 2004); *Smart v. Biggs*, 26 Ark. App. 141 (1988)(the personal waiver of the successor guardian, made in her own behalf when she was not a party to the action and before she was appointed successor guardian, did not bar her challenging an order on behalf of her ward).

## **5. Requests for Notice**

- a. Demand for notice may be made by an interested person before the will is admitted to probate or before a general personal representative is appointed.
- b. A demand for notice must contain:
  - (1) a statement of the interest of the person filing it; and
  - (2) address of the person, or his or her attorney's address.
- c. After filing the demand, no will shall be admitted to probate and no personal representative shall be appointed until the notice is given pursuant to A.C.A. § 28-40-110.
- d. At any time after issuance of letters, any interested person may serve upon the personal representative and file with the clerk:
  - (1) a written admission or proof of service; and
  - (2) a written request for notice by ordinary mail of the time and place

of all hearings of the settlements of accounts, on final distribution, and on any matters in which notice is required by law, rule of the court, or by order of the court.

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

Ark. Code Ann. § 28-40-108 (Repl. 2004).

## **6. Hearing on Petition Without Notice**

- a. Petition for probate or appointment of a personal representative may be heard without notice if:
  - (1) no demand for notice is filed; and
  - (2) such petition is not opposed by an interested person.

Ark. Code Ann. § 28-40-109 (Repl. 2004).

## **G. Taking Against a Will**

### **1. Surviving Spousal Limitations**

- a. A surviving spouse may elect to take against the deceased spouse's will if the spouse has been married to the decedent continuously for more than one year.
- b. The provision above is limited to:
  - (1) the surviving wife shall receive dower as if her deceased husband had died intestate, which is in addition to her homestead rights and statutory allowances;
  - (2) the surviving husband shall receive a curtesy interest as if his deceased wife had died intestate, which is in addition to his homestead rights and statutory allowances;
  - (3) The surviving spouse receives any residue if the decedent is not survived by lineal or collateral heirs or their descendants and after payment of all statutory allowances, taxes, debts, and satisfaction of all testamentary gifts and bequests.

Ark. Code Ann. § 28-39-401(Repl. 2004); *Burch v. Griffe*, 342 Ark. 559 (2000)(death of a surviving spouse nullifies his or her right to elect to take against the will); *Shaw v.*

*Shaw*, 337 Ark. 530 (1999)(wife could not take against the will when she and decedent had been married for only 13 days, despite the fact that they had been married previously to each other three different times, each marriage ending in divorce); *Hamilton v. Hamilton*, 317 Ark. 572,(1994)(widow's right to an elective share remains inviolate even though that election may at times rebuff the testator's testamentary wishes); *Davis v. Aringe*, 292 Ark. 549 (1987)(section does not make a distinction between a will made before or after a marriage); *Vaught v. Vaught*, 71 Ark. App. 196 (2000)(wife's dower rights in marital home should have been, not by appraisal, but by the court's ordering the property rented and rent divided, or by the court's ordering it sold and the proceeds divided).

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

Ark. Code Ann. § 28-39-402 (Repl. 2004).

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

Ark. Code Ann. § 28-39-405 (Repl. 2004); *Birch v. Griffe*, 342 Ark. 559 (2000)(election to take against the will was filed before the death of the surviving spouse but was not authorized by the court; authorization sought after the death of the surviving spouse was not timely).

- e. The election must be made:
  - (1) at any time before or within one month after the expiration of the date for filing claims against the decedent's estate unless extended by litigation; and

Ark. Code Ann. § 28-39-403 (Repl. 2004).

- (2) in writing, signed, and acknowledged, and filed with the probate clerk in substantially the form set out in this section.

Ark. Code Ann. § 28-39-404 (Repl. 2004).

- f. Revocation of spouse's election
  - (1) An election of a surviving spouse is binding, but may be revoked if:
    - (a) made timely within the period for making an election as set out in A.C.A. §28-39-403; and

- (b) before any distribution based on the election; or
- (c) thereafter for cause that would justify rescission of a deed.

Ark. Code Ann. § 28-39-406 (Repl. 2004); *Townson v. Townson*, 221 Ark. 610 (1953)(just as a widow may statutorily revoke her decision to take against the will, so may she revoke her decision to take under the will and to decide, instead, to take against the will).

## **2. Children Taking Against a Will**

- a. Children or issue of a testator born to or adopted may elect to take against the decedent's will and receive an intestate share of the estate, provided:
  - (1) the child was born or adopted after the will of testator had been made and after-born or adopted children were not mentioned or provided for in the will; or
  - (2) at the time of execution of the will by testator, there were living children or issue of a deceased child of testator not mentioned or provided for in the will; these are called “pretermitted” children and are subject to intestate interests remedies.

Ark. Code Ann. § 28-39-407 (Repl. 2004); *Craig, Personal Representative, v. Carrigo, et al.*, 353 Ark. 761 (2003)(pretermitted children allowed to inherit as if decedent had died intestate); *Alexander v. Estate of Alexander*, 351 Ark. 359(2002)(testator did not have his grandson so clearly in mind as to have met the requirements of the pretermitted child statute); *Dykes v. Dykes*, 294 Ark. 158 (1987)(children may take against a will as if a decedent died intestate only when not mentioned); *Holland v. Willis*, 293 Ark. 518 (1987)(grandchildren are pretermitted when neither they nor their father, who died before the will was executed, was mentioned in the will); *Young v. Young*, 288 Ark. 199 (1986); *Estate of Cisco v. Cisco*, 288 Ark. 552 (1986); *Rowe v. Allison*, 87 Ark. 206 (1908); *Taylor v. Hamilton*, 90 Ark. App. 235 (2005)(illegitimate child awarded share of father’s estate as pretermitted heir).

## **H. Claims Against Estates**

### **1. Allowance of Claims**

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

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

Ark. Code Ann. § 28-50-105 (Repl. 2004); *Taylor v. Woods*, 102 Ark. App. 92 (2008).

## **2. Classification**

- a. Claims shall be classified as one of the following, and if the assets are insufficient to pay all claims, they shall be paid in the following order:
  - (1) Costs and expenses of administration;
  - (2) Reasonable funeral, medical and other expenses related to the last illness, and wages of employees of the deceased;
  - (3) Liability for any state tax debt, decedent’s or his estate’s as a result of his death;
  - (4) Other claims allowed.
- b. No preference is given the payment of any claim over another within the same class, and a claim due and payable is not given preference over claims not due.

Ark. Code Ann. § 28-50-106 (Repl. 2004); Ark. Code Ann. § 20-76-436 (Supp. 2009)(recovery of benefits from recipients’ estates); *DHS v. Estate of Lewis*, 325 Ark. 20 (1996)(claim by DHS for recovery of Medicaid benefits received by decedent before her death); *Acklin v. Riddell*, 42 Ark. App. 230 (1993)(estate was insolvent, and trial court correctly ordered assets of estate sold to pay claims and expenses of administration).

## **3. Time for Filing Claims**

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

Ark. Code Ann. § 28-50-101(a)(Supp. 2009).

# **I. Distribution and Discharge**

## **1. Conclusiveness of Final Order**

- a. The order of final distribution shall be a conclusive determination as to the persons who are the successors in interest to that part of decedent's estate passing through the hands of the personal representative and as to the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the order.
- b. The order shall not affect the rights of third parties acquired from or through a distributee, as against the distributee.
- c. Only affirmative action by probate court can officially close an estate.

Ark. Code Ann. § 28-53-105 (Repl. 2004); *Skaggs v. Cullipher*, 57 Ark. App. 50 (1997)(statute does not provide for a closing of an estate by operation of law; only an affirmative action by the court can close an estate).

## **2. Exoneration of Encumbered Property**

- a. Secured debts shall be discharged out of the general assets of the estate, subject to the right of a decedent to provide otherwise by will.
- b. Nothing precludes a secured creditor from having recourse to his security for satisfaction of a debt.

Ark. Code Ann. § 28-53-113 (Repl. 2004); 3 UALR L.J. 361; *Balfanz v. Estate of Balfanz*, 31 Ark. App. 71 (1990)(section applies only in cases in which secured debts may be discharged out of the general assets of the estate, defined as unpledged personal property of the estate).

## **3. Partial Distribution**

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

Ark. Code Ann. § 28-48-104 (Repl. 2004); *Dunklin v. Ramsay*, 328 Ark. 263 (1997)(plain language of section mandates that when there are more than two executors, their powers may be exercised only by joint action of the majority of them).

## **4. Discharge of Personal Representative.**

- a. The court shall discharge the personal representative and his surety when satisfactory evidence is filed that final order of distribution has been complied with.
- b. Satisfactory evidence may consist of receipts or canceled checks, or where

titled property is concerned, a copy of document transferring title to distributee.

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

Ark. Code Ann. § 28-53-118 (Repl. 2004).

## **5. Reopening Administration.**

- a. Any interested person may petition to reopen an estate for any proper cause.
- b. No claim already barred can be asserted in the reopened administration.

Ark. Code Ann. § 28-53-119 (Repl. 2004); *Bullock v. Barnes*, 366 Ark. 444 (2006)(error to grant petition to reopen probate of aunt's estate as niece failed to file petition within 90-day limitation of ARCP 60(a) or to provide "other cause" such as fraud or lack of notice); *White v. Welsh, Executrix of Estate of Hardcastle*, 323 Ark. 479 (1996)(interested person defined).

## **J. Devise of Property**

### **1. Devise of Encumbered Property**

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

Ark. Code Ann. § 28-26-105 (Repl. 2004).

### **2. Contracts Affecting the Devise of Property**

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

Ark. Code Ann. § 28-24-101 (Repl. 2004); *Avance v. Richards*, 331 Ark. 32 (1998)(contract to make a will not shown); *Hardie v. Estate of Davis*, 312 Ark. 189 (1993)(settlement agreement was valid, enforceable contract into which decedent's

guardian had authority to enter on her behalf); *Songer v. Wiggins*, 71 Ark. App. 152 (2000)(court’s admission into evidence of an unprobated, duly executed, and non-revoked will as evidence of a devise of property was proper); *Hodges v. Cannon*, 68 Ark. App. 170 (1999)(finding that there was no valid contract to make appellant a beneficiary of decedent’s will).

## **K. Contesting a Will**

### **1. Generally**

- a. An interested person may contest the probate of a will, or any part of the will by:
  - (1) stating in writing the grounds for objection; and
  - (2) filing the objection in the court;
- b. The objection must be filed within one of the following time periods:
  - (1) if the ground is discovery of another will, the objection must be filed before the final distribution has been ordered and within the time pursuant to A.C.A. § 28-40-103; or
  - (2) if the contest is on any other ground, then the objection must be filed either:
    - (a) at or before the time of hearing on the petition for probate, if that person has been given notice other than by publication; or
    - (b) within 3 months after the date of the first publication of the notice of the notice of the admission of the will to probate; or
    - (c) within 3 months after the first publication of notice of the probate or within 45 days after a copy of the notice was served upon him whichever is later; or
    - (d) within 3 years after the admission of the will to probate if not barred by any of the above provisions.

Ark. Code Ann. § 28-40-113 (Repl. 2004); *Seymour v. Biehslich*, 371 Ark. 359, 266 S.W.3d 722 (2007)(trial court did not err in finding that appellant contested the will, even though she claimed she did not, thus triggering a no-contest clause in the will); *West v. Williams*, 355 Ark. 148 (2003); *Judkins v. Hoover*, 351 Ark. 552 (2003)(Subsection “b”



did not apply when court considered a challenge to decedent's will after a hearing at which it orally announced its decision to admit the will to probate because no written order had been filed); *Barrera v. Vanpelt*, 332 Ark. 482 (1998)(defining interested persons); *Wells v. Estate of Wells*, 325 Ark. 16 (1996)(party contesting validity of will has burden of proving by a preponderance that the testator lacked mental capacity or acted under undue influence); *Pickens & Ashman v. Black*, 316 Ark. 499 (1994); *Hardie v. Estate of Davis*, 312 Ark 189 (1993)(defining interested persons); *Spicer v. Spicer*, 55 Ark. App. 267 (1996).

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

Ark. Code Ann. § 28-40-113(b)(3) (Repl. 2004).

## **2. Notice of Contest**

- a. If a statement for grounds for objection to admitting the will to probate is filed before admitting it to probate and the notice provided for in A.C.A. § 28-40-110 is given, no further notice is required, unless ordered by court.
- b. If the notice provided for in A.C.A. § 28-40-110 has not be given, then notice shall be given according to A.C.A. § 28-40-110, and shall further state that the will is being contested.
- c. If the will is already admitted into probate and then the objection is filed timely, then notice shall:
  - (1) be given to each heir, devisee, executor, personal representative, or any person the court directs if the will is admitted within the time periods set out in A.C.A. § 28-40-113; and
  - (2) state the will is contested and give the time and place of the hearing set by the court.
- d. All persons notified pursuant to A.C.A. § 28-40-110 or by this section shall be deemed parties to the proceeding for all purposes.

Ark. Code Ann. § 28-40-114 (Repl. 2004).

## **3. Grounds for Contest**

- a. Testamentary capacity and undue influence

*Pyle v. Sayers*, 344 Ark. 354 (2001)(testamentary capacity and undue influence so

interwoven court considers them together), *Pyle v. Sayers*, 72 Ark. App 207 (2001(same case); *Hodges v. Cannon, et al.*, 68 Ark. App. (1999)(failure to show lack of testamentary capacity and undue influence).

- b. Burdens of proof for one challenging validity of will:
  - (1) preponderance of evidence that testator lacked testamentary capacity or was the victim of undue influence;
  - (2) beyond a reasonable doubt to overcome a rebuttable presumption of undue influence that arises when proponent and beneficiary of will procured the drafting of the will.

*Hooten, Special Adm'r v. Jensen*, 94 Ark. App. 130 (2006); *Pyle v. Sayers*, 344 Ark. 354 (2001); *In Re Estate of Garrett*, 81 Ark. App. 212 (2003).

#### **4. Rights of Persons Acquiring Interest Prior to a Filed Objection**

- a. The purchaser or lender shall take title free of rights of any interested person in the estate and incurs no personal liability to the estate or to any interested person whether or not the distribution was proper or supported by court order, if deed or security instrument is made before the filing of objection to a will.
- b. An instrument properly recorded with state documentary fee noted shall be prima facie evidence that the transfer was made for value.

Ark. Code Ann. § 28-40-115 (Repl. 2004).

#### **5. Family Settlement Agreements**

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

*Pfaff v. Clements*, 213 Ark. 852 (1998); *Green v. McAuley*, 59 Ark. App. 114 (1997).

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

*Gannaway v. Goodwin*, 256 Ark. 834 (1974).

### **L. Executors and Administrators**

#### **1. Authority to Act**

- a. Order appointing administrator empowers him/her to act for the estate, and any act carried out under authority of the order is valid.
- b. Letters of administration are not necessary to empower one to act for the estate, but are only for the purpose of notifying third parties that the appointment of an administrator has been made.

Ark. Code Ann. § 28-48-102 (Supp. 2009).

## **2. Duties**

- a. Occupies fiduciary position

*Guess v. Going*, 62 Ark. App. 19 (1998).

- (1) exercises utmost good faith in all transactions;
- (2) may not advance own personal interests at expense of heirs;
- (3) acts as a trustee or conduit for benefit of kin.

*Douglas v. Holbert*, 335 Ark. 305 (1998).

- b. Marshals all assets of the estate.

Ark. Code Ann. § 28-49-101 (Repl. 2004); *Guess v. Going*, 62 Ark. App. 19 (1998).

## **3. Removal**

- a. Personal Representative:

- (1) becomes mentally incompetent,
- (2) becomes disqualified;
- (3) becomes unsuitable;
- (4) becomes incapable of discharging his or her trust;
- (5) has mismanaged estate;
- (6) has failed to perform any duty imposed by law or court order; or
- (7) has ceased to be a resident of this state without filing authorization.

- b. “Unsuitable” is defined as:
  - (1) interest in conflict with duty;
  - (2) mental attitude toward duty or some person interested in the estate that creates reasonable doubt whether the executor or administrator will act honorably, intelligently, efficiently, promptly, fairly, and dispassionately in his or her trust;
  - (3) continuance in office will likely render execution of will or administration of estate difficult, inefficient, or unduly protracted.

*In re Guardianship of Vesa*, 319 Ark. 574 (1995)(“unsuitability” defined); *Guess v. Going*, 62 Ark. App. 19 (1998)(“unsuitability” defined).

c. Judge has wide discretion.

d. Appealability

- (1) Order granting or denying Petition to Appoint Special Administrator is not an appealable order;
- (2) Order granting or denying Petition to Remove Administrator, other than Special Administrator, is appealable.

Ark. Code Ann. § 28-48-103(f)(Repl. 2004); *Brown v. Nat’l Health Care of Pocahontas, Inc.*, 102 Ark. App. 148 (2008)(special administrator’s term expired so that she had no standing to file complaint on behalf of the estate); *Filyaw v. Bouton*, 87 Ark. App. 320 (2004); *Harwood v. Monroe*, 65 Ark. App. 57 (1999)(order to remove Special Administrator is not appealable); *Pickens v. Black*, 316 Ark. 499 (1994)(order granting or denying removal of administrator, other than special administrator, is appealable); see, also, A.C.A. § 28-48-105(a)(1)(Repl. 2004).

## II. INTESTATE SUCCESSION

### A. Elements

#### 1. Definitions

a. “Dying intestate” means dying without a valid last will and testament.

(1) An “intestate” is a person who dies without a valid last will and testament.

b. “Descendants” are a person's children, grandchildren and all others who are in a direct line of descent from him or her.

(1) “lineal” descendants;

(2) excludes ascendants or collateral relatives;

(3) includes adopted children and their descendants.

Ark. Code Ann. § 28-9-202 (Repl. 2004); *Babb, et al. v. Matlock, et al.*, 340 Ark. 263 (2000)(children of decedent’s children who predeceased the decedent are included in the definition of “children,” are not heirs at law, and therefore are not entitled to recover in wrongful death settlement).

c. “Heirs” are the persons who succeed by inheritance to the ownership of real or personal property to which a person dies intestate.

Ark. Code Ann. § 28-9-203 (Repl. 2004).

### B. Intestate Succession Generally

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

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

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

Ark. Code Ann. § 28-9-203 (Repl. 2004); *Harrison v. Harrison*, 82 Ark. App. 521 (2003)(No residuary clause; residue passed by intestate succession).

### **C. Distribution Among Heirs**

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

- a. “Per capita” distribution occurs when all the members of the class who inherit are related to the intestate in equal degree (such as all children, all grandchildren, all nieces and nephews, etc.), and they will inherit in equal shares.

Ark. Code Ann. § 28-9-204(Repl. 2004); *Stokan v. Estate of Cann*, 100 Ark. App. 216, 266 S.W.3d 210 (2007)(per capita distribution was proper).

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

Ark. Code Ann. § 28-9-205 (Repl. 2004).

2. If members of the inheriting class are related to the intestate in unequal degree, those in the nearer degree will take per capita, or in their own right; those in the more remote degree will take per stirpes, or through representation.

Ark. Code Ann. § 28-9-204 (Repl. 2004).

### **D. Interests Transmissible by Inheritance**

1. Heirs may inherit every right, title, and interest owned by the intestate that is not terminated by the intestate's death or disposed of by will.

2. The rights of heirs will be subject to:

- a. Dower or curtesy of the intestate's surviving spouse;
- b. Homestead rights of the intestate's surviving spouse and children;
- c. Statutory rights and allowances to the surviving spouse and minor children;

- d. Rights of a surviving spouse to joint income tax refunds;
  - e. Administration of the estate, if any.
3. The intestate's entire right to any and all reversionary and remainder interests, rights of reentry or forfeiture for condition broken, executory interest, and possibilities of reverter shall be transmissible by inheritance, subject to the conditions set out above.

Ark. Code Ann. § 28-9-206 (Repl. 2004).

**E. Heirs as Tenants in Common**

1. If real or personal property is transferred by inheritance to two or more persons, they will hold the property as tenants in common.

Ark. Code Ann. § 28-9-207 (Repl. 2004).

**F. Male not Preferred over Female**

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

Ark. Code Ann. §2 8-9-208 (Repl. 2004).

**G. Legitimacy of Child**

1. For purposes of intestate succession, a child is presumed to be legitimate if:
- a. The parents have lived together and, before the birth of the child, participated in a marriage ceremony in apparent compliance with the law, even though the attempted marriage is void;
  - b. The child is born or conceived during a marriage;
  - c. After the birth of the child, the father marries the mother and recognizes the child to be his;
  - d. The child is conceived following artificial insemination of a married woman with the consent of her husband. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.
2. An illegitimate child or his descendants may inherit in the same manner as a legitimate child from the child's mother or her blood kindred.

3. A child may inherit from his father or from his father's blood kindred provided a claim is asserted against the estate of the father within 180 days of the father's death and at least one of the following conditions is satisfied:
  - a. A court has established the paternity of the child or has determined the legitimacy of the child pursuant to A.C.A. § 28-9-209(a), (b), or (c);
  - b. The man has made a written acknowledgment that he is the father of the child; *see Cobb v. Estate of Keown*, 53 Ark. App. 171 (1996);
  - c. The man's name appears with his written consent on the birth certificate of the child;
  - d. The mother and father marry prior to the birth of the child;
  - e. The mother and putative father attempted to marry prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid;
  - f. The putative father is obligated to support the child under a written voluntary promise or by court order.

*Rager v. Turley*, 342 Ark. 223 (2000), *rev'g* 68 Ark. App. 187 (1999)(A.C.A. § 28-9-209 applies to time to assert a claim against estate, not time to claim participation in wrongful death settlement); *Boatman v. Dawkins*, 294 Ark. 421 (1988); *Taylor v. Hamilton*, 90 Ark. App. 235 (2005); *Raspberry v. Ivory*, 67 Ark. App. 227 (1999).

4. Property of an illegitimate person passes according to the usual rules of intestate succession to his mother and his kindred of her blood and to his father and his kindred of his father's blood, provided paternity has been established in accordance with Ark. Code Ann. § 28-9-209(d).
5. Nothing contained in Ark. Code Ann. § 28-9-209 shall extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing of decedents' estates or to the determination of heirship.

Ark. Code Ann. § 28-9-209 (Repl. 2004); *Burns v. Estate of Cole*, 364 Ark. 280, 219 S.W.3d 134 (2005); *Bell v. Bell*, 249 Ark. 959 (1971)(insufficient evidence to establish child as heir to putative father).

## **H. Posthumous Heirs**

1. Posthumous descendants of an intestate conceived before his death but born



thereafter shall inherit in the same manner as if born in the lifetime of the intestate.

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

Ark. Code Ann. § 28-9-210 (Repl. 2004); *Finley v. Astrue*, 372 Ark. 103, 270 S.W.3d 849(2008)(in vitro fertilization—embryo implanted in his mother's womb after his father's death could not inherit from the father under intestacy law as a surviving child; to inherit, the child had to have been conceived before the father's death).

### **I. Alienage**

1. An "alien" refers to a person who is not a citizen of the United States.
2. No person is disqualified to inherit or transmit by inheritance because he is an alien.
3. An alien may inherit or transmit by inheritance subject to the same laws of intestate succession as apply to citizens of this state.

Ark. Code Ann. § 28-9-211 (Repl. 2004).

### **J. Computing Degrees of Consanguinity**

1. In computing the degrees of relationship between any two relatives who are not related in a direct line of ascent or descent, start with the common ancestor of the relatives and count downwards. The degree in which they are related to each other is whatever degree they or the more remote of them is distant from the common ancestor.
2. In computing the degrees of relationship between any two relatives who are related in a direct line of ascent or descent, start with one of the persons and count up or down to the other person.
  - a. Two or more children of a common parent are related in the first degree, because from the common parent to each of the children is counted only one degree;
  - b. A person and his or her nephew are related in the second degree. The common ancestor is the grandparent of the nephew, who is two degrees removed from the nephew (the more distant of the two);

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

Ark. Code Ann. § 28-9-212 (Repl. 2004); *Carton v. Missouri Pacific R.R.*, 315 Ark. 5 (1993); *Morton v. Benton Publishing Co.*, 291 Ark. 620 (1987) See Appendix for Cox Chart.

**K. Kinsmen of the Half Blood**

- 1. Kinsmen of the half blood will inherit an intestate's property to the same extent as if they were kinsmen of the whole blood.

Ark. Code Ann. § 28-9-213 (Repl. 2004).

**L. Tables of Descents**

- 1. The intestate's heritable estate, subject to Ark. Code Ann. § 28-9-206, shall pass as follows:
  - a. To the intestate's children and descendants of each child of the intestate who may have predeceased the intestate.
  - b. If there are no descendants, to the intestate's surviving spouse. If the intestate and surviving spouse were married less than 3 years, the surviving spouse will take 50% of the estate.
  - c. If there is no surviving descendant or spouse, to the intestate's surviving parents, sharing equally, or to the sole surviving parent.
  - d. If the intestate is survived by no descendant but is survived by a spouse to whom he was married less than 3 years, the portion of the estate that does not pass to the surviving spouse shall pass to the intestate's surviving parents, sharing equally, or to the sole surviving parent.
  - e. If the intestate is survived by no descendant or parent, then all of his estate shall pass to his brothers and sisters and the descendants of any brothers and sisters of the intestate who may have predeceased the intestate.
  - f. If the intestate is survived by no descendant, spouse, parent or siblings, then all of the estate shall pass to the surviving grandparents, uncles and aunts of the intestate:
    - (a) each taking the same share;

(b) no distinction between maternal and paternal sides.

- g. If the intestate is survived by no descendant, spouse, parent, sibling, grandparents, uncles and aunts, then his estate shall pass to his surviving great grandparents and great uncles and great aunts.
- h. If heirs capable of inheriting the entire estate cannot be found within the inheriting classes, the intestate's property shall pass according to Ark. Code Ann. §28-9-215.

Ark. Code Ann. § 28-9-214 (Repl. 2004); *Scroggin v. Scroggin*, 103 Ark. App. 144(2008)(surviving spouse properly awarded a one-sixth interest in property, even though she had waived her right to dower in a conveyance, because she received her interest after the death of her husband pursuant to subdivision (2) of this section).

**M. Devolution When No Heir Can be Found**

- 1. If an heir cannot be found under Ark. Code Ann. § 28-9-214, then that portion of the estate shall pass as follows:
  - a. To the surviving spouse of the intestate even though they had been married less than 3 years.
  - b. If there is no such surviving spouse, to the heirs of the intestate's deceased spouse, or the last spouse if more than one marriage, but not the heirs of a divorced spouse.
  - c. If there are no heirs, surviving spouse, heirs of the surviving spouse, the estate shall escheat to the county wherein the decedent resided at death.

Ark. Code Ann. § 28-9-215 (Repl. 2004); *Newton County v. West*, 293 Ark. 461 (1987)(escheat occurs immediately upon the death of the intestate, not when the probate court enters an order finding that the estate must escheat).

**N. Advancements**

- 1. If a person dies intestate as to all his estate, property that he gave in his lifetime to an heir shall be treated as an advancement against the heir's share of the estate, if the intestate declared in writing or if the heir acknowledged in writing that the transfer was an advancement.
- 2. The property advanced shall be valued as of the time the heir came into possession of the property or at the time of the decedent's death, whichever occurs first.

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

Ark. Code Ann. § 28-9-216 (Repl. 2004).

**O. Debts to Decedents**

1. A debt owed by an heir to the decedent shall not be charged against the intestate share of any person except the debtor.
2. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the share of the debtor's descendants.

Ark. Code Ann. § 28-9-217 (Repl. 2004).

**P. Doctrine of First Purchaser Abolished**

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

Ark. Code Ann. § 28-9-218 (Repl. 2004).

**Q. Distinction Between Ancestral Estates and New Acquisitions Abolished**

1. For the purposes of intestate succession, the distinction between "ancestral estate" and "new acquisitions" in respect to real estate owned by an intestate is abolished.
2. The devolution of real estate and personal property which the intestate acquired by gift, devise or descent shall be controlled by the same rules that apply to the devolution of property acquired by the intestate in any other manner.

Ark. Code Ann. § 28-9-219 (Repl. 2004); *Heath v. Clear*, 280 Ark. 482 (1983).

**R. Doctrine of Worthier Title Abolished**

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

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

Ark. Code Ann. § 28-9-220 (Repl. 2004); *Eckert Heirs v. Harlow*, 251 Ark. 1018 (1972).

### III. TRUSTS

#### A. ELEMENTS

##### 1. Definitions

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

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

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

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

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

*Busby v. Worthen Bank & Trust*, 484 F. Supp. 647 (D.C. Ark. 1979); *Sutter v. Sutter*, 345 Ark. 12 (2001)(inter vivos trust), *Adams v. Harrell*, 173 Ark. 123 (1927).

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

ARK. CONST. Art. 9 §3; *Cox v. Wasson*, 187 Ark. 453 (1933); *Welch v. Cooper*, 11 Ark. App. 263 (1984). See, also, *Boyle v. AWA, Inc. & Wagner*, 319 Ark. 390 (1995).

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

*Edwards v. Edwards*, 311 Ark. 339 (1992); *Malone v. Hines*, 36 Ark. App. 254 (1992).

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

legal title.

*Edwards v. Edwards*, 311 Ark. 339 (1992); *Walker v. Hookers*, 282 Ark. 61 (1984).

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

*Avance v. Richards*, 331 Ark. 32 (1998)(trust denied); *Betts v. Betts & Simmons*, 326 Ark. 544 (1996); *Edwards v. Edwards*, 311 Ark. 339 (1992); *Armstrong v. Armstrong*, 181 Ark. 597 (1930); *Tripp v. Miller*, 82 Ark. App. 236 (2003) (insufficient evidence to impose constructive trust); *Wrightsell v. Johnson*, 77 Ark. App. 79 (2002) (constructive trust imposed); *Laird v. Shelnut*, 75 Ark. App. 193 (2001) (constructive trust imposed); *Coleman v. Coleman*, 59 Ark. App. 196 (1997).

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

*S & M Oil Co. v. Mosley*, 227 Ark. 250 (1957); *Davidson v. Edwards*, 168 Ark. 306 (1925); *Bray v. Timms*, 162 Ark. 247 (1924).

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

*Hawkins v. Scanlon*, 212 Ark. 180 (1947); *Oliver v. Oliver*, 182 Ark. 1025 (1931).

- h. Charitable Trusts are subject to the laws of this state and the provisions of the Internal Revenue Code of the United States, unless:
  - (1) The trust is determined to be not subject to either by a court of competent jurisdiction; or
  - (2) The trustee, with consent of the trustor and with or without judicial proceedings, amends the trust instrument so as not to be subject to such regulations;
  - (3) None of the above shall impair the rights or powers of the courts,

officers, agencies, or state government with respect to said trust.

Ark. Code Ann. § 28-72-302 (1987). See also, Ark. Code Ann. § 26-51-201; *Bakos v. Dryder & Ledwidge*, 260 Ark. 621 (1976); *Bosson v. Woman's Christian National Library Association*, 216 Ark. 334 (1949).

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

Ark. Code Ann. § 28-72-201 (Repl. 2004).

- j. A public trust is:

- (1) Effective upon acceptance by the beneficiary;

Ark. Code Ann. § 28-72-202(a)(Repl. 2004).

- (2) Subject to the leasing of the subject property to the trustee;

Ark. Code Ann. § 28-72-204 (Repl. 2004).

- (3) Accepted by endorsement upon trust instrument by accepting governmental authority;

Ark. Code Ann. § 28-72-202(c)(Repl. 2004).

- (4) Subject to the appointment, powers, duties, term and compensation (for trustee) provisions of trust instrument;

Ark. Code Ann. § 28-72-203 (Repl. 2004).

- (5) Subject to liability by acts or omissions of the trustee only to the extent of trust estate;

Ark. Code Ann. § 28-72-206 (Repl. 2004).

- (6) Subject to amendment or termination of the trust instrument as provided therein, or by law, or by agreement of all concerned;

Ark. Code Ann. § 28-72-205 (Repl. 2004).

- (7) Exempt from taxation by the state or its governmental taxing subdivisions to the same extent as property of the beneficiary not



so in trust.

Ark. Code Ann. § 28-72-207 (Repl. 2004).

## 2. Trusts - Generally

- a. Circuit courts shall have original jurisdiction of all justiciable matters not otherwise assigned pursuant to the Arkansas Constitution.

Ark. Code Ann. § 16-13-201(a)(Supp. 2009); *Sutter v. Sutter*, 345 Ark. 12 (2001)(construction, interpretation and operation of trusts are equitable proceedings).

- (1) It is the court's to reconcile conflicting provisions of a trust to attempt to give meaning to every provision of the trust.
- (2) The paramount principle is that the settlor's intention governs.

*Summers v. Garland*, 352 Ark. 29 (2003) (interpretation; future interest in trust property); *Wisener v. Burns*, 345 Ark. 84 (2001)(instrument creating trust may provide for principal of trust to be in one person and income paid to another, even the settlor); *Aycock Pontiac, Inc. v. Aycock*, 335 Ark. 456 (1998).

- b. A trustee may, with agreement of sureties, if any, deposit trust funds for safekeeping with court approval both as to deposit and withdrawal.

Ark. Code Ann. § 28-69-101 (Repl. 2004).

- c. Bank or depository shall show ownership of deposit and/or investment including whether it is in a common trust fund, or other approved banking facility.

Ark. Code Ann. §§ 28-69-202 to -205 (Repl. 2004).

- d. Depository trustee shall account as desired or requested and court shall approve same.

Ark. Code Ann. § 28-69-202 (Repl. 2004).

- e. Trust powers may be:
  - (1) Provided for by trust instrument, will, statutes, or judicial order.
  - (2) Incorporated by reference to statutory powers in will or inter vivos trust if intent to do so is express.

Ark. Code Ann. §§ 28-69-301 to -304 (Repl. 2004).

- f. None of the above shall affect power of a court of competent jurisdiction over the fiduciary.

Ark. Code Ann. § 28-69-302 (Repl. 2004).

- g. Without court order, trustee may divide one trust into two or more if in best interests of beneficiary for tax purposes.

Ark. Code Ann. § 28-69-703 (Repl. 2004).

**B. UNIFORM PRINCIPAL AND INCOME ACT**

**Ark. Code Ann. § 28-70-101 to -605 (Repl. 2004 & Supp. 2009)**

**1. Administration**

- a. In administering a trust, a fiduciary:

- (1) shall administer the trust in accordance with the terms of the trust or will;
- (2) may administer by exercise of a discretionary power given by the terms of the trust or will;
- (3) shall administer in accordance with these Code provisions unless the terms of the trust or will contain a different provision or give the fiduciary a discretionary power of administration;
- (4) shall add a receipt or charge a disbursement to principal to extent that terms of trust and Code do not provide a rule for allocating the receipt or disbursement to or between principal and income.

Ark. Code Ann. § 28-70-103(a) (Repl. 2004). See Ark. Code Ann. § 28-70-102 (Repl. 2004); *Peek v. Simmons First Nat'l Bank*, 309 Ark. 294 (1992); *Salem v. Lane Processing Trust*, 72 Ark. App. 340 (2001).

- b. In exercising power to adjust or discretionary power of administration, a fiduciary shall administer a trust or estate impartially, based upon fairness or reasonableness to all beneficiaries, unless terms of trust or will clearly manifest intention to favor one or more beneficiaries.

Ark. Code Ann. § 28-70-103(b) (Repl. 2004).

- c. A trustee has the power to adjust between principal and income to the extent necessary to invest and manage the estate as a prudent investor.

Ark. Code Ann. § 28-70-104(a) (Supp. 2009).

**C. UNIFORM TESTAMENTARY ADDITIONS TO TRUSTS ACT**  
**Ark. Code Ann. §28-27-101 to -106 (Repl. 2004)**

**1. Provisions**

- a. Act 751 of 1995, Ark. Code Ann. § 28-27-101 to -106 (Repl. 2004), applies to wills of testators who die after July 31, 1995.
- b. Purpose is to make uniform the laws with respect to the subject of this chapter among other adopting states.

Ark. Code Ann. §§ 28-27-102 & -103 (Repl. 2004).

- c. A devise or bequest, valid under this state's law, may be made:
  - (1) By will to a trustee of an established trust or a trust to be established;
  - (2) By a testator:
    - (a) Individually or with others;
    - (b) Funded or unfunded;
    - (c) With or without reservation of rights of ownership of insurance contracts;
  - (3) If the trust is identified:
    - (a) In the will;
    - (b) Set forth in writing in another instrument executed before or concurrently with the will; or
    - (c) Set forth in a valid last will and testament of a person who has predeceased the testator.

Ark. Code Ann. § 28-27-101(a) (Repl. 2004).

- d. The validity of the trust is not affected by:
  - (1) A provision making it amendable or revocable, or both;
  - (2) Amendment of the trust after execution of the will or death of the testator.

Ark. Code Ann. § 28-27-101(a) (Repl. 2004).

- e. Unless the testator's will requires it, property devised or bequeathed in trust shall:
  - (1) Not be deemed to be held under a testamentary trust of the testator, but shall become part of the trust to which given; and
  - (2) Be administered and disposed of in accordance with provisions of the will or instrument creating it, including amendments made before the death of testator; and
  - (3) Include, if the testator's will so provides, amendments to the trust made after testator's death.

Ark. Code Ann. § 28-27-101(b) (Repl. 2004); *Sutter v. Sutter*, 345 Ark. 12 (2001); *McCollum v. McCollum*, 328 Ark. 607 (1997).

- f. A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse, unless the testator's will provides otherwise.

Ark. Code Ann. § 28-27-101(c)(Repl. 2004).

- g. Arkansas law requires proof beyond a reasonable doubt and shifts burden of proof to proponent of a testamentary trust who is a beneficiary to show that procurement was not the result of undue influence and that testator had requisite mental capacity.

*Noland, et al. v. Noland*, 55 Ark. App. 232 (1996).

#### **D. Cases Involving Trusts**

*Buchbinder v. Bank of America*, 342 Ark. 632 (2000)(case of first impression involving beneficiaries who sought and received disbursement in excess of amounts specified in trust; they could not recover from trustee because settlor and beneficiaries consented. See Ark. Code Ann. § 28-69-401 (Repl. 2004).

## IV. FIDUCIARIES AND TRUST ESTATES

### A. Fiduciaries

#### 1. Types

- a. Trustee under any express trust;
- b. Executor, administrator, guardian, curator or agent;
- c. Trustee under an implied, resulting, or constructive trust;
- d. Receiver, trustee in bankruptcy;
- e. Assignee for benefit of creditors;
- f. Partner, agent, officer of a corporation, public or private;
- g. Public officer, nominee; or
- h. Any other person acting in a fiduciary capacity for any person, trust or estate.

Ark. Code Ann. § 28-69-201 (Repl. 2004).

#### 2. Power to Receive and Deposit Funds

- a. By agreement with sureties or order of court, fiduciaries may receive and deposit funds in banks, investments, common trust funds, and international or inter-American banks.

Ark. Code Ann. § 28-69-101 (Repl. 2004); Ark. Code Ann. § 28-69-202-205 (Repl. 2004).

#### 3. Subject To

- a. Standards of care and conduct;

Ark. Code Ann. § 28-71-101-106 (Repl. 2004 & Supp. 2009).

- b. Accounting as requested, or ordered by court;

*Salem v. Lane Processing Trust, et al.*, 72 Ark. App. 340 (2001)(beneficiary's request for

trust records was unreasonable; entitled to a general accounting).

- c. Powers provided by trust instrument or statute;
- d. Power of court notwithstanding any of the above;
- e. Liability for acts or omissions contrary to their trust;
- f. Provisions of Prudent Investor Rule.

Ark. Code Ann. §§ 28-69-202 & -203 (Repl. 2004); Ark. Code Ann. §§ 28-69-301 to -304 (Repl. 2004).

#### 4. Minors

- a. All persons under 18 years of age shall be considered minors and would generally require guardian either natural or legal to act for them unless:
  - (1) Their disabilities of minority are legally removed; or
  - (2) A guardian ad litem is appointed to represent or act for them.

Ark. Code Ann. §§ 9-25-101 & -104 (Repl. 2008).

- b. Any person owing money or property valued at \$5,000 or less to a minor may deliver it:
  - (1) To a minor 18 years of age or married; or
  - (2) To a parent; person with care and custody of minor with whom minor resides; guardian of minor; or financial institution incident to deposit in minor's name.

Ark. Code Ann. §9-26-102 (Repl. 2008); *Walker v. Stephens*, 3 Ark. App. 205 (1981).

## **B. Estates of Missing Persons**

### 1. Jurisdiction

- a. Circuit courts have jurisdiction of the estates of persons imprisoned in a foreign country and of the estates of missing persons.

Ark. Code Ann. § 28-72-101 (Repl. 2004).

2. Appointment of Trustee

- a. The court shall appoint a trustee of the estate of a person who is imprisoned in a foreign country or who is missing and who has a family or dependents residing in Arkansas.
- b. A person whose support is dependent upon the missing person or person imprisoned in a foreign country may petition for the appointment of a trustee.

Ark. Code Ann. § 28-72-102 (Repl. 2004).

3. Powers and Duties of Trustee

- a. The trustee shall have the authority to collect money or property that may be due the missing person or person imprisoned in a foreign country.
- b. The trustee shall immediately report to the court the amount of money or property as it is received.
- c. The court shall have the authority to authorize the trustee to use the money or property for the support and maintenance of the family of the missing person or person imprisoned in any foreign country.

Ark. Code Ann. § 28-72-103 (Repl. 2004).

4. Bond of Trustee

- a. The trustee shall give bond in double the amount of property or money received.
- b. Upon the appearance of the missing person or person imprisoned in any foreign country, the trustee shall be required to account to and turn over to the person the balance of all funds and property.
- c. The bondsman's liability for any money or property unaccounted for by the trustee shall be the same as his liability for administrators.

Ark. Code Ann. § 28-72-104 (Repl. 2004).

**C. Power of Attorney for Benefit of Infirm**

1. Purpose

- a. Proceeding for a state resident who wishes to execute a power of attorney in anticipation of or because of infirmity resulting from:
  - (1) injury;
  - (2) old age;
  - (3) senility;
  - (4) blindness;
  - (5) disease; or
  - (6) other related or similar cause;
- b. To provide for the care of his or her person or property, or both, who shall execute the instrument in one of the following three methods.

Ark. Code Ann. § 28-68-304 (Repl. 2004); *Filk v. Beatty*, 298 Ark. 40 (1989).

2. Methods of executing power of attorney

- a. In the presence and with approval of circuit judge of county of principal's domicile; or
- b. In the presence of at least two witnesses attesting execution by affidavit to be filed with instrument which shall be approved by circuit court of county of principal's domicile; or
- c. In the presence of a notary public who shall so acknowledge by certificate to be filed with instrument which shall be approved by circuit court of county of principal's domicile.

Ark. Code Ann. § 28-68-304 (Repl. 2004).

3. Scope

- a. Power not invalidated by reason of any subsequent change in mental or physical condition of principal.

Ark. Code Ann. § 28-68-306 (Repl. 2004).

4. Judicial approval



- a. Approval of court may be given only if:
  - (1) principal requests approval;
  - (2) attorney in fact consents to serve;
  - (3) the judge is satisfied that:
    - (a) principal qualifies under Ark. Code Ann. § 28-68-301, et seq.
    - (b) principal reasonably understands nature and purpose of power;
    - (c) Attorney in fact is suitable;
    - (d) Provisions of Ark. Code Ann. § 28-68-301 et seq. have been observed;
- b. Approval may be given:
  - (1) informally in chambers or other convenient place;
  - (2) without notice; and
  - (3) with endorsement on face of original of instrument.

Ark. Code Ann. § 28-68-304 (Repl. 2004).

#### 5. Contents and Filing

- a. Provide therein the scope, terms, and applicability of the power;
- b. Be filed with the clerk of the probate records in the county of the principal's domicile;
- c. Be limited to property values prescribed by law;
- d. Be subject to termination as provided by law.

Ark. Code Ann. §§ 28-68-303, -305, -307, - 308, -311, & -312 (Repl. 2004).

#### 6. Attorney In Fact

- a. Subject to removal for cause or as provided for in the power;
- b. Subject to appointment of a successor if needed or required;
- c. Subject to standards of good conduct and liability applicable to other fiduciaries;
- d. Compensated for services and reimbursed for reasonable expenses payable out of income or assets subject to the power;
- e. Subject to accounting to his principal as requested, or as directed by a court, and upon termination of his power or authority; and
- f. Shall surrender any and all property held by him upon termination.

Ark. Code Ann. §§ 28-68-308 through -310, & -313 (Repl. 2004).

**D. UNIFORM TRANSFERS TO MINORS ACT**  
**Ark. Code Ann. 9-26-201 to -227 (Repl. 2008)**

1. Application.

- a. Uniform Transfers to Minors Act applies after March 21, 1985, if the transfer purports to have been made under the Uniform Gifts to Minors Act; or
- b. Instrument used to make the transfer uses in substance the designation " as custodian under the Uniform Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state, and application is necessary to validate the transfer.

Ark. Code Ann. § 9-26-221 (Repl. 2008).

2. Method of transfers

- a. Irrevocable gift or irrevocable exercise of power or appointment in favor of a custodian for benefit of minor;

Ark. Code Ann. § 9-26-204 (Repl. 2008).

- b. Irrevocable transfer by will or trust;

Ark. Code Ann. § 9-26-205 (Repl. 2008).

- c. Irrevocable transfer by another fiduciary;

Ark. Code Ann. § 9-26-206 (Repl. 2008).

- d. Irrevocable transfer by an obligor;

Ark. Code Ann. § 9-26-207 (Repl. 2008).

- e. May be made for only one minor and only one person may be the custodian.

Ark. Code Ann. § 9-26-210 (Repl. 2008).

### 3. Manner of Creating Custodial Property

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

Ark. Code Ann. § 9-26-209 (Repl. 2008).

### 4. Irrevocable Transfer

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

Ark. Code Ann. § 9-26-211 (Repl. 2008).

### 5. Care and Use of Custodial Property

- a. Custodian shall:

- (1) Take control of custodial property;
- (2) Record title to custodial property;
- (3) Collect, hold, manage, invest custodial property;
- (4) Observe standard of prudent person;
- (5) Exercise special skill or expertise, if designated custodian because of such skill;

- (6) Keep custodial property separate from all other property;
- (7) Keep records of all transactions with respect to the custodial property;
- (8) Make records available for inspection by parent, or legal representative of the minor, or by the minor if the minor has attained the age of 14 years.

Ark. Code Ann. § 9-26-212 (Repl. 2008).

- b. Custodian may invest in or pay premiums on life insurance on the life of the minor only if the minor or the minor's estate is the sole beneficiary; or the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the irrevocable beneficiary.

Ark. Code Ann. § 9-26-212(c) (Repl. 2008).

- c. A custodian may deliver to the minor as much of the property as the custodian considers advisable (without court order).

Ark. Code Ann. § 9-26-214(a) (Repl. 2008).

- d. On petition of an interested person of the minor, if at least 14 years of age, the court may order the custodian to deliver property to the minor.

Ark. Code Ann. § 9-26-214(b) (Repl. 2008).

#### 6. Custodian: Power, Expenses, Compensation, Bond

- a. A custodian shall have all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property.

Ark. Code Ann. § 9-26-213 (Repl. 2008).

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

Ark. Code Ann. § 9-26-215(a) (Repl. 2008).

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

Ark. Code Ann. § 9-26-215(b) (Repl. 2008).

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

Ark. Code Ann. §9 -26-215(c) (Repl. 2008).

#### 7. Exemption of Third Person from Liability

- a. A third person in good faith may deal with a person purporting to act in the capacity of a custodian and, in the absence of knowledge, shall not be responsible for determining:
  - (1) The validity of the purported custodian's designation;
  - (2) The authority for any acts of the purported custodian;
  - (3) The validity of any instrument executed by the person purporting to make a transfer or by the purported custodian;
  - (4) The propriety of the application of any of the minor's property delivered to the purported custodian.

Ark. Code Ann. § 9-26-216 (Repl. 2008).

#### 8. Liability to Third Persons

- a. A claim may be asserted against the custodial property by proceeding against the custodian in the custodial capacity if the claim is based on:
  - (1) a contract entered into by a custodian acting in a custodial capacity;
  - (2) an obligation arising from the control of custodial property; or
  - (3) a tort committed during the custodianship.
- b. A custodian shall not be personally liable:
  - (1) On a contract properly entered into in the custodial capacity unless the custodian fails to reveal that capacity and to identify the custodianship in the contract; or
  - (2) For an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is

personally at fault.

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

Ark. Code Ann. § 9-26-217 (Repl. 2008).

9. Renunciation, Resignation, Death or Removal of Custodian

- a. A person nominated as custodian may decline to serve;
- b. A custodian may designate a trust company or an adult other than a transferor under Ark. Code Ann. § 9-26-204 as successor custodian;
- c. A custodian may resign at any time;
- d. If a custodian dies or becomes ineligible to serve or incapacitated without having designated a successor and the minor has attained the age of 14 years, the minor may designate a successor custodian. If the minor has not attained the age of 14, Ark. Code Ann. § 9-26-218(d) specifies who may serve as successor custodian.
- e. A transferor, an adult member of the minor's family, a guardian of the person of the minor, the conservator of the minor, or the minor, if he has attained the age of 14 years, may petition the court to remove the custodian for cause and to designate a successor custodian.
- f. If a custodian is removed, the court shall require an accounting and order delivery of the custodial property and records to the successor custodian.

Ark. Code Ann. § 9-26-218-219(d) (Repl. 2008).

10. Accounting by Custodian

- a. The following persons may petition the court for an accounting by the custodian or for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property:
  - (1) A minor who has attained the age of 14 years;
  - (2) The minor's guardian of the person;

- (3) An adult member of the minor's family;
- (4) A transferor.

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

Ark. Code Ann. § 9-26-219 (Repl. 2008).

#### 11. Termination of Custodianship

- a. The custodian shall transfer the custodial property to the minor or the minor's estate upon the earlier of:
  - (1) The minor's attainment of age 21 years (for property transferred under Ark. Code Ann. §§ 9-26-204 or -205);
  - (2) The minor's attainment of age 18 years (for property transferred under Ark. Code Ann §§ 9-26-206 or -207); or
  - (3) The minor's death.
- b. A transferor may designate that custodial property be transferred to the minor at any time between the ages of 18 and 21 years by using designated statutory wording at the time the property is transferred to the custodian.

Ark. Code Ann. § 9-26-220 (Repl. 2008).

## V. GUARDIAN AND WARD

### A. Procedure

#### 1. Jurisdiction

- a. Circuit court has exclusive jurisdiction over all matters of guardianship other than guardians ad litem.

Ark. Code Ann. § 28-65-107(a) (Supp. 2009); *Moore v. Sipes*, 85 Ark. App. 15 (2004)(circuit court had authority to appoint a guardian and therefore had jurisdiction to appoint guardian for mother's children).

- b. This chapter has no effect over the jurisdiction of any court authorized to remove disabilities of minority.

Ark. Code Ann. § 28-65-107(b) (Supp. 2009).

- c. If a juvenile is the subject of a pending case filed under the Arkansas Juvenile Code, such as dependency neglect, delinquency, or FINS, a guardianship petition that arises shall be filed in that case.

Ark. Code Ann. § 28-65-107(c) (Supp. 2009). See Administrative Order 14, that a guardianship proceeding that arises while a juvenile proceeding is pending may be heard in the same juvenile proceeding.

#### 2. Venue

- a. Venue for appointment of a guardian shall be in the Arkansas county where:

- (1) the incapacitated person is domiciled;
- (2) the incapacitated person resides, if the incapacitated person is not domiciled in this state; or
- (3) his property, or the greater part of it, is situated, when the incapacitated person is neither domiciled nor resides in this state; and

Ark. Code Ann. § 28-65-202(a) (Repl. 2004); *Moore v. Sipes*, 85 Ark. App. 15 (2004).



- (4) in a juvenile court which has previously asserted jurisdiction over the juvenile in another proceeding.

Ark. Code Ann. § 9-27-307(a)(4) (Supp. 2009).

- b. If proceedings are commenced in more than one county, they shall be stayed, except for the first proceeding begun, which will make a final determination of venue.

Ark. Code Ann. § 28-65-202(b) (Repl. 2004); see *Blunt v. Bell*, 337 Ark. 535 (1999).

- c. If proper venue is determined to be in another county, the court shall transmit the original file to the proper county.
- d. If before the end of a guardianship, it appears that the proceeding was commenced in a county of improper venue, then the court shall order the proceeding transferred to another circuit court.
- e. If during the guardianship, the residency of the incapacitated person changes and it would be in the best interests of the ward, the court in its discretion may order the proceedings transferred to another circuit court.
- f. With any transfer of proceedings, all pertinent papers, files and certified copies of any court orders shall be transferred to the receiving court.

Ark. Code Ann. § 28-65-202 (Repl. 2004); *Blunt v. Cartwright*, 342 Ark. 662 (2000).

### 3. For Whom a Guardian May be Appointed

- a. A guardian of the estate may be appointed for an incapacitated person.
- b. A guardian of the person may be appointed for any incapacitated person except a married minor who is incapacitated for the sole reason of his or her minority.

Ark. Code Ann. § 28-65-201 (Repl. 2004); *In re Powers*, 311 Ark. 101 (1992)(mere physical presence of incompetent who had resided in a sister state was proper basis for jurisdiction in this state of the person and estate); *Deffenbaugh v. Estate of Claphan*, 48 Ark. App. 208 (1995)(sets out requirements for “capacity”).

### 4. Qualifications of a Guardian

- a. The following are qualified to be a guardian:

- (1) of the person and estate of an incapacitated person:
  - (a) a natural person,
  - (b) who is a resident of Arkansas,
  - (c) 18 years or older,
  - (d) of sound mind, and
  - (e) not a convicted and unpardoned felon.
- (2) of the person and estate of a minor:
  - (a) the Arkansas Department of Human Services, or
  - (b) any charitable organization, or
  - (c) any humane society incorporated under Arkansas law when the major portion of support for the minor is from the department or organization; or when the court finds that the minor has been abandoned by parents or that parents are incapacitated or unfit for the duties of guardianship, or if no other suitable person is found.
- (3) of the person of his or her child: a parent, including one under the age of 18 years old;
- (4) of the estate of an incapacitated person:
  - (a) a corporation authorized to do business in Arkansas and empowered by its charter to become a guardian;
  - (b) a bank or similar institution with trust powers;
- (5) of a minor: a nonresident natural person with qualifications listed in “a(1)” above, except for residence, who has appointed a resident agent to accept service of process in any action or suit with respect to the guardianship and the appointment is registered with the court.

Ark. Code Ann. § 28-65-203(a)-(e) (Supp. 2009); *In re Pollock*, 293 Ark. 195

(1987)(either the adoptive parents or the child must be a resident of Arkansas or an agency of the State of Arkansas must have care, custody or control of the child).

- b. The following are *not* qualified to become a guardian of the person or estate:
  - (1) any person whom the court finds unsuitable to perform the duties incident to the appointment;
  - (2) a sheriff, clerk of probate proceedings, or deputy of either, or a judge over probate proceedings, except that the person may be appointed temporary guardian if he is related to the incapacitated person within 3 degrees of consanguinity and the court determines that any potential conflict of interest is insubstantial and that the appointment is in the best interest of the ward;
  - (3) no public agency or its employee acting in his or her official capacity, except that the person may be appointed temporary guardian if he is related to the incapacitated person within 3 degrees of consanguinity and the court determines that any potential conflict of interest is insubstantial and that the appointment is in the best interest of the ward;
  - (4) an employee of a public agency that provides direct services to the incapacitated person may not serve as guardian of the person or estate or as temporary guardian, except that such person may be appointed temporary guardian if he is related to the incapacitated person within 3 degrees of consanguinity and the court determines that any potential conflict of interest is insubstantial and that the appointment is in the best interest of the ward.

Ark. Code Ann. § 28-65-203(f)-(I) (Supp. 2009); Ark. Code Ann. § 28-9-212 (Repl. 2004)(counting degrees of consanguinity); *Bailey v. Maxwell*, 94 Ark. App. 358 (2006)(Grandmother not qualified as guardian of grandchildren because she offered no testimony that she was not a convicted an unpardoned felon, a statutory prerequisite to serving).

## 5. Preferences

- a. The parent(s) of an unmarried minor shall be preferred over all others for appointment as guardian, if qualified and, in the opinion of the court, suitable.

- b. Subject to the above preference for parents, the court shall appoint as guardian the one most suitable who is willing to serve having due regard to:
  - (1) any request contained in a will or other written instrument executed by the parent or legal custodian of a minor;
  - (2) any request made by a minor who is fourteen (14) years or over;
  - (3) any request made by the spouse of an incapacitated person;
  - (4) the relationship by blood or marriage to the person for whom guardianship is sought.
  
- c. The court shall consider any request made by the incapacitated person concerning his preference for guardian. This request may be made to the court by any means, but the incapacitated person is not required to make a court appearance.

Ark. Code Ann. § 28-65-204 (Repl. 2004); *Freeman v. Rushton*, 360 Ark. 445 (2005)(maternal grandparents were awarded guardianship over father who had never had custody; it was in the child's best interests to remain with his grandparents); *Blunt v. Cartwright*, 342 Ark. 662 (2000)(preferential rights of a parent do not attach automatically; the parent must be both qualified and, in the court's opinion, suitable, before he is preferred over all others); *Moore v. Sipes*, 85 Ark. App. 15 (2004)(error to appoint grandparents as guardians where evidence did not show that mother was unfit); *In re Guardianship of Markham*, 32 Ark. App. 46 (1990) (preferential rights of the parents are only secure as long as they discharge their obligations).

## 6. Petition

- a. Any person may file a petition for the appointment of himself, herself, or some other qualified person as guardian.
  
- b. The petition shall contain:
  - (1) the name, age, residence, and post office address of the incapacitated person;
  - (2) the nature of the incapacity and purpose of the guardianship;

See Ark. Code Ann. § 28-65-104 (Repl. 2004)(classifications of incapacitated person).

- (3) the approximate value and description of the incapacitated person's

property, including any compensation, pension, insurance, or allowance to which he may be entitled;

- (4) whether there is, in any state, a guardian of the person or of the estate of the incompetent;
- (5) the residence and post office address of the person whom petitioner asks to be appointed guardian;
- (6) the names and addresses of the persons most closely related to the incapacitated person by blood or marriage;
- (7) the name and address of the person or institution having the care and custody of the incapacitated person;
- (8) the names and addresses of wards for whom any natural person whose appointment is sought is already guardian;
- (9) the reasons why the appointment of a guardian is sought and the interest of the petitioner in the appointment;
- (10) a statement of the respondent's alleged disability;
- (11) a recommendation proposing the type, scope, and duration of guardianship;
- (12) a statement that any facility or agency from which the respondent is receiving services has been notified of the proceedings; and
- (13) the names and addresses of others having knowledge about the person's disability.

Ark. Code Ann. § 28-65-205 (Repl. 2004).

- c. If an application is made for guardianship for two or more incapacitated persons who are children of a common parent, or are parent and child or are husband and wife, it shall not be necessary that a separate petition, bond, or other paper be filed for each incompetent, and the guardianship may be considered as one proceeding, except that the guardian shall maintain and file separate accounts for the estates of each of the wards.

Ark. Code Ann. § 28-65-206 (Repl. 2004).

## B. Notice

1. Notice of Hearing for Appointment
  - a. Notice of the hearing for appointment of guardian is *not* required for any person:
    - (1) who has signed the petition;
    - (2) who has waived notice in writing, except that the alleged incapacitated person may *not* waive notice;
    - (3) who actually appears at the hearing;
    - (4) whose existence, relationship to the alleged incapacitated person, or whereabouts is unknown and cannot be ascertained by reasonable diligence;
    - (5) other than the alleged incapacitated person, one whom the court finds to be beyond the limits of the continental United States, or himself incompetent;
    - (6) the alleged incapacitated person, whom the court finds is detained or confined by a foreign power or has disappeared.
  - b. Except for appointment of a temporary guardian, notice of the hearing for appointment of guardian *shall* be required for:
    - (1) the alleged incapacitated person if over 14 years of age, and the incapacitated person *shall* be notified of his rights under Ark. Code Ann. § 28-65-213; notice of his rights shall be served with the notice of hearing;
    - (2) the parents of an alleged incapacitated person who is a minor;
    - (3) the spouse of the alleged incapacitated person;
    - (4) any other person who is the guardian or has custody of the alleged incapacitated person, and the director of any agency from which the respondent is receiving services;
    - (5) DHS, when the petition seeks the appointment of a guardian who, at the time the petition is filed, serves as guardian of five (5) or

more minor wards;

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

(7) if directed by the court, any department, bureau, agency, or political subdivision of the United States or of Arkansas:

(a) which makes or awards pension, compensation, insurance, or other allowance for the benefit of the ward or his estate;

(b) any charitable organization which may be charged with the supervision, control, or custody of the incompetent; or

(c) any other person designated by the court.

c. If the alleged incapacitated person is over 14 years of age, there shall be personal service upon him or her, if personal service can be had; service on others may be had in any manner provided by Ark. Code Ann. § 28-1-112(b) or (e)(Repl. 2004). Service in probate proceedings can be by any method allowed by Rules of Civil Procedure.

d. If good cause is shown, the court may reduce the number of days of notice, but in every case at least twenty 20 days notice shall be given.

e. It shall not be necessary that the alleged incapacitated person be represented by a guardian ad litem in the proceedings.

Ark. Code Ann. § 28-65-207 (Repl. 2004); *Earle v. Bennett*, 289 Ark. 448 (1986)(notice to incapacitated person required).

## 2. Notice of Other Hearings

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

(1) the guardian of the person;

(2) the guardian of the estate;

(3) if directed by the court, any department, bureau, agency, or

political subdivision of the United States or of Arkansas:

- (a) which makes or awards pension, compensation, insurance, or other allowance for the benefit of the ward's estate; or
- (b) any charitable organization which may be charged with the supervision, control, or custody of the incapacitated person; or
- (c) any other person whom the court may designate.

Ark. Code Ann. § 28-65-208 (Repl. 2004).

### 3 Request for Special Notice of Hearings

- a. At any time after the issuance of letters of guardianship, the following entities or individuals may file a written request for written notice of all hearings:
  - (1) Any department, bureau, agency, or political subdivision of the United States or of Arkansas:
    - (a) which makes or awards pension, compensation, insurance, or other allowance for the benefit of the ward's estate; or
    - (b) any charitable organization, which may be charged with the supervision, control, or custody of the incapacitated person; or
    - (c) an interested person, either in person or by attorney.
- b. The entity or individual may serve the guardian personally or his attorney, and may file with the clerk of the court where the proceedings are pending the following: a written admission or proof of service, and the written request of the person seeking notice, stating that he desires written notice of all petitions for the settlement of accounts; for the sale, mortgage, lease, or exchange of any property of the estate; for an allowance of any nature payable from the ward's estate; for the investment of funds of the estate; for the removal, suspension, or discharge of the guardian or final termination of the guardianship; and for any other matter affecting the welfare or care of the incapacitated person and his property.

Ark. Code Ann. § 28-65-209 (Repl. 2004).



### **C. Proof Required for Appointment of Guardian**

1. Before appointing a guardian, a court must be satisfied that:
  - a. The person for whom a guardian is sought is either a minor or otherwise incapacitated;
  - b. A guardianship is desirable to protect the minor or incapacitated person; and
  - c. The person to be appointed guardian is qualified and suitable for guardianship.

Ark. Code Ann. § 28-65-210 (Repl. 2004); *Smith v. Thomas*, 373 Ark. 427 (2008); *Devine v. Martens*, 371 Ark. 60 (2007); *Freeman v. Rushton*, 360 Ark. 445 (2005); *Blunt v. Cartwright*, 342 Ark. 662 (2000)(a child's grandparents, rather than her putative father, were properly appointed guardians); *Bailey v. Maxwell*, 94 Ark. App. 358 (2006); *Moore v. Sipes*, 85 Ark. App. 15(2004).

### **D. Hearings**

1. Determination of Incapacity
  - a. The fact of minority, disappearance, detention, or confinement by a foreign power, shall be established by satisfactory evidence.
  - b. For all other cases, incapacity shall require that the evidence of incapacity include the oral testimony or sworn written statement of one or more qualified professionals, whose qualifications shall be set forth in their testimony or written statement.
  - c. If the alleged incapacitated person is confined or undergoing treatment in a mental institution, a hospital, or a penal institution, one of the professionals shall be a member of the medical staff of that hospital or institution.
  - d. At its discretion, the court may require that the alleged incapacitated person appear in court.
  - e. The court shall fix the fees paid to the examiners, which shall be charged as part of the costs of the proceeding.

- f. The costs of the proceeding shall be paid for by the petitioner, who shall be reimbursed by the estate if a guardian is appointed.

Ark. Code Ann. § 28-65-211 (Repl. 2004); *In Re: Bailey*, 299 Ark. 352 (1989)(statutory requirements for determining incapacity); *Cogburn v. Wolfenbarger*, 85 Ark. App. 206 (2004).

## 2. Evaluations

- a. A professional evaluation of the alleged incapacitated person shall be performed before the court hearing on any petition for guardianship, except when appointment is being made because of minority, disappearance, detention, or confinement by a foreign power, or pursuant to Ark. Code Ann. § 28-65-218.
- b. The evaluation, performed by a professional(s) with expertise in the respondent's alleged incapacity, shall include the following:
  - (1) the respondent's medical and physical condition;
  - (2) his adaptive behavior;
  - (3) his intellectual functioning; and
  - (4) recommendation as to the specific areas for which assistance is needed and the least restrictive alternatives available.
- c. If no professional evaluations performed within the last 6 months are available, the court will order an independent evaluation.
- d. If a guardian is appointed, the estate of the incapacitated person will pay for the independent evaluation. If a guardian is not appointed, the cost will be borne by the petitioner.
- e. The court may request the help of a DHS resource person to gather records, investigate the respondent's condition, and help arrange for appropriate professional evaluations; DHS shall issue regulations to implement this provision.
- f. Any existing evaluations made by the Arkansas Department of Human Services of which the court has notice must be considered by the court.

Ark. Code Ann. § 28-65-212 (Repl. 2004); *In Re: Bailey*, 299 Ark. 352 (1989); *Cogburn*

*v. Wolfenbarger*, 85 Ark. App. 206 (2004).

3. Effect of Determination Hearings

- a. At the hearing, the respondent shall have the right to:
  - (1) be represented by counsel;
  - (2) present evidence on his or her own behalf;
  - (3) cross-examine adverse witnesses;
  - (4) remain silent;
  - (5) be present; and
  - (6) require the attendance by subpoena of one or more of the professionals who prepared the evaluation.
- b. The burden of proof by clear and convincing evidence is the petitioner's, and a determination of incapacity shall be made before consideration of a disposition.
- c. If the respondent is found to be incapacitated, the court shall determine the extent of the incapacity and the feasibility of less restrictive alternatives to guardianship to meet the needs of the respondent.
- d. If the court finds that alternatives to guardianship are feasible and adequate to meet the needs of the respondent, the court may dismiss the action.
- e. If the court finds that the respondent is substantially without capacity to care for himself or his estate, a guardian for the person, estate, or both shall be appointed.

Ark. Code Ann. § 28-65-213 (Repl. 2004); *Deffenbaugh v. Estate of Claphan*, 48 Ark. App. 208 (1995)(once a court finds "lack of capacity," the court must appoint a guardian); *Morrell v. Morrell*, 48 Ark. App. 54 (1994)(ruling from the bench that the court was appointing a guardian is not effective until an order is filed as set out in Administrative Order No. 2 and Rule 58 of the ARCP).

4. Guardianship Order

- a. The court order establishing guardianship shall contain findings of fact

that the respondent:

- (1) is an incapacitated person; and
  - (2) is in need of a guardian for the person, or estate, or both.
- b. The order may limit the power and duties of the guardian and may define the legal and civil rights retained by the incapacitated person.
  - c. If satisfied that a guardian should be appointed, the court shall appoint one or two general or limited guardians of the person, estate, or both. However, not more than one guardian of the person shall be appointed unless they are husband and wife.
  - d. If the guardianship is limited, the court order shall set forth the specific powers, authorities, and duties the guardian shall possess, which may be stated in terms of powers or rights the incapacitated person may exercise without intervention of the guardian.
  - e. The order shall specify the nature of the guardianship and the amount of the bond to be given.
  - f. While defining the powers and duties of the guardian, the court shall consider the right of the incapacitated person to rely upon non-medical remedial treatment in accordance with a recognized religious method of healing in lieu of medical care.
  - g. In cases involving minor children, the order may make provisions for visitation and child support as in other cases involving child custody.

Ark. Code Ann. § 28-65-214 (Repl. 2004); *In re Evatt*, 291 Ark. 153 (1987); *Bailey v. Maxwell*, 94 Ark. App. 358, 230 S.W.3d 282 (2006).

#### 5. Bond of the Guardian

- a. If the guardianship is only of the person, the bond shall not exceed \$1,000 or the court may dispense with the bond.
- b. At every accounting, the court shall inquire into the sufficiency of the bond and of the sureties, and if found insufficient, the guardian shall be ordered to file a new or additional bond.
- c. The testator can waive the bond requirement in his will regarding property

given to the ward under the will.

- d. Ark. Code Ann. § 28-48-201 through Ark. Code Ann. § 28-48-209 with respect to bonds of personal representatives shall be applicable to the bonds of guardians, except that in fixing the amount of the guardian's bond, the value of the real property, as distinguished from the income therefrom, unless it is sold, shall not be considered and shall not constitute property which may reasonably be expected to pass through the hands of the guardian.
- e. If the ward's estate is entirely cash:
  - (1) the court may dispense with the bond if the guardian deposits the entire estate in an interest-bearing account in an Arkansas bank, savings and loan, or federally insured credit union;
  - (2) however, the value of the estate should not be greater than the maximum amount insurable for a single depositor;
  - (3) the bank, savings and loan, or credit union shall file with the probate clerk an agreement not to permit any withdrawal from the deposit except on authority of a court order.

Ark. Code Ann. § 28-65-215 (Repl. 2004); *Jiles v. Union Planters Bank*, 90 Ark. App. 245 (2005).

#### 6. Issuance of Letters

- a. When a guardian has paid the bond, if required, and has filed a written acceptance of the appointment, the court will issue letters of guardianship.
- b. The letters shall protect persons who act in good faith reliance upon them until the letters are revoked or canceled by the court.

Ark. Code Ann. §§ 28-65-216 & -217 (Repl. 2004) (form of letters); *The Prudential Insurance Co. of America v. Frazier*, 323 Ark. 311 (1996)(no letters issued).

#### 7. Temporary Guardian

- a. The court may appoint a temporary guardian for an incompetent person, with or without notice, for a specified period that shall not exceed 90 days, including all extensions, if the court finds:

- (1) imminent danger to the life or health of the incapacitated person, or the loss, damage, or waste to the property of an incapacitated person; and
- (2) that this requires the immediate appointment of a guardian of the person, estate, or of both.

Ark. Code Ann. § 28-65-218(a) (Repl. 2004); *Devine v. Martens*, 371 Ark. 60 (2007).

- b. Immediate notice of the temporary guardianship order shall be served by the petitioner upon the following:
  - (1) the ward if over fourteen years old;
  - (2) the parents of the ward, if the ward is a minor;
  - (3) the spouse, if any, of the ward;
  - (4) any other person who is the guardian of the person or of the estate;
  - (5) any other person who has the care and custody of the ward;
  - (6) the director of any agency from which the respondent is receiving services;
  - (7) DHS when the temporary guardian appointed serves as guardian of five or more wards; and
  - (8) if no known parent or spouse, at least one of the ward's nearest relatives by blood or marriage;
  - (9) if directed by the court, immediate notice shall be served upon any department, bureau, agency, or political subdivision of the United States or of Arkansas
    - (a) which makes or awards pension, compensation, insurance, or other allowance for the benefit of the ward's estate; or
    - (b) any charitable organization, which may be charged with the supervision, control, or custody of the incapacitated person; or
    - (c) any other person designated by the court.

Ark. Code Ann. § 28-65-218(b) (Repl. 2004).

- c. The notice shall include:
  - (1) a copy of the petition;
  - (2) a copy of the temporary order and order of appointment;
  - (3) notice of a hearing date;
  - (4) statement of rights, as provided in Ark. Code Ann. § 28-65-213(Repl. 2004); and
  - (5) if the ward is over fourteen years old, there shall be personal service if possible. Service on others is according to the Rules of Civil Procedure.

Ark. Code Ann. § 28-65-218(c)(Repl. 2004).

- d. Notice is not necessary, under Ark. Code Ann. § 28-65-207(a)(6)(Repl. 2004), for the following:
  - (1) one who signed the petition;
  - (2) one who in writing waived notice of hearing (alleged incapacitated may not waive);
  - (3) one who actually appears;
  - (4) one whose existence or relationship to alleged incapacitated is unknown or cannot be ascertained;
  - (5) other than an alleged incapacitated, one who is outside the Continental U.S. or is himself or herself incompetent; or
  - (6) the alleged incompetent if the court finds that he or she is detained by a foreign power or has disappeared.

Ark. Code Ann. § 28-65-218(e) (Repl. 2004).

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

Ark. Code Ann. § 28-65-218(f) (Repl. 2004).

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

Ark. Code Ann. § 28-65-218(g) (Repl. 2004).

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

Ark. Code Ann. § 28-65-218(h) (Repl. 2004).

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

Ark. Code Ann. § 28-65-218(I) (Repl. 2004).

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

Ark. Code Ann. § 28-65-218(j) (Repl. 2004).

*Murphy v. Danforth*, 323 Ark. 482 (1996)(temporary custody under the PKPA); *Bynum v. Savage*, 312 Ark. 137 (1993) (parent has a fundamental liberty interest in the care, custody, and management of his or her child); *Earle v. Bennett*, 289 Ark. 448 (1986) (medical evidence is needed before the appointment of a guardian by reason of habitual drunkenness and excessive use of drugs).

## 8. Substitution or Removal

- a. When a minor ward has attained the age of 14 years, his guardian may be removed on petition of the ward to have another person appointed guardian if the court is satisfied that the person chosen is suitable, qualified, and competent, and that it is for the best interest of the ward that such person be appointed.
- b. A guardian may also be removed on the same grounds and in the same manner provided in Ark. Code Ann. § 28-48-105, for the removal of a personal representative.

Ark. Code Ann. § 28-65-219 (Repl. 2004); *In Re: Guardianship of Vesa*, 319 Ark. 574 (1995).



9. Successor Guardian

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

Ark. Code Ann. § 28-65-220 (Repl. 2004).

10. Standby Guardian

- a. Applies when a parent is chronically ill or near death and does not require surrendering parental rights of minor children.
- b. Same procedures apply as with other guardianships.
- c. Authority is effective upon parent's:
  - (1) death;
  - (2) mental incapacity; or
  - (3) physical debilitation and consent.
- d. Standby guardian has duty to notify the court immediately of parent's death, incapacity, or debilitation and immediately to assume role of guardian to the minor child(ren).
- e. Court shall enter an order of guardianship in conformity with this section.

Ark. Code Ann. § 28-65-221 (Repl. 2004); see also Ark. Code Ann. § 28-65-301 (Repl. 2004)(duties of guardians generally).

**E. Duties of a Guardian**

**Ark. Code Ann. §§ 28-65-301 to -323 (Repl. 2004 & Supp. 2009)**

1. Generally

See, generally, Brantley, *Use of the Trust to Manage Property of the Elderly or Disabled*, 42 Ark. L. Rev. 619.

- a. A guardian shall care for and maintain the ward, consistent with and out of

the resources of the ward's estate.

- b. If the ward is a minor, the guardian shall see to it that the ward is properly trained and educated and that the ward has an opportunity to learn a trade, occupation, or profession.
- c. A guardian of the person may be required to report the condition of his ward to the court at regular intervals or as the court directs.
- d. A guardian of the person shall be entitled to the custody of the ward, but shall not have the power to bind the ward or the ward's property.
- e. It shall be the duty of the guardian of the estate to exercise due care to protect and preserve the estate, to invest the estate, to account for it faithfully, to perform all other duties required by law, and, at the termination of the guardianship, to deliver the assets of the ward to the persons entitled to them. To the extent applicable, the law of trusts shall apply to the duties and liabilities of a guardian of the estate.

Ark. Code Ann. § 28-65-301 (Repl. 2004); *Brasel v. Estate of Harp*, 317 Ark. 379 (1994).

## 2. Care, Treatment and Confinement of Ward

- a. A guardian appointed before October 1, 2001, must file a petition and receive the court's approval for any of the following:
  - (1) To consent on behalf of incapacitated person to abortion, sterilization, psychosurgery, or removal of bodily organs except in a situation which is life-threatening to the incapacitated person;
  - (2) To consent to withhold life-saving treatment;
  - (3) To authorize experimental medical procedures;
  - (4) To authorize termination of parental rights;
  - (5) To prohibit the incapacitated person from voting;
  - (6) To prohibit the incapacitated person from obtaining a driver's license;
  - (7) To consent to a settlement or compromise of any claim by or against the incapacitated person or his or her estate.

- b. A guardian appointed on or after October 1, 2001, shall not make any of the following decisions without filing a petition and receiving express court approval:
  - (1) To consent on behalf of incapacitated person to abortion, sterilization, psychosurgery, or removal of bodily organs except in a situation which is life-threatening to the incapacitated person;
  - (2) To consent to withhold life-saving treatment;
  - (3) To authorize experimental medical procedures;
  - (4) To authorize termination of parental rights;
  - (5) To authorize an incapacitated person to vote;
  - (6) To prohibit the incapacitated person from obtaining a driver's license;
  - (7) To consent to a settlement or compromise of any claim by or against the incapacitated person or his or her estate.

*Note: The only difference is #5.*

- c. Provided, however, that the provisions of “b” above do not apply to written requests under Ark. Code Ann. § 20-17-214.

Ark. Code Ann. § 28-65-302 (Repl. 2004).

- d. A guardian of the person or any interested person may file a petition with the court seeking to hospitalize an incapacitated person at the Arkansas State Hospital or other appropriate institution, and the court may authorize or direct the guardian of the person to pursue involuntary hospitalization for the ward.
- e. Upon further petition and for good cause shown, the court may modify, amend, or revoke such an order.
- f. In an emergency, the guardian may cause the incapacitated person to be temporarily confined so that the guardian can file a petition for involuntary hospitalization.

Ark. Code Ann. § 28-65-303 (Repl. 2004).

3. Title and Possession of the Estate

- a. A guardian of the estate shall take possession of the entirety of the incapacitated person's estate, real and personal.
- b. Title to the estate remains with the incapacitated person, not the guardian.

Ark. Code Ann. § 28-65-304 (Repl. 2004).

4. Actions -- Service of Process

- a. Actions regarding the estate of the incapacitated person shall be prosecuted by or against the guardian of the estate, and the guardian shall represent the interests of the incapacitated person.
- b. Process shall be served on the guardian of the estate.

Ark. Code Ann. § 28-65-305 (Repl. 2004); Ark. Code Ann. § 16-61-103-110 (Repl. 2005).

5. Enforcement of Contracts

- a. Upon petition, a court may authorize the performance of a contract entered into but not executed before the onset of incapacity.
- b. Any execution of an instrument shall be in the name and on behalf of the incapacitated person, and shall have the same effect as if he or she executed it personally.

Ark. Code Ann. § 28-65-306 (Repl. 2004).

6. Liability for Continuation of A Business

- a. When a guardian of the estate is appointed, the court may also authorize the guardian to continue a business on behalf of the incapacitated person for a period of time and subject to conditions in the best interest of the incapacitated person.
- b. The ward's estate shall be liable for tort damages or other acts committed by employees and agents in the course of conduct of the business.
- c. The guardian shall not be liable for mistakes made in good faith.

Ark. Code Ann. § 28-65-307 (Repl. 2004).

7. Power to Borrow Money and Make Gifts

- a. The court may authorize the guardian to borrow money, execute notes, and mortgage property if shown to be advantageous to the estate of the incapacitated person.
- b. Likewise, the court may authorize the guardian to make gifts and disclaimers on behalf of the incapacitated person.

Ark. Code Ann. § 28-65-308 (Repl. 2004).

8. Periodic Allowances

- a. The court upon petition may direct the guardian to make periodic payments for the care, maintenance, and education of the incapacitated person and his or her dependents.
- b. The court may also order payment directly to the incapacitated person.
- c. The court may increase or decrease the amounts periodically.
- d. The guardian is not bound to see the application of payments which are ordered by the court to be made to another.

Ark. Code Ann. § 28-65-309 (Repl. 2004).

9. Support of the Minor Incapacitated Person

- a. Parents are responsible for the support of their unmarried children and may be sued jointly or severally.
- b. Taking into consideration the parents' and the minor's resources, the court may order the guardian of the estate to expend income or principal of the minor's estate for his or her care, maintenance, and education.
- c. By court order, any surplus of income may used for the care, maintenance, and education of the minor's dependents.
- d. If the income is insufficient to care for the minor and his or her dependents, the court may order expenditure of the principal as is necessary.

Ark. Code Ann. § 28-65-310 (Repl. 2004); *In Re Porter*, 298 Ark. 121 (1989)(the probate court has exclusive jurisdiction to determine how a guardian uses the ward's funds)(decided before Amendment 80).

10. Investments

- a. By court order, a guardian of an estate may deposit, as a fiduciary, a ward's funds either in a checking or savings account in a financial institution of this state, as a general deposit.
- b. The guardian shall invest the funds not reasonably needed for the ward's care, maintenance, or education in securities selected by the guardian from among the 14 categories listed in this statute.
- c. Investments may be made without prior approval of a court in:
  - (1) Obligations unconditionally guaranteed as to principal and income by the United States;
  - (2) Bonds issued by the State of Arkansas;
  - (3) Shares of any investment company or investment trust described and limited by subsection b (12) of this statute.
- d. The court shall not approve an investment in an issue of securities which has been in default for longer than 120 days during the 5 years preceding the investment.
- e. If the guardian of the estate is a state or national bank or trust company authorized by law to establish and maintain common trust funds and in fact does so, and the fund is limited to purchase of investments listed in this statute, the guardian may invest in the common fund without prior court order.

Ark. Code Ann. § 28-65-311 (Repl. 2004).

11. Retention of Property and Investment

- a. The court may order the guardian of the estate to retain property belonging to the ward which the guardian may obtain other than by purchase even though not an investment authorized by Ark. Code Ann. § 28-65-311, if it is in the best interest of the ward or the estate.

- b. If an investment meets the requirements of Ark. Code Ann. § 28-65-311, but later fails to meet the requirements, the guardian may retain the investment unless the court otherwise directs.

Ark. Code Ann. § 28-65-312 (Repl. 2004).

12. Purchase of A Home

- a. The court may authorize purchase of real property in this state to be used as a home for the ward or for the dependent family, unless the ward is an unmarried minor.
- b. Notice must first be given to the ward if he or she is 14 years of age or older and the incapacity is due solely to minority. The court may direct others to receive notice as well.

Ark. Code Ann. § 28-65-313 (Repl. 2004).

13. Sales and Mortgages of Property Generally

- a. Whenever it is in the best interest of the ward, the real or personal property, including a homestead interest, may be sold, mortgaged, leased, or exchanged, or an easement granted by the guardian of the estate, if the court authorizes it to pay the ward's debts and provide for care, maintenance, and education of the ward and/or dependents, or for investing the proceeds.
- b. Any action by the guardian under this section shall be considered an exchange of property of the ward.
- c. A guardian shall not purchase property of the ward, unless sold at public sale and approved by the court, and then only if the guardian is the spouse, parent, child, or sibling of the ward and is a cotenant with the ward of the property.
- d. This does not apply if a special guardian is appointed and reports to the court that a private sale is in the ward's best interest, and notice is given and a hearing is held.
- e. The court shall determine prior to sale whether the guardian's bond is sufficient and may order it increased or supplemented to protect the ward's interest.
- f. Regardless of the law regarding decedents' estates applicable to sales,

mortgages, leases, etc., the term of a lease of real property of a ward shall not be limited to 3 years, nor shall the credit to be extended by the guardian be limited to 1 year.

Ark. Code Ann. § 28-65-314 (Repl. 2004).

14. Oil, Gas, and Mineral Interests

- a. A guardian of the estate on behalf of a ward who owns land in this state or an interest in land, or who owns or leases an interest in oil, gas, or other mineral rights may lease, assign, sell or enter into a contract with reference to those rights in the best interest of the ward.
- b. Such transaction shall be binding on the ward and the estate and all parties unless set aside by the court.
- c. Within 60 days of the transaction, the guardian must report the transaction to the circuit court of the county in which the majority of the property is located, explaining the transaction in detail, attaching a copy of the instrument executed, and petitioning the court to ratify the transaction. Failure to so report constitutes a violation, and upon conviction, the guardian shall be fined an amount not to exceed \$1,000.00.
- d. After notice and hearing and determination of the sufficiency of the bond, if the court finds the transaction to be in the best interest of the ward at the time of execution or delivery, the court shall enter an order of approval.
- e. If the court determines the transaction was not in the ward's best interest, it shall enter an order setting aside the transaction and require the guardian to return any consideration he or she may have received.
- f. If this county is not the site of the guardianship proceedings, the order shall direct that a copy of the order be forwarded to the clerk of the county of guardianship.
- g. If the guardian fails to file the report within 60 days, the person with whom the guardian contracted has 75 days after the date of the transaction to petition the court to require the guardian to file the report.
- h. The court shall then issue a show cause order to the guardian and approve or set the transaction aside, depending on the outcome of the hearing.
- I. A transaction under this section not reported to the court shall be null and



void after the expiration of the time provided for another party to petition the court to require the guardian to file the report and petition.

Ark. Code Ann. § 28-65-315 (Supp. 2009).

15. Oil, Gas, and Mineral Interests - Agreements for Operation and Development

- a. Upon petition and notice given as the court may direct, the court may authorize the guardian of the estate to enter transactions, execute instruments necessary or advantageous to the estate in the operation and development of any interest, including leasehold interest, in oil, gas, or minerals.
- b. This may include but is not limited to: unit operating agreements, royalty unitization agreements, royalty pooling agreements, field unitization and repressure agreements, and such other agreements and contracts relative thereto as the court finds in the best interest of the ward.

Ark. Code Ann. § 28-65-316 (Repl. 2004).

16. Payment of Claims

- a. A guardian of the estate is under a duty to pay from the estate all just claims arising before or after the grant of guardianship, whether in contract or tort, etc., upon allowance or approval by the court.
- b. The duty of the guardian does not preclude his or her personal liability for the guardian's own contracts and acts performed on behalf of the estate according to common law.
- c. The court, after notice and hearing, may direct the guardian to pay a claim of any person petitioning against the estate for services lawfully rendered, for necessaries provided, or for payment of a lawful liquidated claim or demand against the estate.

Ark. Code Ann. § 28-65-317 (Repl. 2004); *Forehand v. American Collection Service, Inc.*, 307 Ark. 342 (1991)(probate court has exclusive jurisdiction over payment of claims against ward's account)(decided before Amendment 80).

17. Compromise Settlements

- a. The court may authorize a guardian of the estate to settle or compromise any claim by or against the ward or the estate which arose before or after

the guardianship if the court is satisfied it is in the best interest of the ward.

- b. A settlement of a tort claim against the ward made by or on behalf of the guardian shall be binding, if otherwise valid, without court authorization.
- c. The guardian shall not take credit in his or her accounts for any money or property expended in the settlement unless the guardian was first authorized by the court to make the settlement, or having made the settlement, shows by clear and convincing evidence that the settlement was in the interest of the ward and the estate.
- d. Other than a tort, a discharge, acquittal, or receipt given by a guardian of the estate for any claim shall be valid in favor of any person who takes it in good faith, but if not previously approved by the court, the guardian bears the burden of proving that any compromise was made in the interest of the ward and the ward's estate, and the guardian shall be liable to the ward if the ward or estate is injured by the guardian's action.

Ark. Code Ann. § 28-65-318 (Repl. 2004).

#### 18. Employment of Professionals

- a. The guardian may employ legal counsel to assist in the performance of his or her duties, and the court sets the attorney's fee which is allowed as an expense of administration.
- b. If the guardian is an attorney and has performed necessary legal services, the court shall consider this in fixing the compensation of the guardian.
- c. The guardian may employ other professionals when the court authorizes it in the reasonable discharge of the guardian's duties, and the court shall fix the compensation for those services which shall be allowed as an expense of the administration.

Ark. Code Ann. § 28-65-319 (Repl. 2004); *Bailey v. Rahe*, 355 Ark. 560 (2004)(trial court abused discretion in cutting attorney fees without explanation); *Johnson v. Guardianship of Ratliff*, 72 Ark. App. 85, 34 S.W.3d 749 (2000)(guardian's hiring an attorney is not a decision that always requires court approval); *Winters v. Winters*, 24 Ark. App. 29 (1988)(section authorizes fees for a guardian required to defend his actions as guardian and his accounting).

#### 19. Accounting

- a. A guardian must file an annual written, verified accounting with the court within 60 days of the anniversary date of the appointment, and within 60 days after termination of the guardianship unless otherwise directed by the court.
- b. Notice of hearing of each accounting shall be given just as with notice when the petition for guardianship is filed except that the court may excuse notice to the ward if he or she is mentally incapacitated and giving notice would be detrimental to his or her well-being.
- c. The accounting shall be itemized, and the court may allow or disallow each item in whole or in part, taking into consideration any good faith reliance by a guardian upon orders previously entered by the court.
- d. When notice has been given, the settlement of an account by the court is binding upon all persons concerned, subject to the right of appeal and the power of the courts to vacate its final order.
- e. The provisions for accounting by a personal representative also apply to accounting by guardian.
- f. A guardian who fails to file an accounting within the time set by this section may be denied compensation for services performed between the date an accounting should have been filed and actually was filed.

Ark. Code Ann. § 28-65-320 (Repl. 2004).

## 20. Inventory - Appraisal

- a. The guardian shall file an inventory of the ward's property just as is done for the inventory of a decedent's estate under Ark. Code Ann. § 28-49-110.
- b. The court may order an independent appraisal by one or more disinterested and qualified persons appointed by the court.

Ark. Code Ann. § 28-65-321 (Repl. 2004).

## 21. Reports

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

- (1) the person's current mental, physical, and social conditions;
- (2) present living arrangements;
- (3) the need for continued guardianship services;
- (4) accounting of the estate if the guardian has been delegated that responsibility by court order or as a result of being guardian of the estate;
- (5) any other information requested by the court or necessary in the opinion of the guardian.

Ark. Code Ann. § 28-65-322 (Repl. 2004).

## 22. Administration of Deceased Ward's Estate

- a. Subject to the direction of the court, the guardian of the estate is authorized, as such, to administer the estate of a deceased ward after further letters are issued to him, after a hearing, pursuant to a petition for letters, testamentary or of administration, which has been filed no later than 40 days after death of the ward.
- b. The guardian shall file an account of the administration of the estate up to the date of the ward's death and shall cause notice of the filing to be published combined with a notice to creditors of the deceased ward.
- c. Proceedings for claims against the estate shall be governed by the laws relating to claims against decedents' estates, with the guardian serving as personal representative.
- d. Liability on the guardian's bond shall continue and apply to the complete administration of the estate.
- e. If someone other than the guardian is appointed to administer the estate, the guardian's authority shall terminate, and he or she shall deliver to the appointed representative the assets of the estate remaining in the hands of the guardian.
- f. The clerk is entitled to additional fees, not to exceed \$100.00, to cover the initiation of the administration of the ward's estate, and if so initiated, shall direct the personal representative to pay those fees.

Ark. Code Ann. § 28-65-323 (Repl. 2004); *First Security Bank v. Estate of Leonard*, 369 Ark. 213 (2007).

**F. Termination of a Guardianship**

1. Termination -- Generally

a. A guardianship is terminated:

- (1) by an adjudication of the ward's competency;
- (2) by the death of the ward; or
- (3) if the guardianship was solely because of the ward's minority, the marriage of the ward shall terminate guardianship of the person, but not of the estate, except for the ward's earnings for personal services.

b. The court may terminate a guardianship after notice:

- (1) if the guardianship was solely because of the ward's minority, and the ward attains majority or the disability of minority of the ward is removed for all purposes by a court. However, if the Court finds it in the ward's best interest to continue a guardianship after the ward reaches majority, it may continue the guardianship until the court terminates it;
- (2) if the ward becomes a non-resident of the state; or
- (3) if, for any other reason, the guardianship is no longer necessary or for the best interest of the ward.

c. Except for the ward's death, when a guardianship ends, the powers of the guardian end, except that a guardian of the estate may make disbursements for claims that the court allows, for liabilities already incurred for the estate or for the ward, and for administrative expenses.

d. When a guardianship terminates by the ward's death, the guardian of the estate may proceed under Ark. Code Ann. § 28-65-323 (Repl. 2004), but the rights against the ward's estate shall be determined by the law governing decedents' estates.

Ark. Code Ann. § 28-65-401 (Repl. 2004); *Crosser v. Henson*, 357 Ark. 635 (2004);

*Hooks v. Pratte*, 53 Ark. App. 161 (1996)(guardianship may be terminated if no longer in the best interest of the ward); *In re Estate of Strickland*, 50 Ark. App. 7, 902 S.W.2d 238 (1995)(reaching majority, absent other disabilities, entitled ward to have guardianship of estate terminated, when guardianship was to protect her interests as a minor); *In re Guardianship of Markham*, 32 Ark. App. 46 (1990)(preferential rights of parents are secure only so long as they discharge their obligations).

## 2. Restoration of Capacity of a Ward

- a. If any person alleges in a sworn written oath, that an incapacitated person or a person addicted to habitual drunkenness, is no longer incapacitated or addicted, the court in which the proceedings were held shall cause an inquiry into the facts in such a manner as the court may direct.
- b. If it is found that the person has been restored to capacity or has reformed, the person shall be discharged from care and custody, and the guardian shall immediately settle the ward's accounts and shall return all the ward's belongings in his or her possession.

Ark. Code Ann. § 28-65-402 (Repl. 2004); *Potter ex rel. Redden v. First Nat'l Bank*, 292 Ark. 74 (1987)(ward has standing to attack a guardianship of his person and estate; attorney has authority to act on ward's behalf).

## 3. Discharge of Guardian and Surety

- a. When the guardian of the estate can satisfactorily show the court by filing receipts or other evidence that he or she has delivered the property to the proper persons, the court shall make an order discharging the guardian and his surety from further liability or accountability with respect to the guardianship.
- b. The discharge shall operate as a release from the duties of guardianship which have not been terminated previously and shall be final. However, a petition may be filed within three (3) years of the discharge which could set aside the discharge for fraud in the settlement of the account.

Ark. Code Ann. § 28-65-403 (Repl. 2004); *In re Heavener*, \_\_\_ B.R. \_\_\_ (Bankr. E.D. Ark. 8/28/08).

## **G. Dispensing With Guardianship**

### 1. Generally Dispensing with Guardianship

- a. The parent(s) of a minor shall be the natural guardian of the person of each unmarried minor child of the parents and shall have the care and management of the estate derived from gifts from the parents of each minor without necessity of judicial appointment.
- b. However, upon a showing of the necessity to protect the interests of the minor child, the court may appoint a guardian of the estate of the minor, and when appointed and qualified, the guardian shall have exclusive control over the estate of the minor.
- c. The court may appoint the natural guardian as guardian of the estate of the minor.

Ark. Code Ann. § 28-65-501 (Repl. 2004); *Beatty v. USAA Cas. Ins. Co.*, 330 Ark. 354 (1997)(minor daughter's insurable interest in an automobile, and guardian's legal obligation to exercise prudence and due care in managing the estate of the minor, gave the guardian an insurable interest in the auto on behalf of the minor).

2. Dispensing with Guardianship in a Small Estate

- a. When the whole estate of the minor or incompetent does not exceed \$5,000, the court, at its discretion and without appointment of a guardian or the giving of bond, may authorize payment or delivery of all or any part of the estate to the minor or incompetent or other suitable person, institution, or agency for him, to be retained or used for the benefit of the minor or incompetent as the court may direct.

Ark. Code Ann. § 28-65-502 (Repl. 2004).

3. Ward Receiving Public Assistance

- a. At the court's discretion and without appointment of a guardian or the giving of bond, the court may authorize the payment and delivery of any moneys or other property due, or that may in the future become due, to some suitable person, institution, or agency for the minor or incompetent, to be retained or used for the benefit of the ward, in cases in which:
  - (1) the present total value of the personal property of a minor or an incompetent is less than \$100; and
  - (2) the minor or incompetent owns no real property; and
  - (3) the minor or incompetent should have a guardian to care for his

needs; and

- (4) the minor or incompetent is supported in whole or in part by monthly income from the Department of Human Services, pension boards, or other person or agency except the Veteran's Administration.
- b. Should the money or property of the minor or incompetent person accumulate to \$500 or more, the suitable person shall immediately report it to the circuit court.

Ark. Code Ann. § 28-65-503 (Supp. 2009).

## **H. Foreign Guardians**

**Ark. Code Ann. §§ 28-65-601 to -603 (Repl. 2004)**

1. Petition to Act in Arkansas
  - a. If an incompetent person who is not a resident of Arkansas has a court appointed guardian, the "foreign guardian" may petition a [circuit] court in Arkansas where the guardianship of the estate is pending, or the county where there is property belonging to the ward, or where a cause of action on behalf of the ward may be brought, for authority:
    - (1) to remove the property to the domicile of the guardian and the ward; or
    - (2) to sell, mortgage, lease, or exchange the property of the ward, or to take any other action that a locally appointed guardian would be authorized to take, and to remove the proceeds to the domicile of the guardian and the ward; or
    - (3) to bring the action in behalf of the ward; or
  - b. The foreign guardian shall file an authenticated copy of his letters of guardianship and bond with his or her petition and evidence of the value of the property of the ward in the jurisdiction of the appointment.

Ark. Code Ann. § 28-65-601 (Repl. 2004).

2. Effect of Grant or Denial of Petition to Act in Arkansas
  - a. Upon the court's satisfaction of the foreign guardian, the court may, if there



is no locally appointed guardian, grant the petition, in whole or in part and direct the foreign guardian to proceed with the directed action as a local guardian would do.

- b. If there is a locally appointed guardian and the court finds the foreign guardian acceptable, the court at its discretion may:
  - (1) order the termination of the local guardianship and the payment, transfer, or delivery of the property of the ward to the foreign guardian and grant the foreign guardian's petition in whole or in part;
  - (2) order the local guardian to take the action, in whole or in part, for which the foreign guardian asked authority; or
  - (3) deny the petition.
- c. If the court orders the termination of the local guardianship, the local guardian shall file his account immediately.

Ark. Code Ann. § 28-65-602 (Repl. 2004).

### 3. Corporate Guardians

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

Ark. Code Ann. § 28-65-603 (Repl. 2004).

## **I. Uniform Veterans Guardianship Act**

**Ark. Code Ann. §§ 28-66-101 through -124 (Repl. 2004 & Supp. 2009)**

### 1. Scope

- a. Arkansas has a separate Veterans Guardianship Act known as the Uniform Veterans Guardianship Act, which is in addition to and supersedes when in conflict the regular guardian and ward statutes of this state.
- b. It is otherwise generally the same except that the Administrator of Veterans Affairs is a party in interest in veterans' guardianship matters and the Veterans Administration requires notice of appointment or removal of a guardian for a veteran.

Ark. Code Ann. §§ 28-66-101, -102 (Repl. 2004).

2. Requirements for appointment of guardian.

- a. A certificate of necessity for appointment of guardian for minor or medical affidavit of the VA for one mentally incompetent;

Ark. Code Ann. §§ 28-66-106, -107 (Repl. 2004).

- b. A petition for appointment;

Ark. Code Ann. § 28-66-105 (Repl. 2004).

- c. Required notices;

Ark. Code Ann. § 28-66-108 (Repl. 2004).

- d. Limitation on the number of wards;

Ark. Code Ann. § 28-66-104 (Repl. 2004).

- e. Bond;

Ark. Code Ann. § 28-66-109 (Repl. 2004).

- f. Accounting and waivers;

Ark. Code Ann. § 28-66-110 (Supp. 2009).

- g. Prescribed compensation;

Ark. Code Ann. § 28-66-112 (Repl. 2004).

- h. Maintenance, support, assistance to ward;

Ark. Code Ann. § 28-66-114 (Repl. 2004).

- I. Compliance with Veterans Guardianship Act requirements;

Ark. Code Ann. § 28-66-118 (Repl. 2004).

3. Requirements for discharge of guardian.

- a. The court determines that the ward has attained majority or has regained his competency;
- b. The guardian files a final accounting;
- c. The guardian delivers the ward's assets to him.

Ark. Code Ann. § 28-66-117 (Repl. 2004).

4. Requirements for commitment to Veterans Administration or other U.S. agency
  - a. It is determined as required by law that commitment is necessary;
  - b. The person is eligible for treatment by the Veterans Administration or other U.S. agency;
  - c. The court receives a certificate from the Veterans Administration or other U.S. agency showing that facilities are available and that person is eligible for care.

Ark. Code Ann. § 28-66-118 (Repl. 2004).

**J. Attorneys Ad Litem in Guardianship of Children Cases**

1. Director of AOC authorized to establish attorney ad litem program for representation of children in guardianship cases when custody is an issue.

Ark. Code Ann. § 9-13-106(a) (Repl. 2008).

2. Circuit judge authorized to appoint private attorney to represent a child when he or she determines that appointment will facilitate a case in which custody is in issue and to further protect the rights of the child.

Ark. Code Ann. § 9-13-106(b) (Repl. 2008).

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

Ark. Code Ann. § 9-13-106(c)(1) (Repl. 2008).

- b. In extraordinary cases, an attorney may be appointed who does not meet the

required standards and qualifications for service, but may not be appointed to subsequent cases until making efforts to meet the standards and qualifications.

Ark. Code Ann. § 9-13-106(c)(2)(A) & (B) (Repl. 2008); Administrative Order No. 15, Appendix.

3. When attorneys are appointed according to these provisions, fees for services and reimbursable expenses shall be paid from funds appropriated for that purpose to the AOC.

Ark. Code Ann. § 9-13-106(d) (Repl. 2008).

- a. When a judge orders payment as authorized by these provisions, he or she shall transmit a copy of the order to the AOC, which is authorized to pay the funds.

Ark. Code Ann. § 9-13-106(e)(1) (Repl. 2008).

- b. The judge may require the parties to pay all or a part of the expenses of the attorney ad litem, according to their ability to pay.

Ark. Code Ann. § 9-13-106(e)(2) (Repl. 2008).

4. The AOC shall establish guidelines for maximum expenses and fees per hour and per case.

Ark. Code Ann. § 9-13-106(f) (Repl. 2008).

- a. Maximum rate is \$90.00 per hour when any part of the fee is paid with state funds.
- b. Maximum total is \$1,250.00 per case.
- c. Out of pocket expenses may also be reimbursed, and are included in the \$1,250 maximum.
- d. If case closes, then reopens, if attorney ad litem is reappointed, he or she is entitled to additional funding, with the same maximums applying: \$90.00 per hour, up to \$1,250.00 for the case.

*Guidelines for Payment, Appendix.*

5. Funds appropriated for ad litem representation in custody cases shall be apportioned among the courts according to a formula developed by the AOC and approved by the Arkansas Judicial Council and the Regulations Subcommittee of the Arkansas Legislative Council.

Ark. Code Ann. § 9-13-106(g)(Repl. 2008).

6. The AOC shall develop a statistical survey for each attorney ad litem to complete at the conclusion of a case. Statistics shall include:
  - a. ages of children served;
  - b. whether custody issue arose at divorce or post-divorce;
  - c. whether psychological services were ordered; and
  - d. any other relevant information.

Ark. Code Ann. § 9-13-106(h)(1) & (2) (Repl. 2008).

## VI. CONSERVATORS

### A. Procedure

#### 1. Jurisdiction

- a. All laws relating to the jurisdiction of the court over the estate of a person under guardianship as an incompetent shall be applicable to the estate of a person under conservatorship.

Ark. Code Ann. § 28-67-102 (Repl. 2004).

#### 2. Petitioner

- a. A person who is ineligible to serve as guardian of a ward shall not serve as conservator of an estate.

Ark. Code Ann. § 28-67-106 (Repl. 2004).

- b. Any person, relative, or friend may petition the court for conservatorship.

Ark. Code Ann. § 28-67-103 (Repl. 2004).

#### 3. Content

- a. The verified petition for appointment of a conservator shall contain the following:
  - (1) that the proposed ward is an inhabitant or resident of the county; and
  - (2) by reason of advanced age or physical disability, the proposed ward is unable to manage his or her property; and
  - (3) the ward is the petitioner, or voluntarily consents to the petition; and
  - (4) if able, the proposed ward attends the hearing.

Ark. Code Ann. § 28-67-103 (Repl. 2004).

- b. A hearing may be held upon petition.

Ark. Code Ann. § 28-67-103 (Repl. 2004).

4. Service

- a. Notice of a hearing shall be served on the proposed ward's
  - (1) spouse, if any; and
  - (2) at least one nearest competent relative by blood or marriage, if there is no spouse; and
  - (3) any other person designated by the court.
- b. Notice of hearing may be waived in writing.

Ark. Code Ann. § 28-67-104 (Repl. 2004).

5. Decision

- a. After a full hearing and examination, if the court determines that the proposed ward is by reason of advanced age or physical disability unable to manage his property, then the court may appoint a conservator of the estate.

Ark. Code Ann. § 28-67-105(Repl. 2004); *Yeary v. Baptist Health Foundation*, \_\_\_F.Supp.2d \_\_\_(E.D. Ark. 1/7/08).

**B. Duties**

1. Bond -- Exception

- a. The conservator must give a bond as provided in provisions governing a guardian of an incompetent person.
- b. The court may dispense with the bond if the conservator is a federally insured bank or trust company.

Ark. Code Ann. § 28-67-107 (Repl. 2004).

2. Care and Management

- a. Every conservator appointed shall have the care, custody, and management of the estate of his ward until he is legally discharged.

Ark. Code Ann. § 28-67-107 (Repl. 2004).

- b. A conservator has the same powers and duties as a guardian of an incompetent person, except with respect to custody of the person.

Ark. Code Ann. § 28-67-108 (Repl. 2004).

3. Compensation

- a. The conservator will receive the same compensation as provided by law for guardians.

Ark. Code Ann. § 28-67-110 (Repl. 2004).

**C. Discharge**

1. Petition and Notice

- a. When a ward petitions the court, a conservator may be discharged by the court.
- b. Notice must be given to the conservator and next of kin as the court determines reasonable when it seems that the conservatorship is no longer needed.
- c. In the event of the death, resignation, or removal of a conservator, the court may certify that the ward is discharged by operation of law upon the application of the former ward and notice to the next of kin as the court may order.

Ark. Code Ann. § 28-67-109 (Repl. 2004).

2. Subsequent Appointment of Guardian

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

Ark. Code Ann. § 28-67-111 (Repl. 2004).



## VII. ADOPTION

### A. Procedure

#### 1. Who May Be Adopted

- a. Any individual may be adopted.

Ark. Code Ann. § 9-9-203 (Repl. 2008).

#### 2. Who May Adopt

- a. A husband and wife together may adopt, even if one or both are minors.
- b. An unmarried adult may adopt.
- c. The unmarried biological father or mother may adopt.
- d. A married individual may adopt without the other spouse joining as a petition if:
  - (1) the other spouse is a biological parent and consents to the adoption;
  - (2) the petitioner and other spouse are legally separated; or
  - (3) the failure of the other spouse to join the petition is excused by the court because of prolonged unexplained absence, unavailability, incapacity, or circumstances establishing an unreasonable withholding of consent.

Ark. Code Ann. § 9-9-204 (Repl. 2008); *King v. Ochoa*, 373 Ark. 600 (2008)(a child's biological father can adopt the child, despite the fact that he is unmarried); *In re Perkins/Pollnow*, 300 Ark. 390 (1989)(wife filed adoption petition without husband, who was away serving in the military); *Reid v. Frazee*, 72 Ark. App. 474 (2001)(step-father adoption).

#### 3. Petition

- a. The petition for adoption shall:
  - (1) be signed and verified by the petitioner;

*In re Reeves*, 309 Ark. 385 (1992).

- (2) be filed with the clerk of the court;
- (3) state the date and place of birth of the adoptee, if known;
- (4) state the name to be used by the adoptee;
- (5) state the date the petitioner acquired custody of the minor and the date the minor was placed;
- (6) state the name of the person placing the minor for adoption;
- (7) state how the petitioner acquired custody of the adoptee;
- (8) state the full name, age, place, and duration of residence of petitioner;
- (9) state the marital status of the petitioner, including the date and place of marriage, if married;
- (10) state that the petitioner has facilities and resources to care for the minor;
- (11) state that the petitioner has a desire to establish the relationship of a parent and child with the adoptee;
- (12) state a description and estimate value of any property the adoptee owns;
- (13) state the name of any person who has not consented to the adoption whose consent is required and any reason why lack of consent is excused;
- (14) state that an inquiry has been made to the putative father registry when the mother is not married at the time of the birth, and either:
  - (a) no information has been filed; or
  - (b) information is contained in the registry.

Ark. Code Ann. § 9-9-210(a) (Repl. 2008).

- b. In addition to a petition, a certified copy of the birth certificate or verification of the birth record, if available, and the required consents and relinquishments shall be filed with the clerk.

Ark. Code Ann. § 9-9-210(b) (Repl. 2008).

- c. The caption of the petition shall be styled substantially, "In the matter of the Adoption...." The adoptee's name by which he or she is to be known if petition is granted shall be designated in the caption.

Ark. Code Ann. § 9-9-205(d) (Repl. 2008).

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

Ark. Code Ann. § 9-9-205(e) (Repl. 2008).

#### 4. Jurisdiction

- a. Jurisdiction for the adoption of minors:

- (1) a child under the age of 6 months is a resident of this state if:

- (a) the child's birth mother resided in Arkansas for more than 4 months immediately preceding the birth of the child;
    - (b) the child was born in this state or any border city adjoining Arkansas or separated only by a river; and
    - (c) the child remains in this state until interlocutory decree has been entered, or, for a nonresident adoptive family, upon receipt of ICPC approval, the child and the prospective adoptive parents may go to their state of residence and return to Arkansas for a hearing on the adoption petition.

Ark. Code Ann. § 9-9-205(a)(2)(A) (Repl. 2008).

- (2) A child over the age of 6 months is considered a resident of this state if:

- (a) the child has resided in this state for 6 months;
      - (b) the child currently resides in Arkansas; and
      - (c) the child is present in the state when the petition for adoption is filed and heard by a court having appropriate jurisdiction.

Ark. Code Ann. § 9-9-205(a)(2)(B) (Repl. 2008).

- b. A person seeking to adopt is a resident of this state if he or she:
  - (1) occupies a dwelling within the state;
  - (2) has a present intent to remain in the state for a period of time; and
  - (3) manifests the genuineness of that intent by establishing an ongoing physical presence within the state together with indications that the person's presence within the state is something other than merely transitory in nature.

Ark. Code Ann. § 9-9-205(a)(2)(C) (Repl. 2008).

*Roberts v. Westover, et al.*, 368 Ark. 288 (2006)(Arkansas courts had no jurisdiction of adoption when neither the child nor the prospective adoptive parents resided in Arkansas. The fact that the guardian of the child was a resident of Arkansas—when the child did not live with the guardian—was not enough).

- c. Jurisdiction for the adoption of an adult requires only the petitioner's or the adoptee's physical presence to confer subject matter jurisdiction.

Ark. Code Ann. § 9-9-205(b) (Repl. 2008).

## 5. Venue

- a. Proceedings must be brought in the county where, at the time the adoption is filed, the petitioner(s), the adoptee, or the agency having care of the child is located.

Ark. Code Ann. § 9-9-205 (c)(1) (Repl. 2008).

- b. If the court finds in the interest of substantial justice that the matter should be heard in another forum, the court may transfer, stay, or dismiss the proceedings.

Ark. Code Ann. § 9-9-205 (c)(2) (Repl. 2008).

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

Ark. Code Ann. § 9-9-205(a)(3) (Repl. 2008); § 9-27-307(a)(4) (Repl. 2008).

6. Preferences

- a. If an adoptee's biological parent(s) express(es) a preference for placing the child in a home with similar religious backgrounds, the court shall place the child with a family of a similar religious background, or if such a family is not available, with a family which is knowledgeable and appreciative of the child's religious background.

Ark. Code Ann. §9-9-102(c) (Repl. 2002).

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

Ark. Code Ann. § 9-9-102(d) (Repl. 2002).

**B. Consent**

1. Required Consent

- a. The following, subject to Ark. Code Ann. § 9-9-207, shall be required to give written consent for the adoption of a minor:

- (1) the mother of the minor;

Ark. Code Ann. § 9-9-206 (a)(1)(Repl. 2008); *Martin v. Martin*, 316 Ark. 765 (1994); *In re J.L.T.*, 31 Ark. App. 85 (1990).

- (2) the father of the minor if:

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

Ark. Code Ann. § 9-9-206 (a)(2)(Repl. 2008); *Britton v. Gault*, 80 Ark. App. 311 (2003)(remand to consider Ark. Code Ann.§§9-9-206 & 207 together); *Reid v. Frazee*, 72 Ark. App. 474 (2001).

- (b) the child is his by adoption;
- (c) he has custody of the minor at the time the petition is filed;
- (d) he has a written order of legal custody of the minor at the time the petition for adoption is filed;
- (e) his paternity was judicially adjudicated before the adoption

petition is filed; or

- (f) he proves a significant custodial, personal, or financial relationship with the minor existing before the petition for adoption is filed.

Ark. Code Ann. § 9-9-206 (a)(2)(Repl. 2008); *In the Matter of the Adoption of SCD, a Minor*, 358 Ark. 51 (2004)(Court considered circumstances in which a putative father must consent before adoption can occur; court interpreted the phrase “otherwise legitimated”).

- (3) any person lawfully entitled to custody of the minor or empowered to consent;
- (4) the court which has jurisdiction to determine custody, if the legal guardian or custodian is not empowered to consent to the adoption;
- (5) the minor, if older than 10 years, unless in the best interest of the minor the court dispenses with the consent.

Ark. Code Ann. §§ 9-9-206 (a)(3) - (5) (Repl. 2008); *Reid v. Frazee*, 72 Ark. App. 474 (2001); *Swaffar v. Swaffar*, 309 Ark. 73 (1992)(child was 15 at the time of the adoption and no consent was entered; therefore, no adoption occurred; when consent of a minor is required, the absence is more than mere technicality); and

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

Ark. Code Ann. § 9-9-206(a)(6) (Repl. 2008).

- b. For the adoption of an adult, written consent must be given by the adult to be adopted and the adult's spouse.

Ark. Code Ann. § 9-9-206(b) (Repl. 2008).

- c. A parent shall not receive a compensation, fee, or any other thing of value as a consideration for the relinquishment of a minor for adoption. However, incidental costs may be assessed for prenatal, delivery, and postnatal care if such costs are reimbursements for expenses incurred or fees for services rendered. Unlawfully accepting compensation as a consideration for relinquishment of a minor is a Class C felony.

Ark. Code Ann. § 9-9-206(c) (Repl. 2008).

## 2. Consent not Required

a. Consent is not required of the following people:

(1) a parent who has deserted a child or abandoned a child.

Ark Code Ann. § 9-9-207(a)(1)(Repl. 2008); *Apel v. Cummings*, 76 Ark. App. 93 (2001)(father “essentially” had abandoned); *King v. Lybrand*, 329 Ark. 163 (1997).

(2) a parent of a child in the custody of another, if the parent has failed significantly, without significant justification, for one year to communicate with the child or provide care and support of the child as required by law or judicial decree.

Ark. Code Ann. § 9-9-206(a)(2) (Repl. 2008); *Powell v. Lane*, 375 Ark. 178 (2008); *Neel v. Harrison*, 93 Ark. App. 424 (2005)(trial court erred in granting adoption to stepmother upon a finding that mother’s consent was not necessary under this provision); *McClelland v. Murray*, 92 Ark. App. 301 (2005)(trial court erred in finding that failure to communicate for more than one year was justifiable and in denying step-father’s petition to adopt); *Ray v. Sellers*, 82 Ark. App. 530 (2003)(error to grant adoption absent evidence that parent failed to significantly communicate or provide for child for one-year period; in addition court did not specify the time period so the appellate court could not determine if it lasted for one year); *Cassat v. Hennis*, 74 Ark. App. 226 (2001); *Shorter v. Reeves*, 72 Ark. App. 71 (2000); *Manuel v. McCorkle*, 24 Ark. App. 92 (1988); *Bemis v. State*, 19 Ark. App. 198 (1986).

(3) the father of a child whose consent is not required by Ark. Code Ann. § 9-9-206(a)(2);

(4) a parent who has relinquished the right to consent or whose parental rights have been terminated by order of the court under Ark. Code Ann. § 9-9-220 or § 9-27-341;

(5) a parent judicially declared incompetent if the court dispenses with the parent’s consent;

(6) a parent of an adult to be adopted;

(7) a legal guardian or custodian, other than a parent, who fails to give a written response to the request for consent within 60 days or if found by the court to be withholding consent unreasonably;

(8) the spouse of the person to be adopted, if the court excuses the spouse from consenting by reason of prolonged unexplained absence, unavailability, incapacity, or unreasonable withholding of consent;

- (9) a putative father who signed an acknowledgment of paternity but failed to establish a significant custodial, personal, or financial relationship with the child prior to the time the adoption petition is filed; or
- (10) a putative father who is listed on the Putative Father Registry but who failed to establish a significant custodial, personal, or financial relationship with the child prior to the time the adoption petition is filed.

Ark. Code Ann. § 9-9-207(a) (Repl. 2008).

- b. Except as provided in Ark. Code Ann. § 9-9-212 and Ark. Code Ann. § 9-9-224, notice of hearing for adoption is not required to be given to a person whose consent is not required or whose consent or relinquishment was filed with the petition.

Ark. Code Ann. § 9-9-207(b) (Repl. 2008).

### 3. Execution of Consent

- a. At any time after the birth of the child, the required consent shall be executed as follows:
  - (1) if by the individual to be adopted, in the presence of the court;
  - (2) if by an authorized representative of an agency, in the presence of a person authorized to take sworn statements;
  - (3) if by any other person, in the presence of the court or a person authorized to take sworn statements; or
  - (4) if by a court, by an appropriate order or certificate.

Ark. Code Ann. § 9-9-208(a) (Repl. 2008); *In re Parsons*, 302 Ark. 427 (1990)(Ark. Code Ann. §§ 9-9-208 and 9-9-220 are mutually exclusive in obtaining consent; either one or the other should be used, but not both); *Bridges v. Bush*, 93 Ark. App. 461 (2005)(biological parents signed consents but the notary was not present when the consents were signed, so execution was not in conformity with Adoption Code. Court of Appeals affirmed trial court's finding that this constituted a fraud upon the court in procuring the decree and that the adoption should be overturned).

- b. If the parent is a minor, a written consent shall be signed by the court-appointed guardian ad litem for the minor parent, who has been appointed



by a court to appear on behalf of the minor parent for the purpose of executing consent. The signing shall be in the presence of an authorized placement agency representative, or a notary public, or a court.

Ark. Code Ann. § 9-9-208(c) (Repl. 2008).

- c. A consent that does not identify the adopting parent is valid if it contains a statement by the consenting person that he or she voluntarily executed the consent even if the adopting parent is not identified.

Ark. Code Ann. § 9-9-208(b) (Repl. 2008).

- d. A consent shall state that the person has the right to withdraw consent and shall provide the address of the court clerk of probate records where the adoption is to be filed or where the guardianship will be filed if a guardianship is to be filed.

Ark. Code Ann. § 9-9-209(b)(2) (Supp. 2009); *Martin v. Martin*, 316 Ark. 765 (1994)(adoption properly granted 13 days after birth mother executed her consent).

#### 4. Withdrawal of Consent

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

Ark. Code Ann. § 9-9-209 (a) (Supp. 2009); *Dale v. Franklin*, 22 Ark. App. 98 (1987)(A natural parent may only withdraw consent after an order of adoption upon proof of fraud, duress, or intimidation).

- b. A consent may be withdrawn within 10 calendar days after it is signed or the birth of the child, whichever is later, by filing an affidavit with the clerk where the guardianship or adoption is filed. No fee shall be charged for filing an affidavit.
- c. The court may waive the 10-day waiting period for filing a withdrawal of consent for agencies as defined by § 9-9-202(5), minors over 10 years of age who consented to the adoption, or biological parents if a step-parent is adopting.

Ark. Code Ann. § 9-9-209(b)(1) (Supp. 2009).

5. Rules of Civil Procedure do not apply to adoptions, which are "special proceedings." [Note: The Adoption Code references Rules of Civil Procedure and indicates their use in specific instances]

*In the Matter of the Adoption of Baby Boy Martindale*, 327 Ark. 685 (1997).

### **C. Requirements Prior to Hearing**

#### 1. Notice

- a. Notice of the time and place of the adoption hearing shall be given at least 20 days before the date of the hearing by the petitioner to:

- (1) any agency or person whose consent is required, but who has not consented; and

Ark. Code Ann. § 9-9-212(a)(4)(A) (Supp. 2009); *Mayberry v. Flowers*, 347 Ark. 476 (2002)(before actual notice to a father of an adoption of his child may be deemed an adequate substitute for the notice required by Ark. Code Ann. § 9-9-212 and Rule 4 of the ARCP, it must be gained before entry of an adoption decree).

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

Ark. Code Ann. § 9-9-212(a)(4)(B)(Supp. 2009); *Reid v. Frazee*, 72 Ark. App. 474 (2001).

- b. When a petitioner alleges that any person entitled to notice cannot be located, the court shall appoint an attorney ad litem who shall make a reasonable effort to locate and serve actual notice.
- c. If the attorney fails to give actual notice, the attorney ad litem shall publish a notice of the hearing in a general circulation newspaper at least once a week for four weeks with the last publication being at least seven days prior to the hearing. The attorney shall file proof of the publication and an affidavit reciting the efforts made to locate the person entitled to notice.

Ark. Code Ann. § 9-9-212(a)(5)(A) (Supp. 2009).

- d. Notice shall be given in accordance with the Rules of Civil Procedure or as the court by order directs; proof of notice shall be filed with the court

before the petition is heard.

Ark. Code Ann. § 9-9-212(e)(1) (Supp. 2009).

- e. When one parent of minor is deceased, the parents of deceased parent shall be given notice of the adoption proceedings unless the parent/child relationship has been previously terminated.

Ark. Code Ann. § 9-9-212(f) (Supp. 2009); *Johnson v. Tomkins*, 341 Ark. 949 (2000)(grandparents have a right to notice, but not a right to intervene or to be heard; because grandparents did not have court-ordered visitation and had never stood in loco parentis before initiation of the adoption proceedings, they were not entitled to be heard); *Henry v. Buchanan*, 364 Ark. 485 (2006)(Maternal grandparents had no right to notice of adoption by their grandchild's stepmother with the consent of the child's biological mother simply because they had preexisting court-ordered visitation with the grandchild.)

- f. In all cases involving a child born to a mother unmarried at the time of the child's birth, when information concerning the child is contained in the putative father registry at the time the petition is filed, a copy of the petition shall be served on the registrant, unless waived by the registrant in writing signed before a notary public.

Ark. Code Ann. § 9-9-224(b) (Repl. 2008).

## 2. Home Studies

- a. Before placement of a child in petitioner's home, a home study shall be conducted by any licensed child welfare agency or any licensed social worker. For non-Arkansas residents, it may be conducted by a person or agency licensed in that state to conduct home studies for adoptive purposes. The home study shall be filed before a petition is heard.
- b. The Dept. of Human Services shall not be ordered by any court except the juvenile division of circuit court to conduct a home study unless the responsible party is indigent and the study is of an Arkansas resident.
- c. The home study shall include a state of residence and national fingerprint-based criminal background check on adoptive parents and all household members 16 and older. Each prospective adoptive parent shall be responsible for payment of costs of the criminal background check and shall cooperate with the requirements of the State Police in this regard. For prospective adoptive parents who have lived in the state for at least 6 years immediately before adoption, only a state criminal background check is necessary.

- d. A child maltreatment central registry check is required for all household members aged 10 and older as a part of a home study.
- e. The home study shall address whether an adoptive home is suitable and shall include a recommendation regarding approval of (an) adoptive parent(s).
- f. The home study shall include an evaluation of the prospective adoption with a recommendation regarding the granting of the petition and any other information the court requires.
- g. A home study is not required for an adoption of an adult, and the court may waive for a step-parent adoption.
- h. Before placement, the licensed adoption agency or person handling the adoption shall provide prospective adoptive parents with a detailed, written health history and genetic and social history of the child which excludes information that would identify the birth family.
  - (1) this document shall be kept separate from information identifying the birth family;
  - (2) this document shall be filed with the clerk before entry of the adoption decree;
  - (3) the clerk may tender this information to any person identified by the court as entitled to it, for good cause shown.
  - (4) Unless directed by the court, a detailed, written health history and genetic and social history is not required if:
    - 1. the person to be adopted is an adult;
    - 2. the petitioner is a stepparent; or
    - 3. the petitioner and child to be adopted are related within the second degree of consanguinity.

Ark. Code Ann. § 9-9-212(Supp. 2009); *Mayberry v. Flowers*, 347 Ark. 476 (2002)(failure to give notice of adoption proceeding to natural parent violated due process and entitled parent to have decree set aside).

## D. Hearing and Decrees of Adoption

### 1. Required Residency

- a. A final decree of adoption shall not be issued or become effective until the minor, other than a stepchild of the petitioner, has lived in the adoptive home for at least 6 months after placement by an agency or at least 6 months after the filing of the petition for adoption.

Ark. Code Ann. § 9-9-213 (Repl. 2008).

### 2. Appearance in Court

- a.. The petitioner and the person to be adopted shall appear at the hearing, unless excused by the court for good cause shown.

Ark. Code Ann. § 9-9-214(a) (Repl. 2008).

### 3. Continuance

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

Ark. Code Ann. § 9-9-214(b) (Repl. 2008).

### 4. Decree of Adoption

- a. If the court finds petition complete and the adoption in the best interest of the child, the court may:

- (1) issue a final decree of adoption; or

Ark. Code Ann. § 9-9-214(c) (Repl. 2008); *Apel v. Cummings*, 76 Ark. App. 93 (2001)(not mandatory to grant adoption because one has forfeited the right to consent; adoption must be in best interest of child); *Ark. Dept. of Human Servs. v. Couch*, 38 Ark. App. 165 (1992)(keeping siblings together is just one factor in what is in the best interest of the child).

- (2) issue an interlocutory decree of adoption that will become final by its own terms within 6 months to 1 year.

Ark. Code Ann. § 9-9-214(c) (Repl. 2008).

- b. If the requirements for a decree have not been met, the court shall dismiss the petition and the child shall be returned to the person having custody prior to the filing of the petition.

Ark. Code Ann. § 9-9-214(d) (Repl. 2008); *Apel v. Cummings*, 76 Ark. App. 93 (2001)(Supreme Court reviews probate proceedings de novo and will not reverse unless clearly against the preponderance of the evidence); *In Re: Adoption of B.L.S.*, 50 Ark. App. 155 (1995)(case reversed as against the preponderance of the evidence).

- c. In cases involving a child born to an unmarried mother, upon the filing of a petition and before entry of a final decree, a certified statement shall be obtained from the putative father registry of:
  - (1) the information regarding the child who is the subject of the adoption; or
  - (2) the fact that no information was contained in the registry when the petition for adoption was filed.

Ark. Code Ann. § 9-9-224(a) (Repl. 2008).

#### 5. Effect of Decree of Adoption

- a. A final decree of adoption will:
  - (1) relieve the natural parents of the adopted person of all parental rights and responsibilities, and terminate all legal relationships with biological relatives, except with respect to a spouse of the petitioner and his or her relatives;
  - (2) create the relationship of a parent and child between the petitioner and the adopted person, as if the adopted person were a legitimate blood descendant of the petitioner, for all purposes; and
  - (3) affect the adopted person's right of inheritance.

See *Wheeler v. Myers & Kerns*, 330 Ark. 728 (1997)(right to inherit is dependent on adoption and inheritance laws in effect at time of natural ancestor's death).

Ark. Code Ann. § 9-9-215 (Repl. 2008); *Tozer v. Warden*, 101 Ark. App. 396 (2008); *Brown v. Johnson*, 81 Ark. App. 60, 97 S.W.3d 924 (2003).

- b. Parents of a deceased parent who died prior to filing of petition for adoption may be granted visitation in a stepparent adoption if the court

finds a close relationship between the grandparent and child and if visitation would be in the child's best interest.

Ark. Code Ann. § 9-9-215(a)(1) (Repl. 2008); *Vice v. Andrews*, 328 Ark. 573 (1997).

- c. Any rights to a child which a non-parental relative may derive through a parent or by a court order may be terminated in connection with a proceeding for adoption or a termination of parental rights if it is in best interest of the child.

Ark. Code Ann. § 9-9-223 (Repl. 2008).

## 6. Appeal of Adoption Decree

- a. An appeal may be taken according to the rules for appeals from a judgment in a civil action.

Ark. Code Ann. § 9-9-216(a) (Repl. 2008); *Parker v. Sebourn*, 351 Ark. 453 (2003)(Rule 60 of the Rules of Civil Procedure applies--motion to set aside a termination of parental rights four years after termination is untimely and appellant is procedurally barred from proceeding on appeal); *Mayberry v. Flowers*, 69 Ark. App. 307(2000)(trial court lacked jurisdiction under adoption statutes or Ark.R.Civ.Pro.60 to dismiss the adoption because it was a final order, and the mother did not allege fraud, duress or intimidation; writ of habeas corpus issued); see, also, *Mayberry v. Flowers*, 347 Ark. 476 (2002)(appeal after remand).

- b. After 1 year, an adoption cannot be questioned by any person for any reason, unless in the case of a minor, the petitioner has not taken custody of the minor within 1 year or in the case of an adult, the adult had no knowledge of the decree within 1 year.

Ark. Code Ann. § 9-9-216(b) (Repl. 2008); *Martin v. Martin*, 316 Ark. 765 (1994); *Wunderlich v. Alexander*, 80 Ark. App. 167 (2002)(adoption outside the one-year period overturned upon a finding that adoptive parents never “took custody” of the adoptive child); *Coker v. Child Support Enforcement Unit*, 69 Ark. App. 293, 12 S.W. 3d 669 (2000).

## 7. Death of Child Before Entry of Decree

If a child dies while placed in adoptive parent’s home for the purpose of adoption, but before the entry of the decree, the court has the authority to enter a final decree of adoption after the child’s death upon the request of the adoptive parents.

Ark. Code Ann. § 9-9-205(f)(Repl. 2008).

**E. Closed Court Proceedings and Records**

1. Confidentiality

- a. All adoption proceedings shall be held in closed court.

Ark. Code Ann. § 9-9-217 (Repl. 2008).

- b. Adoption records shall be closed, confidential, and sealed, unless the court finds good cause and grants authority to open the records.

Ark. Code Ann. § 9-9-217(a)(2)(A) (Repl. 2008); *In re K.F.H.*, 310 Ark. 53 (1992)(motion granted to close appellate record; motion denied to close oral argument).

- c. When an adoption is filed or heard in a juvenile proceeding, the court file relating to the adoption shall be maintained separately from other pending juvenile matters.

Ark. Code Ann. § 9-9-217(a)(2)(B) (Repl. 2008).

- d. All adoption records shall be maintained for 99 years by the agency, person, entity, or organization that handled the adoption. If that agency, person, entity, or organization ceases to function, all adoption records shall be transferred to DHS or another licensed agency in this state with notice to DHS.

Ark. Code Ann. § 9-9-217(d) (Repl. 2008).

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

Ark. Code Ann. § 9-9-217(b) (Repl. 2008); Ark. Code Ann. § 9-9-501, et seq. (Repl. 2008)(Voluntary Adoptive Registry Act).

**F. Relinquishment and Termination of Parental Rights**

1. Purpose

- a. Removes parental right to control of a child or to withhold consent to an adoption.
- b. Dispenses with need to obtain consent from or to give notice of adoption hearing.



- c. May be accomplished before or in conjunction with a petition to adopt the child.
- d. Duty to pay child support continues until an interlocutory decree of adoption is entered.

Ark. Code Ann. § 9-9-220(a) (Supp. 2009); *Hudson v. Kyle*, 352 Ark. 346 (2003)(termination of parental rights provision in Adoption Code is available only for a termination in connection with an adoption; it does not create an independent cause of action for termination of parental rights).

2. Voluntary Relinquishment.

- a. Adult parent may relinquish all parental rights in writing and by his or her signature, subject to court approval.

Ark. Code Ann. § 9-9-220(b) (Supp. 2009); *In re Parsons*, 302 Ark. 427 (1990).

- b. Relinquishment by a minor parent must be executed in the same manner and form as a consent to adopt under Ark. Code Ann. § 9-9-208.
  - (1) Guardian ad litem appointed to represent a minor parent shall sign in the presence of:
    - (a) agency taking custody; or
    - (b) notary public; or
    - (c) judge of court of record of this or any other state in which the minor parent was present at the time of the signing.

Ark. Code Ann. § 9-9-220(b) (Supp. 2009).

- c. Relinquishment may be withdrawn within 10 calendar days of date it is signed or date child is born, whichever is later. Or a waiver of the 10-day period may be elected and the parent may opt for 5 calendar days after it is signed or the child is born, whichever is later.

Ark. Code Ann. § 9-9-220(b)(1)(A) & 3 (Supp. 2009); *Martin v. Martin*, 316 Ark. 765 (1994).

- d. Notice of withdrawal of consent is given by filing an affidavit in the office of the clerk of probate records in the Arkansas county where the guardianship petition, if there is one, or the adoption is to be filed.

- e. When the 10-day period or the 5-day period ends on a weekend or legal holiday, the affidavit may be filed the next working day.
- f. There shall be no filing fee for the affidavit.

Ark. Code Ann. § 9-9-220(b)(1)(A) (Supp. 2009).

- g. In all other cases where there has been relinquishment and the petitioner has given the parent notice of the adoption proceeding, the court may find after considering the circumstances of relinquishment and the continued custody by the petitioner, that it is in the best interest of the child to grant the adoption.

Ark. Code Ann. § 9-9-220(b)(2) (Supp. 2009).

### 3. Involuntary Termination of Parental Rights

#### a. Grounds

##### (1) Abandonment

As defined in Ark. Code Ann. 9-9-202(7).

Ark. Code Ann. § 9-9-220(c)(1)(Supp. 2009).

##### (2) Neglect or abuse by parent which cannot or will not be remedied by parent.

- (a) Rebuttable presumption that the causes will not be remedied when parents have failed to make reasonable efforts to remedy the causes within 12 months.

Ark. Code Ann. § 9-9-220(c)(2)(A)(Supp. 2009); *Corley v. DHS*, 46 Ark. App. 265 (1994).

- (b) Rebuttable presumption that causes will not be remedied when parents have tried but failed to remedy causes within 12 months, and the court finds it unlikely that the causes will be remedied by the eighteenth month.

Ark. Code Ann. § 9-9-220(c)(2)(B) (Supp. 2009).

##### (3) A noncustodial parent is unreasonably withholding consent

contrary to best interests of the child.

Ark. Code Ann. § 9-9-220(c)(3)(Supp. 2009). *Henderson v. Callis*, 97 Ark. App. 163(2006)(Termination of putative father's rights reversed because (1) record did not show that he withheld his consent unreasonably, and (2) he had no obligation to consent merely because he was incarcerated); *In re Adoption of K.M.C.*, 62 Ark. App. 95 (1998).

- b. A decree terminating parental rights in this or any state dispenses with the need for consent and for notice of any adoption proceeding.

Ark. Code Ann. § 9-9-220(d) (Supp. 2009).

- c. Who may file a petition for termination of parental rights in connection with an adoption proceeding
  - (1) Either parent against the other;
  - (2) The petitioner for adoption, guardian of the person or legal custodian, other person standing in loco parentis, or the child's attorney ad litem;
  - (3) An agency; or
  - (4) Any other person with a legitimate interest in the matter.

Ark. Code Ann. §§ 9-9-220(e)(1) - (4) (Supp. 2009).

- d. Filing and Service:
  - (1) Rules of Civil Procedure apply.
  - (2) Notice must be given parents, guardian, legal custodian, one appointed to represent any party in the proceeding, and any person granted rights of care, control, or visitation by a court.

Ark. Code Ann. § 9-9-220(f) (Supp. 2009).

- e. Vacation of relinquishment and a Decree terminating parental rights:
  - (1) Where child is not placed for adoption, parent may withdraw relinquishment of parental rights and may obtain vacation of decree terminating parental rights.
  - (2) Person with custody must consent in writing to withdrawal or

vacation of decree before court will vacate.

Ark. Code Ann. § 9-9-220(g) (Supp. 2009).

NOTE: Termination of parental rights in § 9-9-220 is available only to free a child for adoption and in connection with an adoption. The provision does not provide an independent cause of action for the termination of parental rights. *Hudson v. Kyle*, 352 Ark. 346 (2003).

**G. Collection of Adoption Information**

1. Findings of the General Assembly
  - a. Need for more information on adoptions in Arkansas;
  - b. No agency has responsibility for gathering information;
  - c. Without adequate data, General Assembly cannot make informed decisions about adoption laws.
2. Office of Chief Counsel of the Department of Human Services (DHS) shall prepare adoption information sheet and distribute to each circuit clerk in the state to distribute to each petitioner filing an adoption pleading.
3. Petitioner shall complete form and return to clerk before entry of interlocutory or final decree of adoption.
4. Clerk shall mail completed form to Office of Chief Counsel of DHS.
5. Adoption information shall include, but not be limited to:
  - a. Age of child to be adopted;
  - b. Birth state;
  - c. State of residence of child before adoption;
  - d. State of residence of birth mother;
  - e. Age of each adoptive parent;
  - f. State in which each adoptive parent resides;
  - g. Whether adoption placement was made by licensed Arkansas adoption

agency and, if so, name of agency;

- h. Whether adoption placement was made by
    - (1) private physician;
    - (2) private attorney; or
    - (3) out-of-state entity or individual;
  - i. Whether adoptive parents are married or single;
  - j. Whether adoptive parent is a stepparent or second-parent adoptive parent;
  - k. Whether adoptive parent is a family member of the child; and
  - l. Approximate costs paid by petitioner in adoption.
6. Personally identifiable information regarding the child or an adoptive parent shall not be requested or gathered on the adoptive information sheet.

Ark. Code Ann. § 9-9-104 (Supp. 2009).

## VIII. MENTAL HEALTH

### A. Involuntary Admission for Mental Illness

#### 1. Jurisdiction

- a. Circuit courts have exclusive jurisdiction of involuntary admission procedures.

Ark. Code Ann. § 20-47-205(a) (Supp. 2009).

- b. Hearings (initial, 45-day, and additional hearings for involuntary commitment) may be held at inpatient programs of the state mental health system or a receiving facility or program where the person is detained.

Ark. Code Ann. § 20-47-205(c) (Supp. 2009).

- c. Circuit judges within the 6<sup>th</sup> Judicial Circuit may conduct hearings for persons detained within the 6<sup>th</sup> Circuit, although their proceedings were initiated in other counties. No new petitions shall be filed in the 6<sup>th</sup> Judicial Circuit, but only in the court of original jurisdiction; the Sixth Judicial Circuit judge shall assume the mantle of other judicial districts and shall have authority to enter treatment orders for other judicial districts in the prescribed hearings.

Ark. Code Ann. § 20-47-205(d) (Supp. 2009); *Chatman v. State*, 336 Ark. 323 (1999).

- c. Circuit court has exclusive jurisdiction over criminal acquittees committed to the custody of the Department of Health and Human Services.

Ark. Code Ann. § 5-2-317(a)(Repl. 2006).

#### 2. Venue

- a. Venue is in the county in which the person alleged to have mental illness resides or is detained.

Ark. Code Ann. § 20-47-207(a)(Supp. 2009).

- b. Venue for hearings for criminal acquittees may be in the circuit court of Pulaski County for initial hearings and conditional release hearings.

Ark. Code Ann. § 5-2-317(b)(1)(Repl. 2006).

- c. For subsequent hearings regarding criminal acquittees, venue is in the county where the person currently resides.

Ark. Code Ann. § 5-2-317(b)(2) (Repl. 2006).

### 3. Who May File

Any person who believes that a person meets the criteria as set out by law for involuntary admission may file a verified petition with the clerk who keeps probate records in the county where the person alleged to have mental illness resides or is detained.

Ark. Code Ann. § 20-47-207(a) (Supp. 2009).

### 4. Contents of Petition

- a. Shall state whether the person is believed to be of danger to self or others;
- b. Shall describe conduct, clinical signs and symptoms within petitioner's personal knowledge upon which petition is based;
- c. Shall contain names and addresses of witnesses having knowledge relevant to the petition's allegations;
- d. Shall contain specific prayer for involuntary admission to a hospital or to a receiving facility or program for treatment as set out in Ark. Code Ann. § 20-47-218(c).

Ark. Code Ann. § 20-47-207(b) (Supp. 2009).

### 5. Involuntary Admission Criteria

- a. A person shall be eligible for involuntary admission if he or she is in such a mental condition as a result of mental illness or disorder that he or she poses a clear and present danger to self or others.
- b. "Clear and present danger to self" is established by demonstrating that:
  - (1) the person has inflicted serious bodily injury on self or has attempted suicide or serious self-injury, and there is a reasonable probability that such conduct will be repeated if admission is not

ordered; or

- (2) the person has threatened to inflict serious bodily injury on self, and there is a reasonable probability that such conduct will occur if admission is not ordered; or
- (3) the person's behavior demonstrates such a lack of capacity to care for his or her own welfare that there is a reasonable probability of death, serious bodily injury, or serious physical or mental debilitation if admission is not ordered.
- (4)
  - (a) The persons's understanding of the need for treatment is impaired so that he or she is unlikely to participate in treatment voluntarily;
  - (b) The person needs mental health treatment on a continuing basis to prevent a relapse or harmful deterioration of his or her condition; and
  - (c) Noncompliance with treatment has been a factor in placements within the last 48 months or has been a factor in the person's commission of acts, attempts, or threats of violence within the past 48 months.

- c. "Clear and present danger to others" is established by demonstrating that the person has inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another, and there is a reasonable probability that such conduct will occur if admission is not ordered.

Ark. Code Ann. § 20-47-207(c) (Supp. 2009).

6. Filing Petition--Immediate Confinement

- a. A petition shall be filed within 72 hours, excluding week-ends and holidays, by any citizen or officer who:
  - (1) Takes a person into custody because the latter appears:
    - (a) of danger to self or others; and
    - (b) in need of immediate confinement to avoid harm to self or others.



- (2) Delivers the person to:
  - (a) Hospital; or
  - (b) Receiving facility or program.
- b. Local law enforcement shall provide transportation if no other safe means is available unless a judge orders otherwise.

Ark. Code Ann. § 20-47-210(a) (Repl. 2001).

- c. If immediate confinement is sought, the petitioner shall appear so the judge can determine whether there is reasonable cause to warrant immediate confinement.
- d. If the judge determines there is reasonable cause to detain, the judge shall issue the order and schedule a hearing to be held within 72 hours of the detention as required in Ark. Code Ann. §20-47-209(a)(1).

Ark. Code Ann. § 20-47-210(a) & (b) (Repl. 2001); *Campbell v. State*, 311 Ark. 641 (1993).

#### 7. No Initial Confinement

- a. If the person is not confined at the time the petition is filed, the court may enter an ex parte order directing law enforcement to serve a copy of the petition with a notice to appear for a hearing within 3 days, excluding week-ends and holidays.
- b. The person must also be served with a copy of a statement of rights which includes:
  - (1) the right to effective assistance of counsel, including right of appointed counsel;
  - (2) the right to be present and have counsel present at all significant stages of the proceedings, except that the attorney is not entitled to be present at clinical evaluations;
  - (3) the right to present evidence and to cross-examine witnesses;
  - (4) the right to remain silent;

- (5) the right to view and copy all documents in the court file.

Ark. Code Ann. §§ 20-47-211 & -212 (Repl. 2001); *Buchte v. State*, 337 Ark. 591 (1999)(appellant was not afforded due process protection pursuant to this section).

- (c) If the person named in the petition is not confined at the time the petition is filed, the court may:
  - (1) Enter an ex parte order directing law enforcement to serve him or her with a copy of the petition and a notice to appear for an initial hearing, to be held within 3 days, excluding weekends and holidays, of the filing of the original petition.
  - (2) If the person is served and fails to appear, the court shall:
    - (i) issue a detention order; or
    - (ii) dismiss the petition.

Ark. Code Ann. § 20-47-209(a)(1) & (2) (Repl. 2001).

#### 8. Initial Hearing--Probable Cause

- a. The petitioner must appear to substantiate the petition.
- b. The burden of proof is clear and convincing evidence that probable cause exists to believe the person has a mental illness, disease or disorder and that one of the criteria for involuntary admission applies to the person.
- c. The person named in the petition is not required to attend and may be removed from the presence of the court if the court finds:
  - (1) the person is unable to appear because of physical infirmity;
  - (2) the appearance would be detrimental to the person's mental health, well-being or treatment; or
  - (3) the person's conduct is so disruptive that proceedings cannot reasonably continue with the person present.

Ark. Code Ann. § 20-47-209(b) (Repl. 2001); *Buchte v. State*, 337 Ark. 591 (1999) (strict compliance required).

9. Initial Evaluation

- a. If the person has been taken to a hospital, a receiving facility or program, or a doctor's office, such facility may detain the person for initial evaluation and treatment if:
  - (1) the person is immediately advised of his or her rights as set out in Ark. Code Ann. § 20-47-211; and
  - (2) the staff or the physician determines that person is a danger to self or others; and
  - (3) a hearing for involuntary admission is held within 7 days as set out in Ark. Code Ann. § 20-47-205(b).

Ark. Code Ann. § 20-47-210(c) (Repl. 2001); Ark. Code Ann. § 20-47-213 (Repl. 2001).

- b. The person must be evaluated within 72 hours of detention.

Ark. Code Ann. § 20-47-210(b)(3) (Repl. 2001).

- c. Nothing prevents a person's release by the evaluation staff prior to the next hearing.
- d. The court shall be notified of the release in writing and shall dismiss the action.

Ark. Code Ann. § 20-47-210(d) (Repl. 2001).

10. 45-Day Hearing

- a. An involuntary admission hearing shall be held within 7 days, excluding weekends and holidays, after detention and shall be conducted as follows:
  - (1) the hearing shall be public and open to the media (see also, *Cameras in the Courtroom, Miscellaneous I*);
  - (2) testimony shall be taken under oath by a certified court reporter (Ark. R. Evid. 503(d)(1): no privilege may be claimed in proceedings for hospitalization for mental illness if psychotherapist has determined a need for hospitalization);
  - (3) the court shall inform the witnesses of their liability for perjury for

giving false testimony leading to one's involuntary admission and the penalties for perjury (subject to civil damages and not less than 30 days' incarceration).

Ark. Code Ann. § 20-47-214(Supp. 2009).

- b. The court shall make a determination whether clear and convincing evidence has been presented that the person subject to being involuntarily admitted is of danger to self or others;

Ark. Code Ann. § 20-47-214(b)(2) (Supp. 2009); *Campbell v. State*, 51 Ark. App. 147 (1995).

- c. The prosecuting attorney in the county where the petition is filed or the Office of the Prosecutor Coordinator for hearings at the State Hospital shall represent the petitioner.

Ark. Code Ann. § 20-47-208 (Repl. 2001).

- d. Person sought to be committed has a right to counsel.

Ark. Code Ann. §§ 20-47-211 & 212 (Repl. 2001).

- e. If the burden of proof is met, the court shall issue an order authorizing the hospital or facility or program to detain for treatment for a maximum of 45 days.

Ark. Code Ann. § 20-47-214(b)(3) (Supp. 2009).

- f. If the hearing is not held within the time specified, the person shall be released.

Ark. Code Ann. § 20-47-214(d)(Supp. 2009).

- g. If an order of a 45-day commitment is issued, the circuit (or the clerk of probate records) shall submit a copy of the filed order of commitment to the Arkansas Crime Information Center.

Ark. Code Ann. § 20-47-214(e)(Supp. 2009).

#### 11. Additional Periods of Involuntary Admission

- a. During the 45-day period, the treatment staff may petition the court to

order an additional 180-day involuntary admission if the staff believes that the person needs continued treatment and supervision, without which the person poses a likelihood of danger to self or others if discharged.

- b. The petition must be verified by the psychiatrist of the hospital, receiving facility, or program treatment staff, and the petition must set forth facts and circumstances forming the basis for requesting the additional time.
- c. A hearing must be held before the current period of involuntary admission expires and shall be conducted as follows:
  - (1) the hearing shall be open to the public and media unless the person sought to be involuntarily admitted requests in writing that the hearing be closed;
  - (2) all such requests must be witnessed by the attorney representing the person;
  - (3) testimony is taken under oath by a certified court reporter;
  - (4) the burden of proof is clear and convincing evidence.
- d. Nothing prevents a new original petition from being filed subsequent to the release of a person previously involuntarily admitted.
- e. If an order is issued for additional involuntary commitment, the circuit or probate clerk shall submit a copy of the filed order of commitment to the Arkansas Crime Information Center.

Ark. Code Ann. § 20-47-215(Supp. 2009); *Black v. State*, 52 Ark. App. 140 (1996)(burden is clear and convincing evidence).

## 12. Order

- a. The order involuntarily admitting a person shall specify a receiving facility or program located within the person's geographic area of residence or to an appropriate hospital as defined in statute.

Ark. Code Ann. § 20-47-218(c) (Repl. 2001).

- b. A treatment plan must be submitted to the court by the treatment staff, and the plan shall be incorporated by reference in the order.

Ark. Code Ann. § 20-47-218(d) (Repl. 2001).

13. Continuances

- a. Continuances requested by either party may be granted only for good cause, which includes obtaining another evaluation or expert testimony on behalf of the person, or allowing hospitalization for medical treatment not a part of the person's mental illness, disease, or disorder.

Ark. Code Ann. § 20-47-216 (Repl. 2001).

14. Conversion from Involuntary to Voluntary Status

- a. At any time during the involuntary admission period, a person may be converted to voluntary admission status if the treating physician or staff psychiatrist files a written statement of consent with the court.
- b. The court shall immediately dismiss the action upon the filing of a voluntary consent.

Ark. Code Ann. § 20-47-224 (Repl. 2001).

15. Not Adjudication of Incapacity

- a. Admission, voluntary or involuntary, shall not be considered incapacity *per se* by virtue of such admission.

Ark. Code Ann. § 20-47-223 (Repl. 2001).

16. Commitment Upon Acquittal by Reason of Mental Disease or Defect

- a. If a circuit court acquits on the ground of mental disease or defect but finds that the defendant remains affected by mental disease or defect, the court shall commit the defendant to the custody of the Director of DHS for examination.
- b. DHS shall file the report with the court having venue within 30 days of acquittal, and the court shall conduct a hearing within 10 days following filing of the report.

*Daniels v. State*, 333 Ark. 620 (1998)(delay in filing report did not cause court to lose jurisdiction); *Hattison v. State*, 324 Ark. 317 (1996)(late psychiatric report did not deprive court of jurisdiction).

- c. The burden of proof is upon the person found not guilty on the ground of mental disease or defect, and where the offense involved bodily injury to another person, or serious damage to another's property, or the substantial risk of such injury or damage, the person must show by clear and convincing evidence that release would not create a substantial risk of bodily injury or serious property damage due to the existing mental disease or defect.
- d. Preponderance of the evidence is the burden of proof for all other offenses.
- e. The acquittee has the right to counsel. When the court appoints counsel, the court shall determine amount of the attorney's fee to be paid by the county of venue and shall order payment.
- f. Hearings may be held at the Arkansas State Hospital or a designated receiving facility or program where the acquittee is detained.

Ark. Code Ann. § 5-2-314(h) (Supp. 2009).

17. Discharge or Conditional Release

- a. If the Director of DHS determines that the person committed under Ark. Code Ann. § 5-2-314 should be discharged or conditionally released, the Director shall file an application for discharge or conditional release with the circuit court that ordered the commitment and send a copy to the acquittee's counsel and attorney for the State.

Ark. Code Ann. § 5-2-315 (Supp. 2009); *Gibson v. State*, 89 Ark. App. 184 (2005)(acquittee himself can apply for a release); *Bailey v. State*, 80 Ark. App. 193 (2002); *George v. State*, 80 Ark. App. 185 (2002).

- b. If the acquittee has an impairment due to alcohol or substance abuse, the Director may petition for involuntary commitment.

Ark. Code Ann. § 20-64-815 (Repl. 2001); Ark. Code Ann. §5-2-315(a)(1)(B).

- c. The court may discharge the acquittee or conduct a hearing upon the court's own motion or upon motion of the attorney for the State.

Ark. Code Ann. § 5-2-315(b) (Supp. 2009); *Barnett v. State*, 328 Ark. 246 (1997).

- d. The burden of proof required at this hearing is clear and convincing evidence, as set out in Ark. Code Ann. § 5-2-314(e)(Supp. 2009).

Ark. Code Ann. § 5-2-315 (Supp. 2009).

- e. An order of conditional release must contain a prescribed regimen of medical, psychiatric, or psychological care or treatment certified as appropriate by the director of the facility where the acquittee has been committed, and found by the court to be appropriate.

Ark. Code Ann. § 5-2-315 (Supp. 2009).

- f. If the court finds the burden of proof has not been met, the acquittee shall continue to be committed to the custody of DHS.

Ark. Code Ann. § 5-2-315 (Supp. 2009).

- g. The acquittee, counsel, or acquittee's guardian may also file a motion for discharge once within each 180-day period.

Ark. Code Ann. § 5-2-315(f)(1) & (2)(Supp. 2009); *Gibson v. State*, 89 Ark. App. 184 (2005).

- 18. Within 5 years of conditional release, if the court determines after notice and hearing that the conditionally-released person has violated conditions of release, or that for the safety of the person or the person or property of others that his conditional release should be modified or revoked, the court may modify the conditions of release or order the person committed to the custody of DHS or its designee.

Ark. Code Ann. § 5-2-316(b)(Supp. 2009); *Manning v. State*, 76 Ark. App. 91 (2001).

## **B. Involuntary Admission for Alcohol and Drug Abuse**

### 1. Jurisdiction

- a. The circuit courts have exclusive jurisdiction of involuntary commitment procedures for alcohol and drug abuse.

Ark. Code Ann. § 20-64-802 (Repl. 2001).

- b. The judge may conduct hearings in a receiving facility or program where the person is detained or residing, at the Arkansas State Hospital, or within any county of the judge's judicial district.

Ark. Code Ann. § 20-64-802 (Repl. 2001); Ark. Code Ann. § 20-64-815 (Repl. 2001).



2. Who May File

- a. Any person with reason to believe that a person is homicidal, suicidal, or gravely disabled may file a petition with the clerk who handles filings for probate proceedings in the county where the person alleged to be addicted to alcohol or drugs resides or is detained.
- b. The person filing the petition can be represented by the prosecuting attorney or by any licensed attorney within the state.

Ark. Code Ann. § 20-64-815(a) (Repl. 2001).

3. Contents of Petition

- a. Shall state whether the person is believed to be homicidal, suicidal, or gravely disabled.
- b. Shall describe conduct, clinical signs and symptoms within petitioner's personal knowledge upon which petition is based;
- c. Shall contain names and addresses of witnesses having knowledge relevant to the petition's allegations;
- d. Shall contain specific prayer for commitment to an appropriate facility or program including inpatient or outpatient treatment for alcohol or drug addiction;
- e. Personal service shall be made in compliance with the Rules of Civil Procedure and shall include notice of date, time, and place of hearing; and shall state that failure to appear will result in custody by law enforcement to ensure attendance at a hearing unless the court finds that failure to appear is by reason of physical infirmity or that the appearance would be detrimental to person's health, well-being, or treatment.

Ark. Code Ann. § 20-64-815(b) & (c) (Repl. 2001).

4. Involuntary Admission Criteria

- a. "Homicidal" refers to a person who is addicted to alcohol or drugs and poses a significant risk of physical harm to others as manifested by recent overt behavior evidencing homicidal or other violent assaultive tendencies;
- b. "Suicidal" refers to a person who is addicted to alcohol or drugs and by

reason thereof poses a substantial risk to self as manifested by evidence of, threats of, or attempts at suicide, or serious self-inflicted bodily harm, or by evidence of other behavior or thoughts that create a grave and imminent risk to his or her physical condition;

- c. "Gravely Disabled" refers to a person who, if allowed to remain at liberty, is substantially likely, by reason of addiction to alcohol or drugs, to physically harm himself or others as a result of inability to make a rational decision to receive medication or treatment, as evidenced by:
  - (1) Inability to provide for own food, clothes, medication, medical care, or shelter; or
  - (2) Placement of others in a reasonable fear of violent behavior or serious physical harm to them; or
  - (3) An inability to avoid or protect self from severe impairment or injury without treatment.

Ark. Code Ann. § 20-64-801 (Repl. 2001).

#### 5. Conversion from Voluntary Status

- a. A person who has been voluntarily admitted to a facility or program and makes a request to leave may be subject to continued detention if the administrator or designee files a petition for involuntary commitment.
- b. The petition shall be verified and state with particularity facts personally known to the affiant which establish reasonable cause to believe the person is in imminent danger of death or serious bodily harm, and shall contain a request that the person be involuntarily committed and that detention be continued.
- c. The petition shall be filed and presented to a circuit judge on or before 5:00 p.m. the day following the request to leave, excluding week-ends and holidays.
- d. If upon review of the petition, the Court determines there is probable cause that the person meets the criteria for involuntary commitment and that release would place the person in immediate danger of death or serious bodily harm, the judge shall order continued detention pending a hearing.

Ark. Code Ann. § 20-64-811 (Repl. 2001).

6. Petition for Immediate Detention

- a. Any person filing a petition for involuntary commitment may attach a request for immediate detention.
- b. The request shall be verified and shall
  - (i) state facts personally known to the affiant which establish reasonable cause to believe the person is in imminent danger of death or serious bodily harm;
  - (ii) Shall state whether the person is currently detained in a receiving facility or program as set out above;
  - (iii). Shall include a request that the person be detained immediately at a designated receiving facility or program pending a hearing.
- c. If the judge finds reasonable cause to believe that the person meets the criteria for involuntary commitment and request for immediate confinement, that the person is in imminent danger of death or serious bodily harm, the court may grant the request and order a law enforcement officer to place the person in immediate detention at a designated receiving facility or program for treatment pending a hearing to be scheduled and conducted pursuant to Ark. Code Ann. § 20-64-821.
- d. The person shall be served with a copy of the petition and order by the officer taking the person into custody.

Ark. Code Ann. § 20-64-816 (Repl. 2001).

7. Statement of Rights

- a. The person sought to be involuntarily committed must be served with a copy of a statement of rights which includes:
  - (1) the right to effective assistance of counsel, including right of appointed counsel;
  - (2) the right to be present and have counsel present at all significant stages of the proceedings, except that the attorney is not entitled to be present at clinical evaluations;

- (3) the right to present evidence and to cross-examine witnesses;
- (4) the right to remain silent;
- (5) the right to view and copy all documents in the court file.

Ark. Code Ann. §§ 20-47-211 & -212 (Repl. 2001); and §§ 20-64-817 & -820 (Repl. 2001).

#### 8. Initial Hearing

- a. A hearing on petition for involuntary commitment, with a request for continued detention or for involuntary commitment with a request for immediate detention shall be set within 5 days, excluding weekends and holidays, of the filing of the petition.
- b. The person named in the petition may be removed from the hearing if his or her conduct is so disruptive that proceedings cannot reasonably continue with the person present.
- c. The petitioner shall appear to substantiate the petition by clear and convincing evidence.
- d. If the Court determines that the standards for involuntary commitment apply to the person, he or she shall be remanded to a designated agent of the Bureau of Alcohol and Drug Abuse Prevention or to a designated receiving facility for treatment for a period of up to 21 days. See Appendix.
- e. Any person remanded for treatment shall be evaluated within 48 hours of detention.
- f. A copy of the Court order committing the person shall be forwarded to the designated receiving facility within 5 working days.

Ark. Code Ann. § 20-64-821 (Repl. 2001).

#### 9. Additional Commitment

- a. The treatment staff may request additional commitment orders for 45 days if a person remains suicidal, homicidal, or gravely disabled.
- b. The request shall be made by a verified petition by the treatment staff,

setting forth facts and circumstances forming the basis for the request.

- c. A hearing on the petition shall be held prior to the expiration of the current commitment order.

Ark. Code Ann. § 20-64-824 (Repl. 2001).

- d. The hearing may be held in a receiving facility or program where the person is detained. The court may designate a circuit judge in Pulaski County to hear petitions for additional commitment, and, in that case, the Office of the Prosecutor Coordinator shall appear on behalf of the petitioner, provided the hearing is held on the grounds of the State Hospital in Little Rock. The petitioner may retain his or her own counsel, whereby the Prosecutor Coordinator is relieved of the duty to represent the petitioner..

Ark. Code Ann. § 20-64-823 (Repl. 2001).

- e. The attorney for the person and the person sought to be additionally committed shall be served with a copy of the petition.
- f. Testimony shall be taken under oath by a certified court reporter.
- g. The burden of proof is clear and convincing evidence.

Ark. Code Ann. § 20-64-824 (Repl. 2001).

#### 10. Conversion to Voluntary Status

- a. A person's involuntarily commitment may be converted to voluntary status if the certified substance abuse counselor files a written statement of consent with the court.
- b. The court immediately shall dismiss the action upon the filing of a voluntary consent statement.
- c. The counselor may also ask the court to amend its order if, upon evaluation, the counselor determines the person is not addicted or would benefit from an alternative method of treatment.

Ark. Code Ann. § 20-64-825 (Repl. 2001).

11. Early Release

- a. The court may condition an early release from commitment upon compliance with outpatient treatment, for a time not to exceed the remainder of the commitment order, at a facility specified by the court.
- b. Less restrictive care may be provided before expiration of the commitment period if, in the opinion of the professional in charge of the program, the committed person can be appropriately served by less restrictive treatment.

Ark. Code Ann. § 20-64-826 (Repl. 2001).

12. Presumption of Competency

No person admitted voluntarily or committed involuntarily to a receiving facility or program for alcohol or drug abuse shall be considered incompetent *per se* by virtue of such admission or commitment.

Ark. Code Ann. § 20-64-828 (Repl. 2001).

# MISCELLANEOUS

## I. CAMERAS IN THE COURTROOM

### A. AUTHORITY

#### 1. Source

- a. Arkansas Supreme Court Administrative Order No. 6: Broadcasting, Recording, or Photographing in the Courtroom.
- b. Administrative Orders of the Supreme Court are found in Volume 1 of the Court Rules Volume of the Arkansas Code Annotated.

#### 2. Application

The Administrative Order applies to all courts, circuit, district, and appellate, except as specifically set out in the Order.

#### 3. Authorization--Exceptions

- a. A judge may authorize broadcasting, recording or photographing of a trial.
- b. Exceptions Include:
  - (1) timely objection by party or attorney;
  - (2) timely objection by a witness, upon being informed by the court of the right to refuse any of the above;
  - (3) domestic relations and probate matters and all juvenile matters in circuit court;
  - (4) in camera proceedings unless the court consents;
  - (5) jurors, minors without parental or guardian consent, sexual offense victims, and undercover police agents or informants shall not be broadcast, recorded or photographed.

Arkansas Supreme Court Administrative Order No. 6.



#### **4. Procedure**

- a. Court shall direct news media representatives to enter into a pooling arrangement for the broadcasting, recording, or photographing of a trial.
- b. Requires a written agreement to share with other media representatives.
- c. Media pool selects one of its own as pool coordinator, who files a plan, subject to the final approval of the court.
- d. The court retains ultimate control of application of these rules.
- e. Media pool may have two cameras in the courtroom, one for still photography and one for television photography, both in stationary positions outside the bar of the courtroom.
- f. Other specifics are included in the rule for audio systems for radio broadcasting, for lighting or wiring, and for installation or removal of the camera and audio equipment.

#### **5. Contempt**

- a. Failure to abide by these provisions can result in a contempt citation against the news representative and agency.

*Wofford v. State*, 330 Ark. 8 (1997)(alleged violation of this Order is not appealable after one enters a conditional guilty plea under ARCrP 24.3(b)); *Smith v. State*, 314 Ark. 448 (1993)(decided shortly after Administrative Order No. 6 was adopted)(see separate concurring opinions of Justices Robert Dudley and Tom Glaze for a discussion and history of the Rule).

## **II. FINE COLLECTION**

### **A. SCOPE**

1. Applies to assessment of all monetary fines, however designated, imposed by circuit courts, district courts, or city courts for criminal convictions, traffic convictions, civil violations, and juvenile delinquency adjudications.
2. "Fine" means all monetary penalties imposed by courts, including fines, court costs, restitution, probation fees, and public service work supervisory fees.

A.C.A. § 16-13-701 (Supp. 2009).

### **B. INSTALLMENT PAYMENTS**

1. If a court concludes that a defendant has the ability to pay, but that immediate payment in full would cause a severe and undue hardship, the court can order payment by installments, as described in the provision.
2. An installment fee of \$5.00 per month shall be assessed on the first day of each month on each person who is authorized to pay a fine on an installment basis, to be collected in full each month in which a defendant makes an installment payment.

A.C.A. § 16-13-704 (Supp. 2009).

### **C. ORDERS**

1. An order assessing a fine or penalty shall include, but is not limited to, the defendant's name, current address, social security number, driver's license number, name and address of employment, amount of fine, and agreed upon payment terms and conditions.

A.C.A. § 16-13-711(Repl. 1999).

### **D. FAILURE TO COMPLY**

1. A person who defaults on payment of a fine may be imprisoned not to exceed one day for each \$40.00 of the fine or costs, 30 days if fine was imposed for conviction of a misdemeanor, or one year if fine was imposed for conviction of a felony, whichever is the shorter period.
2. If the court finds that the default in payment is not attributable to a purposeful

refusal to obey the sentence of the court or a failure to make a good-faith effort to obtain the funds required for payment, the court may give the defendant additional time in which to pay, and terms of payment may be changed.

3. Upon default, a fine may be collected by any means authorized for the enforcement of money judgment in civil actions. A judgment that defendant pay a fine shall constitute a lien on defendant's real and personal property to the same extent as a money judgment in a civil action.
4. A judgment entered by district court shall not become a lien against real property unless a certified copy of the judgment, showing the name of the judgment debtor and the date and amount of the judgment, shall be filed in the office of the circuit clerk of the county in which the land is situated.

A.C.A. § 16-13-703 & -707 (Supp. 2009).

5. A court may request that the Department of Finance and Administration revoke, suspend or refuse to renew a person's vehicle registration or driver's license when he or she fails to make satisfactory arrangements for the payment of fines.

A.C.A. § 16-13-708 (Repl. 1999).

### **III. SPECIAL JUDGES**

#### **A. AUTHORITY**

##### **1. Election of Special Judge by Regular Practicing Attorneys**

###### **a. Source**

- (1) Arkansas Constitution, Am. 80, §13
- (2) Arkansas Supreme Court Administrative Order No. 1: Special Judges. Administrative Orders of the Supreme Court are found in Volume 1 of the Court Rules Volume of the Arkansas Code Annotated

###### **b. Who Elects**

Regular practicing attorneys attending court that day

###### **c. When Election Occurs**

When the judge of a circuit court shall fail to attend on a day when court is scheduled, or if a judge is disqualified from presiding in any pending case

###### **d. How a Special Judge is Elected**

- (1) Election is conducted by the clerk of the court, who will accept nominations from the attorneys present
- (2) Regular practicing attorneys attending court shall nominate one of their number
  - (i) secret ballot;
  - (ii) majority of votes cast elect the special judge;
  - (iii) only those qualified to serve as special judge may vote;
  - (iv) the one elected shall be sworn in immediately by the clerk;
  - (v) the one elected shall enter immediately upon the duties of

- office;
- (vi) the one elected shall adjudicate the causes pending at the time of election.

(3) Clerk shall give notice of election

- (i) to regular practicing attorneys in county served by the court;
- (ii) in the most practical manner, including by telephone or by posting the notice in a public and conspicuous place in the courtroom.

**e. Eligible for Election as Special Judge**

- (1) Attorney regularly engaged in the practice of law in Arkansas;
- (2) Licensed and in good standing;
- (3) Resident qualified as an elector of the state, whether registered to vote or not;
- (4) Shall meet qualifications of judge of court to which selected.

**f. Coverage**

Each division of circuit court in a county considered a separate court for purposes of the rule.

**e. Record and Oath**

Documents for clerk's record and oath of office are at the end of Administrative Order No. 1.

**f. Payment for Judges Selected by Local Election Under Administrative Order No. 1**

Judge will be paid a daily rate equivalent to a sitting circuit judge's daily salary.

**2. Assignment by the Supreme Court**

**a. Source**

- (1) Ark. Constitution of 1874, Am. 80, §§ 4, 6 & 13;
- (2) Arkansas Supreme Court Administrative Order No. 16: Procedures Regarding the Assignment of Judges. Administrative Orders of the Supreme Court are found after the Rules of Civil Procedure in the Court Rules Volume of the Arkansas Code Annotated.
- (3) Ark. Code Ann. § 16-10-101 (Supp. 2009).

**b. Who Selects**

The Chief Justice of the Supreme Court or his or her designee.

**c. When Selection Occurs**

- (1) When all the judges in a circuit disqualify pursuant to the Code of Judicial Conduct;
- (2) When a judge is temporarily unable to serve; or
- (3) For other need as determined by the Chief Justice.

**d. How a Special Judge is Selected**

- (1) Judge requesting a special judge writes a letter to the Chief Justice (may be sent to the AOC) asking that assignment be made, stating the basis for the request, and, in the case of disqualification, stating that all the judges in the circuit have recused. The letter should include:
  - (i) name, case number and type of case involved, or date(s) for which special judge is needed;
  - (ii) facts or law in dispute;
  - (iii) whether a temporary hearing is scheduled or needed;
  - (iv) estimated time to hear the matter;
  - (v) names of attorneys representing parties;
  - (vi) other pertinent information to assist in making the

assignment.

- (2) Chief Justice selects a special judge, who may be either a sitting judge or a retired judge, and causes an order to be prepared and entered (the AOC assists with the process);
- (3) Once entered, the Order of Assignment is sent to the requesting judge, the clerk of the county to which the assignment is made, and the assigned judge.

**e. Considerations in Making Assignments**

- (1) Type and complexity of case;
- (2) Amount of time estimated for assignment;
- (3) Geographic location and proximity of assigned judge;
- (4) Consent of sitting or retired judge selected;
- (5) No one shall attempt to influence the decision of the Chief Justice in making an assignment.

**f. Termination and Reassignment**

- (1) For good cause and at request of assigned judge or discretion of Chief Justice;
- (2) Clerk in county where case is filed is notified to assign the case within the circuit;
- (3) If cause necessitating assignment still exists, appropriate circuit judge shall write a letter to the Chief Justice and process for assignment begins anew;
- (4) New assignment shall be made using same process as set out in Administrative Order No. 16.

*Neal v. Wilson*, 321 Ark. 70 (1995).

**g. Reportable Cases**

Assigned judges, including retired judges, are subject to Administrative

Order No. 3, which requires reporting of cases that have been under advisement for more than 90 days.

**h. Expenses**

- (1) A sitting circuit judge who accepts an assignment will receive actual expenses for meals and lodging, plus mileage at the current state rate, while traveling on assignment. Ark. Code Ann. § 16-10-119 (Repl. 1999).
- (2) A retired judge who accepts an assignment of a circuit case will receive actual expenses for meals and lodging, mileage at the current state rate, and a per diem equal to one-half a sitting judge's daily salary.
- (3) Requests for reimbursement are made through the AOC on forms provided by that office.

**3. Exchange Agreements Between Circuit Judges**

**a. Source**

- (1) Ark. Constitution of 1874, Am. 80, § 6;
- (2) Arkansas Supreme Court Administrative Order No. 16: Procedures Regarding the Assignment of Judges. Administrative Orders of the Supreme Court are found in Volume 1 of the Court Rules Volume of the Arkansas Code Annotated.

**b. Process**

- (1) Circuit judges may execute exchange agreements with each other to sit for one another by mutual agreement in their respective circuits. Agreements are often made between judges from contiguous circuits, although nothing mandates that the circuits be contiguous. Judges often execute these agreements at the beginning of each year for a term certain.
- (2) An exchange agreement should not be used to transfer a case in which a judge is disqualified. *State v. George*, 250 Ark. 968 (1971)(Supplemental Opinion).
- (3) Exchange agreements are probably not necessary between circuit



judges within a circuit, at least since Amendment 80, since each judge within a circuit has jurisdiction over any and all types of cases within the circuit.

**4. Special Judge's Power to Sign Documents**

Assigned, exchange, or locally elected judge may sign orders, judgments, documents or other papers in a geographic location other than the judicial circuit in which the matter is pending. Such papers have the same effect as if signed in the judicial circuit in which the matter is pending. Ark. Code Ann. § 16-13-210 (Supp. 2009).

# APPENDIX

## APPENDIX

### I. CHILD SUPPORT

1. PER CURIAM–JUNE 14, 2007
2. PER CURIAM–APRIL 26, 2007
3. ADMINISTRATIVE ORDER NUMBER 10
4. FAMILY SUPPORT CHART
  - a. Weekly
  - b. Biweekly
  - c. Semimonthly
  - b. Monthly
5. AFFIDAVIT OF FINANCIAL MEANS
6. TEXT OF 28 U.S.C. 1738(b), "FEDERAL FULL FAITH & CREDIT ACT FOR CHILD SUPPORT ORDERS"

### II. ATTORNEYS AD LITEM

1. ADMINISTRATIVE ORDER NUMBER 15
2. ATTORNEY AD LITEM REPORT FORM
3. GUIDELINES FOR PAYMENT
4. SAMPLE ORDERS OF APPOINTMENT
5. SAMPLE ORDER FOR PAYMENT

### III. ALTERNATE DISPUTE RESOLUTION

1. TABLE OF CONTENTS
2. REQUIREMENTS FOR CONDUCT OF MEDIATION & MEDIATORS
3. STANDARDS
4. REQUIREMENTS FOR INCLUSION ON ROSTER
5. PROCEDURES FOR DISCIPLINE OF MEDIATORS

# APPENDIX

## CHILD SUPPORT

# SUPREME COURT OF ARKANSAS

Opinion Delivered June 14, 2007

IN RE: ADMINISTRATIVE ORDER  
NO. 10 - Arkansas Child Support  
Guidelines.

SUPPLEMENTAL.

---

## PER CURIAM

On April 26, 2007, this court handed down a per curiam order regarding Administrative Order No. 10 - *Arkansas Child Support Guidelines*, which included the following attachments to the order: (1) a revised Administrative Order No. 10, (2) revised Child Support Charts (weekly, biweekly, monthly, and bimonthly), and (3) a revised Affidavit of Financial Means. These attachments had errors in them. This per curiam order amends and corrects Administrative Order No. 10, the Biweekly Child Support Chart and the Affidavit of Financial Means.

Administrative Order No. 10 is amended in Section III, *Calculation of Support*, in subsection "b," *Income Which Exceeds Chart*. A new *Example* is provided for computing child support when income exceeds the chart. The maximum weekly income in the example now conforms to the maximum weekly income on the revised chart.

Section III is also amended in subsection "c," *Nonsalaried payors*, to update military terminology for "quarters allowance" and to add subsistence allowance as a component of total income for military personnel.

Two of the four Family Support Charts have been amended. The Biweekly Child

Support Chart skipped from "Payor Net Biweekly Income" of \$290 to \$400. The Chart has been corrected. The "bimonthly" chart is renamed the "Semimonthly" Family Support Chart, and all references to "bimonthly" have been changed to "semimonthly" in the administrative order and in the affidavit.

A new Affidavit of Financial Means is substituted, renumbered to correct errors in numbering in the one published originally. Substantive changes include a request for three pay stubs to be attached to the affidavit after section 1.c. There are additions for clarification about income in sections 4.a. and 4.d., and about the children being supported in section 5.b. "Health insurance" was added to the list of monthly expenses as section "m." The term "legally determined illegitimate children" was replaced with "legally legitimated children" in section 23.i. After that section is a new instruction to repeat the "net pay" information on separate attachments for other salaried positions.

We republish the April 26, 2007, per curiam order and substitute all attachments, (1) revised Administrative Order No. 10, (2) revised Child Support Charts, and (3) the revised Affidavit of Financial Means.

# SUPREME COURT OF ARKANSAS

IN RE: ADMINISTRATIVE ORDER  
NO. 10 - Arkansas Child Support  
Guidelines.

Opinion Delivered April 26, 2007

---

## PER CURIAM

On February 5, 1990, this court first adopted guidelines for child support in response to P.L. 100-485 and Ark. Code Ann. §9-12-312(a). Effective October, 1989, P.L. 100-485 required that all states adopt guidelines for setting child support; that it be a rebuttable presumption that the amount of support calculated from the child-support chart is correct; and that each state's guidelines be reviewed and revised, as necessary, at least every four years. In response to the federal law, the Arkansas General Assembly enacted Ark. Code Ann. §9-12-312, which included the federal provisions and authorized the Arkansas Supreme Court to develop guidelines based on recommendations submitted to the court by a committee appointed by the Chief Justice. The Arkansas Supreme Court Committee on Child Support initially made recommendations to the court that formed the substance of a 1990 per curiam order. On May 13, 1991, pursuant to the committee's recommendations, the court issued a new per curiam to supplement the original.

In compliance with the four-year requirement of P.L. 100-485, the committee has

submitted periodic reports and recommendations to the court since 1990. On October 23, 1993, the court issued a per curiam order and adopted guidelines that were published in the Court Rules Volume of the Arkansas Code Annotated. On September 25, 1997, the court issued a per curiam and adopted the recommendations of the child support committee. At that time, the court adopted and published Administrative Order Number 10 – *Arkansas Child Support Guidelines*, effective October 1, 1997. The Administrative Order incorporated by reference weekly and monthly family support charts and the Affidavit of Financial Means. On January 22, 1998, the court entered a per curiam and republished Administrative Order Number 10, making minor corrections to the child support charts and to the Affidavit of Financial Means.

The last revision following the child support committee's periodic review was on January 31, 2002. By a per curiam order, the court adopted and republished Administrative Order Number 10 – *Arkansas Child Support Guidelines*, effective February 11, 2002, which incorporated by reference the weekly and monthly family support charts and the Affidavit of Financial Means. The committee has continued to study the existing guidelines, pursuant to federal and state law. Once again, the committee submitted a report to the court, including recommendations for revisions to the Administrative Order, the guidelines and the Affidavit of Financial Means.

Having carefully considered these most recent recommendations, the court adopts and publishes revised Administrative Order Number 10 – *Arkansas Child Support Guidelines*, effective May 3, 2007. This Administrative Order includes and incorporates by reference



revised weekly and monthly support charts and adds new biweekly and bimonthly charts. The Affidavit of Financial Means has been substantially revised and is also included and incorporated by reference into Administrative Order Number 10.

The court thanks the committee for its service, and as it has done in the past, directs the committee and the Chief Justice, as its liaison, to continue its charge pursuant to law and the rules of this court.

## **ADMINISTRATIVE ORDER NUMBER 10 — CHILD SUPPORT GUIDELINES**

### **Section I. Authority and scope.**

Pursuant to Act 948 of 1989, as amended, codified at Ark. Code Ann. § 9-12-312(a) and the Family Support Act of 1988, Pub. L. No. 100-485 (1988), the Court adopts and publishes Administrative Order Number 10 — Child Support Guidelines. This Administrative Order includes and incorporates by reference the attached weekly, biweekly, semimonthly, and monthly family support charts and the attached Affidavit of Financial Means.

It is a rebuttable presumption that the amount of child support calculated pursuant to the most recent revision of the Family Support Chart is the amount of child support to be awarded in any judicial proceeding for divorce, separation, paternity, or child support. The court may grant less or more support if the evidence shows that the needs of the dependents require a different level of support.

All orders granting or modifying child support (including agreed orders) shall contain the court's determination of the payor's income, recite the amount of support required under the guidelines, and recite whether the court deviated from the Family Support Chart. If the order varies from the guidelines, it shall include a justification of why the order varies as may be permitted under Section V hereinafter. It shall be sufficient in a particular case to rebut the presumption that the amount of child support calculated pursuant to the Family Support Chart is correct, if the court enters in the case a specific written finding within the Order that the amount so calculated, after consideration of all relevant factors, including the best interests of the child, is unjust or inappropriate.

### **Section II. Definition of income.**

Income means any form of payment, periodic or otherwise, due to an individual, regardless of source, including wages, salaries, commissions, bonuses, workers' compensation, disability, payments pursuant to a pension or retirement program, and interest less proper deductions for:

1. Federal and state income tax;
2. Withholding for Social Security (FICA), Medicare, and railroad retirement;
3. Medical insurance paid for dependent children; and
4. Presently paid support for other dependents by court order, regardless of the date of entry of the order or orders.

Cases reflect that the definition of "income" is "intentionally broad and designed to encompass the widest range of sources consistent with this State's policy to interpret 'income' broadly for the benefit of the child." *Evans v. Tillery*, 361 Ark. 63, \_\_\_ S.W.3d \_\_\_ (2005); *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002); *McWhorter v. McWhorter*, 346 Ark. 475, 58 S.W.3d 840 (2001); and *Davis v. Office of Child Support*

*Enforcement*, 341 Ark. 349, 20 S.W.3d 273 (2000).

### **Section III. Calculation of support.**

a. *Basic Considerations.* The most recent revision of the family support charts is based on the weekly, biweekly, semimonthly and monthly income of the payor parent as defined in Section II.

For purposes of computing child support payments, a month consists of 4.334 weeks. Biweekly means a payor is paid once every two weeks or 26 times during a calendar year. Semimonthly means a payor is paid twice a month or 24 times during a calendar year.

Use the lower figure on the chart for income to determine support. Do not interpolate (i.e., use the \$200.00 amount for all income pay between \$200.00 and \$210.00 per week.)

The amount paid to the Clerk of the Court or to the Arkansas Clearinghouse for administrative costs pursuant to Ark. Code Ann. § 9-12-312(e)(1)(A), § 9-10-109(b)(1)(A), and § 9-14-804(b) is not to be included as support.

b. *Income Which Exceeds Chart.* When the payor's income exceeds that shown on the chart, use the following percentages of the payor's weekly, biweekly, semimonthly or monthly income as defined in SECTION II to set and establish a sum certain dollar amount of support:

- One dependent: 15%
- Two dependents: 21%
- Three dependents: 25%
- Four dependents: 28%
- Five dependents: 30%
- Six dependents: 32%

To compute child support when income exceeds the chart, add together the maximum weekly, biweekly, semimonthly, or monthly chart amount, and the percentage of the dollar amount that exceeds that figure, using the percentage above based upon the number of dependents. *Example:* The maximum on the weekly chart is \$1,000 a week. If a payor's net weekly income is \$1,200 and support will be computed for one child—add \$149 (the chart amount of support for one child when payor's net weekly income is \$1,000) and \$30 (15% of \$200, the amount exceeding the maximum chart amount), for total child support of \$179. *Hill v. Kelly*, \_\_\_Ark. \_\_\_, \_\_\_S.W.3d \_\_\_ (2006) (case decided before the Administrative Order was amended to include this computation and example).

c. *Nonsalaried Payors.* For Social Security Disability recipients, the court should consider the amount of any separate awards made to the disability recipient's spouse and children on account of the payor's disability. SSI benefits shall not be considered as income.

For Veteran's Administration disability recipients, Workers' Compensation disability recipients, and Unemployment Compensation recipients, the court shall consider those benefits as income.

For military personnel, see the latest military pay allocation chart and benefits.

Basic Allowance for Housing (BAH) and Basic Allowance for Subsistence (BAS) should be added to other income to reach total income. Military personnel are entitled to draw BAH at a "with dependents" rate if they are providing support pursuant to a court order. However, there may be circumstances in which the payor is unable to draw BAH or may draw BAH only at the "without dependents" rate. Use the BAH for which the payor is actually eligible. In some areas, military personnel receive a variable allowance. It may not be appropriate to include this allowance in calculation of income since it is awarded to offset living expenses which exceed those normally incurred.

For commission workers, support shall be calculated based on minimum draw plus additional commissions.

For self-employed payors, support shall be calculated based on the last two years' federal and state income tax returns and the quarterly estimates for the current year. A self-employed payor's income should include contributions made to retirement plans, alimony paid, and self-employed health insurance paid; this figure appears on line 22 of the current federal income tax form. Depreciation should be allowed as a deduction only to the extent that it reflects actual decrease in value of an asset. Also, the court shall consider the amount the payor is capable of earning or a net worth approach based on property, life-style, etc. For "clarification of the procedure for determining child support by using the net-worth method," see *Tucker v. Office of Child Support Enforcement*, \_\_\_ Ark. \_\_\_, \_\_\_ S.W.3d \_\_\_ (2007).

d. *Imputed Income.* If a payor is unemployed or working below full earning capacity, the court may consider the reasons therefor. If earnings are reduced as a matter of choice and not for reasonable cause, the court may attribute income to a payor up to his or her earning capacity, including consideration of the payor's life-style. Income of at least minimum wage shall be attributed to a payor ordered to pay child support.

e. *Spousal Support.* The chart assumes that the custodian of dependent children is employed and is not a dependent. For the purposes of calculating temporary support only, a dependent custodian may be awarded 20% of the net take-home pay for his or her support in addition to any child support awarded. For final hearings, the court should consider all relevant factors, including the chart, in determining the amount of any spousal support to be paid.

f. *Allocation of Dependents for Tax Purposes.* Allocation of dependents for tax purposes belongs to the custodial parent pursuant to the Internal Revenue Code. However, the Court shall have the discretion to grant dependency allocation, or any part of it, to the noncustodial parent if the benefit of the allocation to the noncustodial parent substantially outweighs the benefit to the custodial parent.

g. *Health Insurance.* In addition to the award of child support, the court order shall provide for the child's health care needs, which normally would include health insurance if available to either parent at a reasonable cost.

#### **Section IV. Affidavit of financial means.**

The Affidavit of Financial Means shall be used in all family support matters. The trial court shall require each party to complete and exchange the Affidavit of Financial

Means prior to a hearing to establish or modify a support order.

#### **Section V. Deviation considerations.**

a. *Relevant Factors.* Relevant factors to be considered by the court in determining appropriate amounts of child support shall include:

1. Food;
2. Shelter and utilities;
3. Clothing;
4. Medical expenses;
5. Educational expenses;
6. Dental expenses;
7. Child care (includes nursery, baby sitting, daycare or other expenses for supervision of children necessary for the custodial parent to work);
8. Accustomed standard of living;
9. Recreation;
10. Insurance;
11. Transportation expenses; and
12. Other income or assets available to support the child from whatever source, including the income of the custodial parent.

b. *Additional Factors.* Additional factors may warrant adjustments to the child support obligations and shall include:

1. The procurement and maintenance of life insurance, health insurance, dental insurance for the children's benefit;
2. The provision or payment of necessary medical, dental, optical, psychological or counseling expenses of the children (e.g., orthopedic shoes, glasses, braces, etc.);
3. The creation or maintenance of a trust fund for the children;
4. The provision or payment of special education needs or expenses of the child;
5. The provision or payment of day care for a child;
6. The extraordinary time spent with the noncustodial parent, or shared or joint custody arrangements;
7. The support required and given by a payor for dependent children, even in the absence of a court order; and
8. Where the amount of child support indicated by the chart is less than the normal costs of child care, the court shall consider whether a deviation is appropriate.

c. *Application of deviation factors.* These deviation factors may be considered for both the custodial and the noncustodial parents.

#### **Section VI. Abatement of support during extended visitation.**

The guidelines assume that the noncustodial parent will have visitation every other weekend and for several weeks during the summer. Excluding weekend visitation with the custodial parent, in those situations in which a child spends in excess of 14 consecutive days with the noncustodial parent, the court should consider whether an adjustment in child support is appropriate, giving consideration to the fixed obligations

of the custodial parent which are attributable to the child, to the increased costs of the noncustodial parent associated with the child's visit, and to the relative incomes of both parents. Any partial abatement or reduction of child support should not exceed 50% of the child support obligation during the extended visitation period of more than 14 consecutive days.

In situations in which the noncustodial parent has been granted annual visitation in excess of 14 consecutive days, the court may prorate annually the reduction in order to maintain the same amount of monthly child support payments. However, if the noncustodial parent does not exercise said extended visitations during a particular year, the noncustodial parent shall be required to pay the abated amount of child support to the custodial parent.

#### **Section VII. Provisions for payment.**

All orders of child support shall fix the dates on which payments shall be made. All support orders issued shall include a provision for immediate implementation of income withholding, absent a finding of good cause not to require immediate income withholding or a written agreement of the parties incorporated in the order setting forth an alternative agreement as required by Ark. Code Ann. § 9-14-218(a). All income withholding forms shall be made a part of the court file by the payee or his or her attorney. Payment shall be made through the Arkansas Clearinghouse pursuant to Ark. Code Ann. § 9-14-805. Times for payment should ordinarily coincide with the payor's receipt of salary, wages, or other income.

# Weekly Family Support Chart

**Arkansas**  
**Weekly Family Support Chart**  
Arkansas Adjusted

Payor Net Weekly Income	One Child	Two Children	Three Children	Four Children	Five Children
100	26	37	44	49	54
110	28	41	49	54	59
120	31	45	53	58	64
130	33	48	57	63	70
140	36	52	61	68	75
150	38	55	66	72	80
160	40	59	70	77	85
170	43	62	74	81	90
180	45	66	77	85	94
190	47	69	81	90	99
200	50	72	85	94	104
210	52	76	89	98	108
220	55	79	93	102	113
230	57	83	97	107	118
240	60	86	102	112	124
250	62	90	106	117	129
260	65	94	110	122	135
270	67	97	115	127	140
280	70	101	119	132	145
290	72	104	123	136	150
300	74	107	126	139	154
310	76	110	129	143	158
320	78	113	133	147	162
330	80	116	136	150	166
340	82	119	139	154	170
350	84	121	142	157	173
360	85	123	144	159	176
370	86	124	146	162	178
380	87	126	148	164	181
390	89	128	150	166	183
400	90	130	152	168	186
410	91	132	154	171	188
420	92	133	157	173	191
430	94	135	159	175	194
440	95	137	161	178	196
450	97	139	163	180	199
460	98	141	165	183	202
470	100	143	167	185	204
480	100	144	169	186	206
490	101	145	170	187	207
500	102	146	171	189	208
510	102	147	172	190	210
520	103	148	173	191	211
530	104	149	174	192	212
540	104	150	175	193	213
550	105	150	175	193	214
560	105	151	176	194	214
570	106	151	176	195	215
580	106	152	177	195	215
590	107	153	177	196	216



**Arkansas**  
**Weekly Family Support Chart**  
Arkansas Adjusted

Payor Net Weekly Income	One Child	Two Children	Three Children	Four Children	Five Children
600	108	154	178	197	218
610	109	156	181	200	220
620	110	158	183	202	223
630	112	160	185	205	226
640	113	162	188	207	229
650	115	164	190	210	232
660	116	166	192	212	234
670	117	168	195	215	237
680	119	169	197	218	240
690	120	171	199	220	243
700	121	173	201	222	245
710	122	174	202	224	247
720	123	176	204	226	249
730	124	177	206	227	251
740	125	179	207	229	253
750	126	180	209	231	255
760	127	182	211	233	257
770	128	183	212	235	259
780	129	185	214	237	261
790	130	186	216	238	263
800	131	187	217	240	265
810	133	189	219	242	267
820	134	190	221	244	269
830	135	192	222	246	271
840	136	193	224	247	273
850	137	195	226	249	275
860	137	196	227	251	277
870	138	197	228	252	278
880	139	198	230	254	280
890	140	199	231	255	282
900	141	201	232	257	284
910	142	202	234	258	285
920	143	203	235	260	287
930	143	204	237	261	289
940	144	205	238	263	290
950	145	207	239	264	292
960	146	208	241	266	294
970	147	209	242	268	295
980	148	210	244	269	297
990	148	211	245	271	299
1000	149	213	246	272	300

# Biweekly Family Support Chart

**Arkansas**  
**Bi-Weekly Family Support Chart**  
Arkansas Adjusted

Payor Net Bi-Weekly Income	One Child	Two Children	Three Children	Four Children	Five Children
200	51	75	89	98	108
220	56	82	97	107	118
240	61	89	106	117	129
260	66	96	114	126	139
280	71	104	123	135	150
300	76	111	131	145	160
320	81	118	139	154	170
340	86	124	147	162	179
360	90	131	155	171	189
380	95	138	162	179	198
400	100	144	170	188	207
420	104	151	178	196	217
440	109	158	185	205	226
460	114	165	194	215	237
480	119	172	203	224	248
500	124	180	212	234	258
520	129	187	221	244	269
540	134	195	230	254	280
560	139	202	238	263	291
580	144	208	245	271	299
600	148	214	252	279	308
620	152	220	259	286	316
640	156	226	265	293	324
660	160	231	272	301	332
680	164	237	279	308	340
700	167	242	284	314	347
720	170	245	288	319	352
740	172	249	292	323	357
760	175	252	297	328	362
780	177	256	301	332	367
800	180	259	305	337	372
820	182	263	309	341	377
840	185	267	313	346	382
860	188	271	318	351	387
880	191	275	322	356	393
900	193	279	326	361	398
920	196	282	331	365	403
940	199	286	335	370	409
960	201	288	337	373	411
980	202	290	339	375	414
1000	203	292	341	377	416
1020	205	294	344	380	419
1040	206	296	346	382	422
1060	208	298	348	384	424
1080	209	299	349	386	426
1100	210	301	350	387	427
1120	211	302	351	388	428
1140	212	303	352	389	429
1160	213	304	353	390	431
1180	214	305	354	391	432
1200	216	307	357	394	435

**Arkansas**  
**Bi-Weekly Family Support Chart**  
Arkansas Adjusted

Payor Net Bi-Weekly Income	One Child	Two Children	Three Children	Four Children	Five Children
1220	218	311	361	399	441
1240	221	315	366	404	446
1260	224	319	371	409	452
1280	226	323	375	415	458
1300	229	327	380	420	463
1320	232	331	384	425	469
1340	235	335	389	430	475
1360	237	339	394	435	480
1380	240	343	398	440	486
1400	242	346	402	444	490
1420	244	349	405	447	494
1440	246	352	408	451	498
1460	248	355	412	455	502
1480	251	357	415	458	506
1500	253	360	418	462	510
1520	255	363	421	466	514
1540	257	366	425	469	518
1560	259	369	428	473	522
1580	261	372	431	477	526
1600	263	375	435	480	530
1620	265	378	438	484	534
1640	267	381	441	488	538
1660	269	384	445	491	542
1680	271	386	448	495	546
1700	273	389	451	498	550
1720	275	392	454	501	554
1740	277	394	457	505	557
1760	278	396	459	508	560
1780	280	399	462	511	564
1800	282	401	465	514	567
1820	283	404	468	517	570
1840	285	406	470	520	574
1860	287	408	473	523	577
1880	288	411	476	526	581
1900	290	413	479	529	584
1920	292	416	481	532	587
1940	294	418	484	535	591
1960	295	420	487	538	594
1980	297	423	490	541	597
2000	299	425	493	544	601

# **Semimonthly Family Support Chart**

**Arkansas**  
**Semi-Monthly Family Support Chart**  
Arkansas Adjusted

Payor Net Semi-Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children
250	64	93	110	122	134
275	70	102	121	133	147
300	76	111	131	145	160
325	82	120	142	157	173
350	88	129	152	168	186
375	94	137	162	179	197
400	100	145	171	189	209
425	106	154	181	200	221
450	112	162	191	211	232
475	118	170	200	221	244
500	124	179	211	233	258
525	130	189	222	245	271
550	137	198	233	258	284
575	143	207	244	270	298
600	149	216	255	282	311
625	155	225	265	293	323
650	160	232	273	302	333
675	165	239	281	311	343
700	170	246	290	320	354
725	175	253	298	329	364
750	180	260	306	338	373
775	183	265	311	344	380
800	186	269	316	350	386
825	189	274	322	355	392
850	192	278	327	361	398
875	196	282	332	367	405
900	199	287	337	373	411
925	202	292	343	379	418
950	206	297	348	384	424
975	210	302	353	390	431
1000	213	307	359	396	438
1025	216	311	363	402	443
1050	218	313	366	405	447
1075	220	316	369	407	450
1100	222	318	371	410	453
1125	223	320	374	413	456
1150	225	323	377	416	460
1175	226	324	378	418	461
1200	228	326	379	419	463
1225	229	327	381	421	464
1250	230	329	382	422	466
1275	231	330	383	423	467
1300	233	333	386	427	471
1325	237	338	392	433	478
1350	240	343	398	440	485
1375	244	348	404	446	492
1400	247	353	409	452	499
1425	251	358	415	459	507
1450	254	363	421	465	514

**Arkansas**  
**Semi-Monthly Family Support Chart**  
Arkansas Adjusted

Payor Net Semi-Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children
1475	257	367	427	472	521
1500	261	372	432	478	527
1525	263	376	436	482	532
1550	266	379	440	487	537
1575	268	383	445	491	542
1600	271	387	449	496	547
1625	274	390	453	500	552
1650	276	394	457	505	557
1675	279	397	461	510	563
1700	281	401	465	514	568
1725	284	405	469	519	573
1750	287	408	474	523	578
1775	289	412	478	528	583
1800	292	416	482	532	588
1825	294	419	486	537	593
1850	297	422	490	541	597
1875	299	425	493	545	601
1900	301	428	497	549	606
1925	303	431	500	552	610
1950	305	434	503	556	614
1975	307	437	507	560	618
2000	309	440	510	564	623
2025	311	443	514	568	627
2050	313	446	517	572	631
2075	316	449	521	575	635
2100	318	452	524	579	639
2125	320	455	528	583	644
2150	322	458	531	587	648
2175	324	461	535	591	652
2200	326	464	538	595	656
2225	328	467	541	598	661
2250	330	470	545	602	665
2275	333	473	548	606	669
2300	335	476	552	610	673
2325	337	479	555	614	677
2350	339	482	559	617	682
2375	341	485	562	621	686
2400	342	487	563	623	687
2425	343	488	565	624	689
2450	344	489	566	625	690
2475	345	490	567	627	692
2500	346	491	568	628	693

# Monthly Family Support Chart



**Arkansas**  
**Monthly Family Support Chart**  
Arkansas Adjusted

Payor Net Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children
500	127	186	220	243	269
550	140	204	242	267	295
600	152	222	263	290	321
650	165	240	284	314	347
700	177	257	304	336	371
750	189	274	324	358	395
800	200	291	343	379	418
850	212	307	362	400	441
900	224	324	381	421	465
950	235	340	400	442	488
1000	248	359	422	467	515
1050	261	377	444	491	542
1100	273	396	466	515	569
1150	286	414	488	540	596
1200	298	433	511	564	623
1250	310	449	530	585	646
1300	320	464	546	604	666
1350	330	478	563	622	687
1400	340	493	580	640	707
1450	351	507	596	659	727
1500	360	521	612	676	747
1550	366	530	622	688	759
1600	373	538	633	699	772
1650	379	547	643	711	784
1700	385	556	653	722	797
1750	391	565	664	733	810
1800	398	574	674	745	823
1850	405	584	685	757	836
1900	412	594	696	769	849
1950	419	603	707	781	862
2000	426	613	718	793	875
2050	432	622	727	803	887
2100	436	626	732	809	893
2150	439	631	738	815	900
2200	443	636	743	821	906
2250	447	641	748	827	913
2300	450	646	753	833	919
2350	453	649	756	836	923
2400	455	652	759	839	926
2450	458	655	761	841	929
2500	460	657	764	844	932
2550	463	660	766	847	935
2600	467	666	773	854	942
2650	474	676	784	866	957
2700	481	686	796	879	971
2750	487	695	807	892	985
2800	494	705	819	905	999
2850	501	715	830	918	1013
2900	508	725	842	930	1027
2950	515	735	854	943	1041

**Arkansas**  
**Monthly Family Support Chart**  
Arkansas Adjusted

Payor Net Monthly Income	One Child	Two Children	Three Children	Four Children	Five Children
3000	521	744	864	955	1054
3050	526	751	873	964	1064
3100	532	759	881	973	1075
3150	537	766	889	982	1085
3200	542	773	897	992	1095
3250	547	780	906	1001	1105
3300	552	788	914	1010	1115
3350	558	795	922	1019	1125
3400	563	802	930	1028	1135
3450	568	809	939	1037	1145
3500	573	817	947	1046	1155
3550	578	824	955	1056	1165
3600	583	831	964	1065	1175
3650	589	839	972	1074	1186
3700	593	845	979	1082	1195
3750	597	851	986	1090	1203
3800	602	857	993	1097	1211
3850	606	863	1000	1105	1220
3900	610	869	1007	1113	1228
3950	614	875	1014	1120	1237
4000	619	881	1021	1128	1245
4050	623	887	1028	1136	1254
4100	627	893	1035	1143	1262
4150	631	899	1041	1151	1270
4200	635	905	1048	1158	1279
4250	640	911	1055	1166	1287
4300	644	917	1062	1174	1296
4350	648	923	1069	1181	1304
4400	652	929	1076	1189	1313
4450	657	935	1083	1197	1321
4500	661	941	1090	1204	1330
4550	665	947	1097	1212	1338
4600	669	953	1104	1220	1346
4650	674	959	1111	1227	1355
4700	678	965	1118	1235	1363
4750	682	971	1124	1243	1372
4800	684	973	1127	1245	1375
4850	686	976	1129	1248	1378
4900	688	978	1132	1251	1381
4950	690	980	1134	1253	1383
5000	691	983	1136	1256	1386

**IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS  
(Domestic Relations Division)**

STATE OF ARKANSAS    }  
  }  
COUNTY OF \_\_\_\_\_ }

**AFFIDAVIT OF FINANCIAL MEANS**

Revised 6/2007

\_\_\_\_\_ Plaintiff

V.

No. \_\_\_\_\_

\_\_\_\_\_ Defendant

The affiant, being duly sworn, says under penalty of perjury that affiant is the (PLAINTIFF) (DEFENDANT) (~~strike out one~~) herein, has prepared this financial statement, knows the contents thereof, and that it is true and correct.

**MY INCOME**  
(Complete Block 23 on page 5 FIRST)

1.	How often are you paid? ___ weekly ___ biweekly (26 times a year) ___ monthly ___ semimonthly (twice a month—24 times a year) ___ other	Amount
1.a.	<b>Net Pay: (Take-home) (from line 23.h.)</b>	\$ _____
1.b.	<b>Allowable Deductions: (from line 23.g.)</b>	\$ _____
1.c.	<b>Other Deductions: (from line 24.i.)</b>	\$ _____

Please attach your last three (3) pay stubs to this affidavit.

2. Number of dependents, including self, claimed for tax withholding purposes: \_\_\_\_\_

3. Additional amount, if any, withheld for tax purposes: \$ \_\_\_\_\_

## OTHER INCOME, FUNDS & LIQUID ASSETS AVAILABLE TO ME

4.	Funds:	Amount:	Source of funds/assets:
4.a.	All other income received (state source, amount, and how often received):	\$	See attached sheet.
4.b.	Cash on hand or in banks:	\$	
4.c.	Stocks & bonds, etc.:	\$	
4.d.	All other child support:	\$	

## THE CHILDREN

5.	Financial responsibility of my children:	Number of children:
5.a.	Number of children I have with opposing party:	#
5.b.	Number of other children I have and support:	#
5.c.	Total Number of children living with me whom I support:	#
5.d.	Full Name of child(ren) born or legally adopted of this marriage:	Date of Birth:
1.		
2.		
3.		
4.		

### MY MONTHLY EXPENSES

6.	Expense:	Amount:		Expense:	Amount:
a.	Rent/house payment:	\$	k.	Drugs:	\$
b.	Gas & electricity:	\$	l.	Life Insurance:	\$
c.	Water:	\$	m.	Health Insurance:	\$
d.	Telephone:	\$	n.	Auto Insurance:	\$
e.	Food:	\$	o.	Fire Insurance:	\$
f.	Clothing:	\$	p.	Transportation:	\$
g.	Laundry & cleaning:	\$	q.	Other:	\$
h.	Child care:	\$	r.	Other:	\$
i.	Car payment:	\$	s.	Other:	\$
j.	Medical:	\$	t.	Other:	\$
				<b>Total:</b>	\$

Place a check mark by all expenses which are not being paid currently.

### CREDITORS

(Complete items 26, 27, & 28 on pages 6 & 7 FIRST)

	Whose Debts:	Total Owed: (A)	Total of Monthly payments: (B)
7.	Joint Debts:	\$	\$
8.	Plaintiff's Debts:	\$	\$
9.	Defendant's Debts:	\$	\$

## GENERAL INFORMATION ABOUT PARTIES

(Do not guess concerning information about opposing party)

	Information about:	Plaintiff	Defendant
10.	Name:		
11.	Address:		
12.	SSN: (last four digits)		
13.	Date of Birth:		
14.	Phone No.: (home)		
15.	Phone No.: (work)		
16.	Employer:		
17.	Employer Address:		
18.	Employer Phone No.:		
19.	Opposing party's net ___ weekly, ___ biweekly, ___ monthly or ___ semimonthly income:		
20.	Other income of opposing party:		
21.	Number of children of opposing party:		

## INCOME FROM SALARY

22. How often are you paid?

weekly     
  biweekly     
  semimonthly     
  monthly     
  other  
 52 times a year     
 26 times a year     
 24 times a year     
 12 times a year     
 Explain

**YOUR NET PAY**  
**(Gross pay minus payroll deductions)**

<b>23.</b>	<b>Income:</b>		<b>Amount</b>	
23.a.	Gross Wages per pay period:		\$	xxxxxxxxxxxx
		<b>Deductions per check:</b>	xxxxxxx	<b>Amount</b>
23.b.		Federal Income Taxes Withheld:	xxxxxxx	\$
23.c.		State Income Taxes Withheld:	xxxxxxx	\$
23.d.		F.I.C.A., and medicare <sup>1</sup> :	xxxxxxx	\$
23.e.		Health Insurance (children only) <sup>2</sup> :	xxxxxxx	\$
23.f.		Court ordered child support <sup>3</sup> :	xxxxxxx	\$
23.g.		<b>Total Withheld: (b) thru (f) above: Carry to line 1.b. on first page.</b>	xxxxxxx	\$
23.h.	<b>Net take-home pay per pay period: (Subtract 23.g from 23.a)</b>			\$
23.i.	<sup>1</sup> F.I.C.A. is Social Security; include any railroad retirement in F.I.C.A. block. <sup>2</sup> Include the amount you pay to cover the children only. <sup>3</sup> Include any court ordered child support for dependents of previous marriages or previously legally legitimated children and adopted children withheld from current paycheck.			

Repeat salary information on a separate attachment for any other salaried positions you have.

**OTHER DEDUCTIONS FROM MY PAYCHECK**

<b>24.</b>	<b>Item:</b>	<b>Amount:</b>
24.a.	Union dues:	\$
24.b.	Credit Union, thrift plan payments:	\$
24.c.	Pension Benefits and stock purchase plans:	\$
24.d.	Charitable contributions:	\$

24.e.	Debt payments and/or garnishments:	\$
24.f.	Life Insurance payments:	\$
24.g.	Other (Identify):	\$
24.h.	Other (Identify):	\$
24.i.	Total Withheld (total of 24.a. thru 24.h.) (Carry to 1.c. on page 1):	\$

The above deductions will not be considered as direct deductions from your gross pay. However, they may affect the amount of the child support obligation.

### OTHER COURT ORDERED CHILD SUPPORT

25.	Other court-ordered child support being paid other than by deduction: Attach child support order and proof of payment.	\$
-----	---	----

### CREDITORS & DEBTS

26. Debts in the names of BOTH PARTIES are:

	Creditor:	Total amount owed:	Monthly payment:
26.a.		\$	\$
26.b.		\$	\$
26.c.		\$	\$
26.d.		\$	\$
26.e.		\$	\$
26.f.		\$	\$
26.g.		\$	\$
26.h.		\$	\$
	<b>Totals:</b>	\$	\$

Attach additional schedules as needed, and then total - Carry to lines 7(A) & 7(B) on page 3.

27. Debts in the name of only the PLAINTIFF are:

	Creditor:	Total amount owed:	Monthly payment:
27.a.		\$	\$



27.b.		\$	\$
27.c.		\$	\$
27.d.		\$	\$
27.e.		\$	\$
	<b>Totals:</b>	\$	\$

Attach additional schedules as needed, and then total - Carry to lines 8(A) & 8(B) on page 3.

28. Debts in the name of only the DEFENDANT are:

	<b>Creditor:</b>	<b>Total amount owed:</b>	<b>Monthly payment:</b>
28.a.		\$	\$
28.b.		\$	\$
28.c.		\$	\$
28.d.		\$	\$
28.e.		\$	\$
	<b>Totals:</b>	\$	\$

Attach additional schedules as needed, and then total - Carry to lines 9(A) & 9(B) on page 3.

Dated this \_\_\_\_\_ of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Affiant

Subscribed and sworn to before me on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My commission expires: \_\_\_\_\_

**NOTICE**

**BOTH PARTIES MUST COMPLETE AND EXCHANGE THIS SEVEN-PAGE AFFIDAVIT PRIOR TO THE TEMPORARY HEARING. BOTH PARTIES MUST SUPPLY THE ORIGINAL NOTARIZED AFFIDAVIT TO THE COURT. THE COURT WILL PUNISH PERJURY BY APPROPRIATE ACTION.**

28 U.S.C.A. § 1738B

United States Code Annotated Currentness

Title 28. Judiciary and Judicial Procedure (Refs & Annos)

▣ Part V. Procedure

▣ Chapter 115. Evidence; Documentary (Refs & Annos)

➔§ 1738B. Full faith and credit for child support orders

**(a) General rule.**--The appropriate authorities of each State--

**(1)** shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

**(2)** shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

**(b) Definitions.**--In this section:

"child" means--

**(A)** a person under 18 years of age; and

**(B)** a person 18 or more years of age with respect to whom a child support order has been issued pursuant to the laws of a State.

"child's State" means the State in which a child resides.

"child's home State" means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

"child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

"child support order"--

**(A)** means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

**(B)** includes--

**(i)** a permanent or temporary order; and

**(ii)** an initial order or a modification of an order.

"contestant" means--

**(A)** a person (including a parent) who--

**(i)** claims a right to receive child support;

**(ii)** is a party to a proceeding that may result in the issuance of a child support order; or

(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

"court" means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

"modification" means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

**(c) Requirements of child support orders.**--A child support order made by a court of a State is made consistently with this section if--

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g)--

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

**(d) Continuing jurisdiction.**--A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

**(e) Authority to modify orders.**--A court of a State may modify a child support order issued by a court of another State if--

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual contestant; or

(B) each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

**(f) Recognition of child support orders.**--If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

(1) If only 1 court has issued a child support order, the order of that court must be recognized.

(2) If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

**(3)** If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

**(4)** If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

**(5)** The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

**(g) Enforcement of modified orders.**--A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

**(h) Choice of law.--**

**(1) In general.**--In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

**(2) Law of State of issuance of order.**--In interpreting a child support order including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

**(3) Period of limitation.**--In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

**(i) Registration for modification.**--If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

**CREDIT(S)**

(Added Pub.L. 103-383, § 3(a), Oct. 22, 1994, 108 Stat. 4064, and amended Pub.L. 104-193, Title III, § 322, Aug. 22, 1996, 110 Stat. 2221; Pub.L. 105-33, Title V, § 5554, Aug. 5, 1997, 111 Stat. 636.)

# APPENDIX

DOMESTIC RELATIONS/  
PROBATE  
ATTORNEYS AD LITEM

**ADMINISTRATIVE ORDER NUMBER 15 — ATTORNEY  
QUALIFICATIONS AND STANDARDS**

**Section 1. Qualifications for attorneys appointed by the court to represent children and indigent parents in dependency-neglect cases.**

a. An attorney shall be licensed and in good standing with the Arkansas Supreme Court.

b. (1) Prior to appointment, an attorney shall have initial education to include approved legal education of not less than 10 hours in the two years prior to the date an attorney qualifies as a court-appointed attorney for children or indigent parents in dependency-neglect cases. Initial training must include:

Child development;

Dynamics of abuse and neglect;

Attorney roles & responsibilities, including ethical considerations;

Relevant state law, federal law, case law, and rules;

Family dynamics, which may include but is not limited to, the following topics: substance abuse, domestic violence and mental health issues; and

Division of Children and Family Services (DCFS) policies and procedures.

Additional initial legal education may include, but is not limited to:

Grief and attachment;

Custody and visitation;

Resources and services; and

Trial and appellate advocacy.

(2) The Administrative Office of the Courts (AOC) shall design and conduct programs for the initial 10 hours of legal education, either alone or in collaboration with other agencies or entities.

(3) Following completion of the initial 10 hours of legal education, continuing legal education (CLE) shall include at least 4 hours per year related to representation in dependency-neglect cases which may include, but is not limited to, the subject categories listed in (b)(1). The 4 hours of CLE may be in any one of the specified categories in (b)(1) or in any combination thereof.

(4) Both the initial 10 hours of education and the 4 hours of CLE shall be certified in accordance with the rules and regulations promulgated by the Continuing Legal Education Board. All educational hours shall be calculated with reference to the CLE reporting period of July 1 through June 30, as utilized for general CLE credit by the Continuing Legal Education Board. The CLE hours for attorneys may not be carried over from one CLE year to the next.

(5) An attorney who is qualified for court appointment in dependency-neglect cases but who fails to acquire 4 hours of CLE required by June 30 of any year shall be subject to the pertinent compliance dates of Rule 5.(D) of the Arkansas Rules and Regulations for Minimum Continuing Legal Education. In accordance with Rule 5.(D), attorneys who sign an acknowledgment deficiency by August 31, and obtain their 4 hours by December 1 shall remain qualified. However, such attorneys shall not be subject to the provisions of Section 5 of the Regulations for Minimum Continuing Legal Education.

(6) When an attorney is seeking to complete the 4-hour CLE requirement

between June 30 and December 1 for the previous CLE year, he or she may remain as attorney on any pending cases for which appointment was made when the attorney was in compliance with the educational requirements. However, that attorney shall not accept appointment to any new cases until he or she is in full compliance with the CLE requirements.

(7) An attorney who fails to complete 4 hours of CLE by December 1 is no longer qualified for court appointment in dependency-neglect cases. His or her name shall be removed from the list of qualified attorneys that is maintained and distributed to the trial courts by the AOC. Such attorney can become qualified again only by completing 10 hours of CLE in the categories required for initial qualification.

(8) Attorneys in compliance with the educational qualifications as an attorney ad litem for dependency-neglect cases as of July 1, 2001 shall be deemed to have met the initial educational qualifications to represent parents in dependency-neglect cases.

*c. Clinical prerequisite for new appointments in dependency-neglect cases.*

(1) *Attorneys ad litem:* Assistance in representation of a child with an experienced attorney in the following hearings:

Emergency;  
Adjudication/Disposition;  
Review;  
Permanency Planning; and  
Termination of Parental Rights.

(2) *Parent counsel:* Assistance in representation of a parent with an experienced attorney in the following hearings:

Emergency;  
Adjudication/Disposition;  
Review;  
Permanency Planning; and  
Termination of Parental Rights.

## **Section 2. Standards of practice for attorneys ad litem in dependency-neglect cases.**

a. An attorney ad litem shall conduct personally or in conjunction with a trained Court Appointed Special Advocate (CASA) volunteer an independent investigation consisting of review of all relevant documents and records including but not limited to: police reports, DCFS records, medical records, school records, and court records. The ad litem shall interview the child, and in conjunction with a trained CASA volunteer, when one has been appointed, shall interview the parents, foster parents, caseworker, service providers, school personnel and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child are mandatory.

b. An attorney ad litem shall determine the best interest of a child by considering such factors as the child's age and sense of time, level of maturity, culture and ethnicity, degree of attachment to family members including siblings; as well as continuity, consistency, and the child's sense of belonging and identity.

c. An attorney shall make earnest efforts to attend all case staffings and

court-ordered mediation conferences and to meet with his or her client prior to every hearing. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court.

d. An attorney ad litem shall explain the court proceedings and the role of the ad litem in terms that the child can understand.

e. An attorney ad litem shall advocate for specific and appropriate services for the child and the child's family.

f. An attorney ad litem shall monitor implementation of case plans and court orders.

g. An attorney ad litem shall file appropriate pleadings on behalf of the child.

h. An attorney ad litem shall review the progress of the child's case and shall advocate for timely hearings.

i. An attorney ad litem shall request orders that are clear, specific, and, where appropriate, include a time line for assessment, services, placement, treatment and evaluation of the child and the child's family.

j. Attorney-client or any other privilege shall not prevent the ad litem from sharing all information relevant to the best interest of the child with the court.

k. An attorney ad litem, functioning as an arm of the court, is afforded immunity against ordinary negligence for actions taken in furtherance of his or her appointment.

l. An attorney ad litem shall participate in 10 hours of initial legal education prior to appointment and shall participate in 4 hours of CLE each year thereafter.

m. An attorney ad litem shall identify any potential or actual conflict of interest that would impair his or her ability to represent a client. The attorney shall notify the court as soon as practical of such conflict to allow the court to appoint another attorney for the client or for the client to retain counsel prior to the next hearing.

n. A full-time attorney shall not have more than 75 dependency-neglect cases, and a part-time attorney shall not have more than 25 dependency-neglect cases. Any deviations from this standard must be approved by the Administrative Office of the Courts which shall consider the following, including but not limited to: the number of counties and geographic area in a judicial district, the experience and expertise of the attorney ad litem, area resources, the availability of CASA volunteers, the attorney's legal practice commitments and the proportion of the attorney's practice dedicated to representing children in dependency-neglect cases, the availability of qualified attorneys in the geographic area, and the availability of funding. An attorney who is within 5 cases of reaching the maximum caseload shall notify the Administrative Office of the Courts and the Juvenile Division Judge.

o. An attorney shall not accept appointment of any case for which he or she cannot devote the requisite amount of time to comply with the above Standards of Practice and the Model Rules of Professional Conduct.

### **Section 3. Standards of practice for attorneys appointed by the court to represent parents in dependency-neglect cases.**



a. An attorney shall conduct a review of all relevant documents and records including but not limited to: police reports, DCFS records, medical records, and court records. An attorney shall interview all people having relevant knowledge to assist in representation, including but not limited to the investigator, OCC attorney or DCFS case worker, and service providers.

b. An attorney shall make earnest efforts to attend all case staffings and court-ordered mediation conferences and to meet with his or her client prior to every hearing. An attorney shall attend all dependency-neglect court hearings until the case is closed or his or her client's parental rights have been terminated.

c. An attorney shall diligently and zealously protect and advance the client's interests, rights and goals at all case staffings and in all court proceedings.

d. An attorney shall advise and explain to the client each stage of the court proceedings and the likelihood of achieving the client's goals. An attorney, where appropriate, shall identify alternatives for the client to consider, including the client's rights regarding any possible appeal, and explain the risks, if any, inherent in the client's position.

e. An attorney shall appear at all hearings and present all evidence and develop all issues to zealously advocate for his or her client and to further the client's goals.

f. An attorney shall advocate for specific and appropriate services for the parent to further the client's goals.

g. An attorney shall monitor implementation of case plans and court orders to further the client's goals.

h. An attorney shall file appropriate pleadings to further the client's goals.

i. An attorney shall review the progress of the client's case and shall advocate for timely hearings when necessary to further the client's goals.

j. An attorney shall request orders that are clear, specific, and, where appropriate, include a time line for assessment, services, placement, and treatment.

k. An attorney shall participate in 10 hours of initial legal education prior to appointment and shall participate in 4 hours of CLE each year thereafter.

l. An attorney shall identify any potential or actual conflict of interest that would impair his or her ability to represent a client. The attorney shall notify the court as soon as practical of such conflict to allow the court to appoint another attorney for the client or for the client to retain counsel prior to the next hearing.

m. An attorney shall not accept appointment of any case for which he or she cannot devote the requisite amount of time to comply with the above Standards of Practice and the Model Rules of Professional Conduct.

#### **Section 4. Qualifications for attorneys appointed by the court to represent children in domestic relations cases and guardianship cases when custody is an issue.**

a. An attorney shall be licensed and in good standing with the Arkansas Supreme Court.

(1) Prior to appointment, an attorney shall have initial education to include approved legal education of not less than 10 hours in the two years prior to the date the attorney qualifies for appointment. Initial education shall include but is not

limited to:

Child development;  
Ad litem roles and responsibilities, including ethical considerations;  
Relevant substantive state, federal and case law;  
Custody and visitation; and  
Family dynamics, including substance abuse, domestic abuse, and mental health issues.

(2) The Administrative Office of the Courts shall design and conduct programs for the initial 10 hours of legal education, either alone or in collaboration with other agencies or entities.

(3) Continuing education required to maintain qualification as an attorney ad litem shall include 4 hours of annual education in any of the five subject-matter areas set out in (b)(1) above for initial training, or in other areas affecting the child and family. The 4 hours of CLE may be in any one of the specified categories or in any combination thereof.

(4) Both the initial 10 hours of education and the 4 hours of CLE shall be certified as CLE in accordance with the rules and regulations promulgated by the Continuing Legal Education Board. All educational hours shall be calculated with reference to the CLE reporting period of July 1 through June 30, as utilized for general CLE credit by the Continuing Legal Education Board. The CLE hours for attorneys ad litem may not be carried over from one CLE year to the next.

(5) An attorney who is qualified as an attorney ad litem but who fails to acquire 4 hours of CLE by June 30 of any year shall be subject to the pertinent compliance dates of Rule 5.(D) of the Arkansas Rules and Regulations for Minimum Continuing Legal Education. In accordance with Rule 5.(D), attorneys who sign an acknowledgment of deficiency and obtain their four hours by December 1 shall remain qualified as attorneys ad litem. However, such attorneys shall not be subject to the provisions of Section 5 of the Regulations for Minimum Continuing Legal Education.

(6) When an attorney ad litem is seeking to complete the 4-hour continuing education requirement between June 30 and December 1 for the previous CLE year, he or she may remain as attorney ad litem on any pending cases for which appointment was made when the attorney was in compliance with educational requirements. However, that attorney shall not accept appointment to any new cases until he or she is in full compliance with the CLE requirements.

(7) An attorney who fails to complete 4 hours of CLE by December 1 is no longer qualified as an attorney ad litem. His or her name shall be removed from the list of qualified attorneys that is maintained and distributed to the trial courts by the AOC. Such attorney can become qualified again only by completing 10 hours in the categories required for initial qualification.

## **Section 5. Standards of practice for attorneys ad litem in domestic relations cases and guardianship cases when custody is an issue.**

a. An attorney ad litem shall conduct an independent investigation consisting of review of all relevant documents and records. The ad litem shall interview the child,

parents, and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child during the pendency of the action are mandatory. Upon entry of a final order, the attorney ad litem's obligation to represent the minor child shall end, unless directed otherwise by the court.

b. An attorney ad litem shall determine the best interest of a child by considering such custody criteria as:

(1) *Moral Fitness* factors: integrity, character, compassion, sobriety, religious training and practice, a newly acquired partner regarding the preceding elements;

(2) *Stability* factors: emotional stability, work stability, financial stability, residence and school stability, health, partner stability;

(3) *Love and Affection* factors: attention given, discipline, attitude toward education, social attitude, attitude toward access of the other party to the child, and attitude toward cooperation with the other party regarding the child's needs;

(4) *Other Relevant Information* regarding the *child* such as stated preference, age, sex, health, testing and evaluation, child care arrangements; and regarding the *home* such as its location, size, and family composition.

c. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court, as well as the recommendations of the ad litem.

d. An attorney ad litem shall file appropriate pleadings on behalf of the child, call witnesses, participate fully in examination of witnesses, present relevant evidence, and advocate for timely hearings.

e. An attorney ad litem shall explain to the child the court proceedings and the role of the ad litem in terms that the child can understand.

f. An attorney ad litem shall make recommendations to the court for specific and appropriate services for the child and the child's family. All recommendations shall likewise be communicated to the attorneys for the parties, or if a party is *pro se*, then to the party.

g. An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child.

h. An attorney shall not accept appointment to any case for which he or she cannot devote the requisite amount of time to comply with these standards of practice and the Model Rules of Professional Conduct.

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

Attorney Ad Litem: \_\_\_\_\_ Judge: \_\_\_\_\_  
(please print)

Attorney Address: \_\_\_\_\_ Telephone \_\_\_\_\_

County: \_\_\_\_\_ Judicial Circuit #: \_\_\_\_\_ Case Docket #: \_\_\_\_\_

Date Appointed: \_\_\_\_\_ # of children represented \_\_\_\_\_ Ages of children \_\_\_\_\_

Duration of Appointment: \_\_\_\_\_

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

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

Amount requested for ad litem services:

Attorney fee                            \$ \_\_\_\_\_

out-of-pocket expenses            \$ \_\_\_\_\_

Total requested                      \$ \_\_\_\_\_

Was a portion of fee paid by others? \_\_\_ yes \_\_\_ no. If yes, by whom? \_\_\_\_\_

Services requested on behalf of child(ren): \_\_\_ psychological \_\_\_ educational \_\_\_ medical

\_\_\_ parenting \_\_\_ mediation \_\_\_ other (describe):

Services ordered: \_\_\_ psychological \_\_\_ educational \_\_\_ medical \_\_\_ parenting

\_\_\_ mediation \_\_\_ other (describe):

Attorney Signature: \_\_\_\_\_

Bar #: \_\_\_\_\_ Date: \_\_\_\_\_

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

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

ARK. CODE ANN. § 9-13-101(e)(Repl. 2008) & § 9-13-106(g)(Repl. 2008)

Act 708 of 1999, with pertinent provisions codified at ARK. CODE ANN. § 9-13-101(e)(Repl. 2008) & § 9-13-106(Repl. 2008), authorized the Administrative Office of the Courts to establish an attorney ad litem program in then-chancery court cases (now Domestic Relations Division of Circuit Court) and guardianship cases in probate court (now Probate Division of Circuit Court) where custody is an issue. In furtherance of the Act, the General Assembly appropriated \$50,000 in FY 99-00 and \$100,000 in FY 00-01 with which to reimburse attorneys. Pursuant to the Act, the Administrative Office of the Courts (“AOC”) prepared a funding formula for apportionment of the funds to ensure that each judicial circuit had access to the funds. The formula was approved by the Arkansas Judicial Council and by the Rules and Regulations Subcommittee of the Arkansas Legislative Council, in conformity with Act 708.

The amount of funding has increased over the years and the funding formula has changed, but the current formula is the same as it was the first year. The funds are allocated pro rata to judicial circuits based upon the number of divorce filings for a previous calendar year. The Administrative Judge for a circuit decides how the funds allocated to his or her circuit will be distributed to the judges in the circuit or whether the funds will be used by all the judges in the circuit first-come, first-served. The circuit judge then notifies the Administrative Office of the Courts how the funds will be used. The current appropriation for the state is \$250,000 a year.

\_\_\_\_\_The following guidelines for the authorization and payment of fees to be paid from the appropriation are adopted pursuant to Ark. Code Ann. § 9-13-101 (e)(6)(Repl. 2008). The maximums for fees (number 4 below) apply when any portion of the costs of the attorneys ad litem is ordered to be paid from state funds.

1. When a circuit judge determines that an appointment of an attorney ad litem would facilitate a domestic relations or probate case in which custody is an issue and would further protect the rights of the child, the judge may appoint a private attorney to represent the child.
2. To be considered for appointment, an attorney must meet the prescribed standards of practice and qualifications adopted by the Arkansas Supreme Court and now set out in Administrative Order Number 15. In extraordinary cases, the trial court may appoint an attorney ad litem who does not meet the required standards and qualifications. The attorney may not be appointed in subsequent cases, however, until he or she has made efforts to meet the standards and qualifications. Attorneys who serve as an attorney ad litem shall file with the trial court a fee petition for services rendered and any out-of-

pocket expenses.

3. The judge shall review and approve the fee which shall be contained in an order of the court. The judge or the attorney shall then transmit a copy of the order to the AOC, which is authorized to pay the attorney. This action shall not limit the ability of the court to require the parties to pay all or a portion of the expenses, depending upon the ability of the parties to pay.
4. If a circuit judge appoints an attorney ad litem and determines that the parties can afford to pay the attorney ad litem's fee without state assistance, the judge can approve any fee the judge finds reasonable. However, if the judge authorizes part or all of the attorney ad litem fee to be paid by the state the judge shall not approve an hourly rate in excess of \$90 per hour for either the portion to be paid by the state or the portion to be paid by the litigants. In addition, the judge may award out-of-pocket expenses including long-distance telephone calls, mileage at the approved state rate, witness fees, and other incidental costs. The total award to be paid from the appropriation in any single case shall not exceed \$1,250. If a case is completed and then reopens, the case is eligible for additional payment, up to \$1,250 for each reopening.
5. An attorney who receives payment from state funds shall be required to complete a statistical survey prepared by the AOC which will include information about the amount of time expended on the case and the type of services provided.
6. Orders for payment shall be received by June 1 of each fiscal year, or by a date set by the AOC. The AOC shall pay each of the ordered amounts from the appropriation for that fiscal year, in the order they are received. Once the funds appropriated for this purpose have been expended, the Administrative Office of the Courts shall have no further obligation to pay for attorney ad litem services in that fiscal year.
7. The AOC shall maintain and distribute to the circuit judges, on a monthly basis, the status of the funds available. The AOC also shall prepare an accounting on a quarterly basis of all funds distributed for review by the Arkansas Supreme Court.

**IN THE CIRCUIT COURT OF WHITE COUNTY, ARKANSAS  
THIRD DIVISION**

**PLAINTIFF**

**VS.**

**NO.**

**DEFENDANT**

**ORDER APPOINTING ATTORNEY AD LITEM**

This cause came on to be heard and it appearing to the Court that \* shall hereby be appointed as the Attorney Ad Litem, hereafter known as "AAL," to represent and protect the interest of the parties minor child.

The AAL will pursue the child's best interest in a manner that minimizes the expense to the parties.

Upon entry of this Order, the AAL shall have a duty to conduct an extensive investigation and otherwise follow the standards set forth in Administrative Order Number 15 of Arkansas Supreme Court, which shall include at a minimum, conferring with the child, the child's parent and other caretakers, school personnel and any other persons having relevant knowledge pertaining to the welfare and best interest of the child. The AAL shall also review all relevant documents including but not limited to medical records, school records and court records.

Furthermore, upon entry of this Order, counsel for the parties shall notify their clients to immediately schedule an appointment with the AAL. Counsel shall forward all pertinent documents and pleadings to the AAL. Thereafter, the AAL shall be served with a copy of all documents pertaining to the child and notified of all court proceedings (i.e. depositions and court dates.)

At the first appointment, each party shall supply AAL with the name, business

address and telephone number of the child's teacher(s), pediatrician(s), coaches, psychologist, care givers, and other persons having relevant knowledge pertaining to the welfare of the child. The AAL shall also be supplied with the child's report cards for the past three (3) years, including attendance records, if applicable.

Subsequent to meeting with all parties, the AAL may contact the child, if appropriate. The child shall be entitled to ready access to the AAL by letter, e-mail, telephone or office conference. Neither parent shall interfere with the communication between the child and the AAL. Neither party, nor any person on their behalf, shall communicate with the minor child concerning the subject matter of the litigation, without prior approval of the Court. All such communication, if any, shall be provided by the AAL at the AAL's discretion. If the child ask either party about pending litigation, the adult in question shall respond only by referring the child to the AAL.

The parties are hereby enjoined from speaking in a derogatory manner about the other parent in the presence of the child.

The AAL shall be provided with access to any and all counseling and/or therapy reports relating to the child and the parties, and the parties shall execute and provide to the AAL, a release of confidentiality, if required by the counselor or therapist. The AAL shall also have access to confidential information as provided in the Order for Access to Confidential Information that will be signed at the same time as this Order.

This Order hereby allows the AAL to inspect all records and documents pertaining to the welfare of said child including, but not limited to, records of the Department of Human Services, pediatricians, mental health professionals, hospitals, clinics and said agencies shall make full disclosure to the AAL. The restrictions of state



law shall apply. The documents obtained shall remain confidential and shall not be released to a party without prior court approval.

The parties shall be responsible for paying the AAL's fees and costs at the hourly rate of \$90.00 for both in-court and out-of-court work. Within 15 days of entry of this Order, Plaintiff shall deposit \$300.00 and Defendant shall deposit \$300.00. The parties' individual shares of the responsibility for the fees and costs as between the parties are to be determined later. At the final hearing, payment of any additional fees shall be determined. Upon entry of a final order, the AAL's obligation to represent the minor child shall end, unless directed otherwise by this Court. Failure to pay the AAL in a manner acceptable to the AAL shall subject the party to contempt charges by this Court.

ALL OF WHICH IS HEREBY ORDERED, ADJUDGED AND DECREED, this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

---

Craig Hannah  
Circuit Judge

File Marked Copies to:

**IN THE CIRCUIT COURT OF WHITE COUNTY, ARKANSAS  
THIRD DIVISION**

**PLAINTIFF**

**VS.**

**NO.**

**DEFENDANT**

**ORDER FOR ACCESS TO CONFIDENTIAL INFORMATION**

\* has been appointed Attorney Ad Litem for the minor child, and shall have immediate access to such child, and to all otherwise privileged or confidential information regarding such child, without the necessity of any further order or release. Such information includes but is not limited to social services, drug and alcohol treatment, medical evaluation, law enforcement, school, probate and court records, records of trusts and accounts of which the child is a beneficiary, and other records relevant to the case, including court records of parties to this case or their household members.

Mental health records that are privileged or confidential under state or federal laws shall be released to the Attorney Ad Litem only in accordance with such laws.

\_\_\_\_\_  
Craig Hannah  
Circuit Judge

\_\_\_\_\_  
Date

File Marked Copies to:

*SAMPLE ORDER APPOINTING DOMESTIC RELATIONS ATTORNEY AD LITEM*

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS

NAME

PLAINTIFF

vs.

NO. \_\_\_\_\_

NAME

DEFENDANT

ORDER APPOINTING [DOMESTIC RELATIONS][PROBATE]  
ATTORNEY AD LITEM

On this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, the Court orders:

Pursuant to Ark. Code Ann. § 9-13-101(e)(2)(Repl. 2008), \_\_\_\_\_

[name of attorney] is hereby appointed attorney ad litem to represent the minor child(ren),

\_\_\_\_\_ (name or names) herein.

The attorney ad litem shall be paid [by the parties][by the Administrative Office of the Courts, pursuant to Ark. Code Ann. § 9-13-101(d), so long as appropriated funds are available, and subject to the maximum rate of \$90.00/hour and \$1,250.00 per case, as allowed by the Guidelines adopted by the Arkansas Judicial Council].

IT IS SO ORDERED.

\_\_\_\_\_  
CIRCUIT JUDGE

\_\_\_\_\_  
DATE

*SAMPLE ORDER TO PAY DOMESTIC RELATIONS/GUARDIANSHIP ATTORNEY AD LITEM*

IN THE CIRCUIT COURT OF \_\_\_\_\_ COUNTY, ARKANSAS

NAME

PLAINTIFF

vs.

NO. \_\_\_\_\_

NAME

DEFENDANT

ORDER TO PAY [DOMESTIC RELATIONS][PROBATE] ATTORNEY AD LITEM

\_\_\_\_\_ (name of attorney ad litem) was appointed to represent the minor child(ren), \_\_\_\_\_ (name or names of child(ren)) herein. Based upon the attorney's fee petition, the Court hereby orders the Administrative Office of the Courts to pay an attorney's fee of \$\_\_\_\_\_, [and out-of-pocket expenses of \$\_\_\_\_\_], [for a total of \$\_\_\_\_\_,] from the funds appropriated to the AOC for this purpose. Payment is subject to the availability of funding and to the maximum rate of \$90.00 an hour and the maximum total of \$1,250.00 per case

allowed under the Guidelines adopted by the Arkansas Judicial Council.

[The Court further orders \_\_\_\_\_, the father of the child, and/or \_\_\_\_\_, the mother of the child, to pay the attorney ad litem \$\_\_\_\_\_.]

IT IS SO ORDERED.

\_\_\_\_\_  
CIRCUIT JUDGE

\_\_\_\_\_  
DATE

## **§ 1738B. Full faith and credit for child support orders**

**(a) General rule.**--The appropriate authorities of each State--

**(1)** shall enforce according to its terms a child support order made consistently with this section by a court of another State; and

**(2)** shall not seek or make a modification of such an order except in accordance with subsections (e), (f), and (i).

**(b) Definitions.**--In this section:

"child" means--

**(A)** a person under 18 years of age; and

**(B)** a person 18 or more years of age with respect to whom a child support order

has been issued pursuant to the laws of a State.

"child's State" means the State in which a child resides.

"child's home State" means the State in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately preceding the time of filing of a petition or comparable pleading for support and, if a child is less than 6 months old, the State in which the child lived from birth with any of them. A period of temporary absence of any of them is counted as part of the 6-month period.

"child support" means a payment of money, continuing support, or arrearages or the provision of a benefit (including payment of health insurance, child care, and educational expenses) for the support of a child.

"child support order"--

**(A)** means a judgment, decree, or order of a court requiring the payment of child support in periodic amounts or in a lump sum; and

**(B)** includes--

**(i)** a permanent or temporary order; and

**(ii)** an initial order or a modification of an order.

"contestant" means--

**(A)** a person (including a parent) who--

**(i)** claims a right to receive child support;

(ii) is a party to a proceeding that may result in the issuance of a child support order; or

(iii) is under a child support order; and

(B) a State or political subdivision of a State to which the right to obtain child support has been assigned.

"court" means a court or administrative agency of a State that is authorized by State law to establish the amount of child support payable by a contestant or make a modification of a child support order.

"modification" means a change in a child support order that affects the amount, scope, or duration of the order and modifies, replaces, supersedes, or otherwise is made subsequent to the child support order.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the territories and possessions of the United States, and Indian country (as defined in section 1151 of title 18).

**(c) Requirements of child support orders.**--A child support order made by a court of a State is made consistently with this section if--

(1) a court that makes the order, pursuant to the laws of the State in which the court is located and subsections (e), (f), and (g)--

(A) has subject matter jurisdiction to hear the matter and enter such an order; and

(B) has personal jurisdiction over the contestants; and

(2) reasonable notice and opportunity to be heard is given to the contestants.

**(d) Continuing jurisdiction.**--A court of a State that has made a child support order consistently with this section has continuing, exclusive jurisdiction over the order if the State is the child's State or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order.

**(e) Authority to modify orders.**--A court of a State may modify a child support order issued by a court of another State if--

(1) the court has jurisdiction to make such a child support order pursuant to subsection (i); and

(2)(A) the court of the other State no longer has continuing, exclusive jurisdiction of the child support order because that State no longer is the child's State or the residence of any individual

contestant; or

**(B)** each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing, exclusive jurisdiction over the order.

**(f) Recognition of child support orders.**--If 1 or more child support orders have been issued with regard to an obligor and a child, a court shall apply the following rules in determining which order to recognize for purposes of continuing, exclusive jurisdiction and enforcement:

**(1)** If only 1 court has issued a child support order, the order of that court must be recognized.

**(2)** If 2 or more courts have issued child support orders for the same obligor and child, and only 1 of the courts would have continuing, exclusive jurisdiction under this section, the order of that court must be recognized.

**(3)** If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized, but if an order has not been issued in the current home State of the child, the order most recently issued must be recognized.

**(4)** If 2 or more courts have issued child support orders for the same obligor and child, and none of the courts would have continuing, exclusive jurisdiction under this section, a court having jurisdiction over the parties shall issue a child support order, which must be recognized.

**(5)** The court that has issued an order recognized under this subsection is the court having continuing, exclusive jurisdiction under subsection (d).

**(g) Enforcement of modified orders.**--A court of a State that no longer has continuing, exclusive jurisdiction of a child support order may enforce the order with respect to nonmodifiable obligations and unsatisfied obligations that accrued before the date on which a modification of the order is made under subsections (e) and (f).

**(h) Choice of law.**--

**(1) In general.**--In a proceeding to establish, modify, or enforce a child support order, the forum State's law shall apply except as provided in paragraphs (2) and (3).

**(2) Law of State of issuance of order.**--In interpreting a child support order

including the duration of current payments and other obligations of support, a court shall apply the law of the State of the court that issued the order.

**(3) Period of limitation.**--In an action to enforce arrears under a child support order, a court shall apply the statute of limitation of the forum State or the State of the court that issued the order, whichever statute provides the longer period of limitation.

**(i) Registration for modification.**--If there is no individual contestant or child residing in the issuing State, the party or support enforcement agency seeking to modify, or to modify and enforce, a child support order issued in another State shall register that order in a State with jurisdiction over the nonmovant for the purpose of modification.

Section 2 of Pub.L. 103-383 provided that:

**"(a) Findings.**--The Congress finds that--

**"(1)** there is a large and growing number of child support cases annually involving disputes between parents who reside in different States;

**"(2)** the laws by which the courts of different jurisdictions determine their authority to establish child support orders are not uniform;

**"(3)** those laws, along with the limits imposed by the Federal system on the authority of each State to take certain actions outside its own boundaries--

**"(A)** encourage noncustodial parents to relocate outside the States where their children and the custodial parents reside to avoid the jurisdiction of the courts of such States, resulting in an increase in the amount of interstate travel and communication required to establish and collect on child support orders and a burden on custodial parents that is expensive, time consuming, and disruptive of occupations and commercial activity;

**"(B)** contribute to the pressing problem of relatively low levels of child support payments in interstate cases and to inequities in child support payments levels that are based solely on the noncustodial parent's choice of residence;

**"(C)** encourage a disregard of court orders resulting in massive arrearages nationwide;

**"(D)** allow noncustodial parents to avoid the payment of regularly scheduled child support payments for extensive periods of time, resulting in substantial hardship for the children for whom support is due and for their custodians; and

**"(E)** lead to the excessive relitigation of cases and to the establishment of conflicting orders by the courts of various jurisdictions, resulting in confusion, waste of judicial resources, disrespect for the courts, and a diminution of public confidence in the rule of law; and

**"(4)** among the results of the conditions described in this subsection are--

**"(A)** the failure of the courts of the States to give full faith and credit to



the judicial proceedings of the other States;

"(B) the deprivation of rights of liberty and property without due process of law;

"(C) burdens on commerce among the States; and

"(D) harm to the welfare of children and their parents and other custodians.

"(b) **Statement of policy.**--In view of the findings made in subsection (a), it is necessary to establish national standards under which the courts of the various States shall determine their jurisdiction to issue a child support order and the effect to be given by each State to child support orders issued by the courts of other States.

"(c) **Purposes.**--The purposes of this Act [enacting this section and a provision set out as a note under section 1 of this title] are--

"(1) to facilitate the enforcement of child support orders among the States;

"(2) to discourage continuing interstate controversies over child support in the interest of greater financial stability and secure family relationships for the child; and

"(3) to avoid jurisdictional competition and conflict among State courts in the establishment of child support orders."

# APPENDIX

## ALTERNATE DISPUTE RESOLUTION

## TABLE OF CONTENTS

I.	Introduction.....	1
II.	Scope, Definition, Mediator's Role, General Principles and Effective Date.....	1
	A. Scope.....	1
	B. Definition of Mediation.....	1
	C. Mediator's Role.....	2
	D. General Principles.....	2
	E. Effective Date.....	2
III.	Standards.....	2
	Standard 1. General	
	A. Integrity, Impartiality, and Professional Competence.....	2
	B. Concurrent Standards.....	3
	Standard 2. Responsibilities to Courts.....	3
	Standard 3. The Mediation Process	
	A. Orientation Session.....	3
	B. Continuing Mediation.....	4
	C. Avoidance of Delay.....	4
	Standard 4. Self-Determination	
	A. Parties' Right and Obligation to Decide.....	4
	B. Prohibition of Coercion.....	5
	C. Misrepresentation Prohibited.....	5
	D. Balanced Process.....	5
	E. Responsibility to Nonparticipating Parties.....	5
	Standard 5. Impartiality and Conflicts of Interest	
	A. Impartiality.....	5
	B. Required Disclosures and Conflicts of Interest.....	5
	Standard 6. Confidentiality	
	A. Confidentiality.....	6
	B. Records and Research Data.....	7
	Standard 7. Professional Advice	
	A. Generally.....	7
	B. Independent Legal Advice.....	7
	C. Participation of Parties.....	7

D. Personal or Professional Opinion.....	7
Standard 8. Fees and Expenses; Pro Bono Service	
A. General Requirements.....	7
B. Records.....	7
C. Referrals .....	7
D. Contingent Fees .....	7
E. Minimum Fees.....	7
F. Disclosure of Fees .....	8
G. Pro Bono Service .....	8
Standard 9. Training and Education	
A. Training.....	8
B. Continuing Education.....	8
C. New Mediator Training.....	8
Standard 10. Advertising .....	8
Standard 11. Advancement of Mediation .....	8

**ARKANSAS ALTERNATIVE DISPUTE RESOLUTION COMMISSION  
REQUIREMENTS  
FOR THE CONDUCT OF MEDIATION AND MEDIATORS**

*The Requirements for the Conduct of Mediation and Mediators* have three primary goals: 1) serve as a guide for the conduct of mediators; 2) inform the mediating parties; and 3) instill public confidence in the mediation process. These requirements are drawn from existing codes of conduct for mediators and address issues and problems which have surfaced in mediation practice.

**I. INTRODUCTION**

These requirements serve as the foundation for the conduct of mediators practicing in the state of Arkansas. They set out standards of behavior for mediators in relationship to the parties in dispute, fellow mediators, and the citizens of Arkansas.

These requirements are not a comprehensive list of the ethical considerations which should guide the conduct of a mediator. However, they are framework for the ethical practice of mediation.

Nothing in these requirements should be interpreted to establish or augment any substantive legal duty on the part of mediators. Violation of a Standard shall not give rise to a cause of action nor shall it create any presumption that a legal duty has been breached. However, violation of *The Requirements for the Conduct of Mediation and Mediators* may result in disqualification from the Commission's Roster of Mediators.

**II SCOPE, DEFINITION, MEDIATOR'S ROLE, GENERAL PRINCIPLES, AND EFFECTIVE DATE**

**A. Scope.** The Requirements set out in this document shall apply to all mediators included on the Arkansas Alternative Dispute Resolution Commission's Roster of Mediators. The Commission recommends that all mediators practicing in the state of Arkansas adhere to these requirements.

**B. Definition of Mediation.** Mediation is a dispute settlement process in which a neutral third party assists disputing parties in reaching a mutually acceptable agreement. The mediator may suggest alternatives, but does not create an agreement for, or impose an agreement on, the parties. Mediation is a non-adversarial process in which the objective is the encouragement and facilitation of a mutually acceptable agreement based on the parties self-determined needs, interests, and values.

**C. Mediator's Role.** In mediation, decision-making authority rests with the disputing parties. The role of the mediator includes, but is not limited to, assisting the disputing parties in

identifying issues, facilitating communication, focusing the disputing parties on their interests maximizing the exploration of alternatives, and helping the disputing parties reach voluntary agreements. The mediator may offer options for the parties to consider as settlement terms, but is not to judge or impose settlement terms on the parties.

**D. General Principles.** Mediation is based on principles of communication, negotiation, facilitation, and the technique or method of solving problems. It emphasizes:

- (1.) The needs and interests of the disputing parties;
- (2.) Fairness and the merits of the issues as defined by the parties;
- (3.) Procedural flexibility;
- (4.) Privacy and confidentiality;
- (5.) Full disclosure; and
- (6.) Self-determination.

**E. Effective Date.** April 13, 2001.

### **III. STANDARDS**

#### **STANDARD 1. GENERAL**

**A. Integrity, Impartiality, and Professional Competence.** Integrity, impartiality, and professional competence are the essential qualifications of any mediator. Professional competence means the knowledge, skill, and thoroughness reasonably necessary for the practice of mediation.

(1.) A mediator shall not accept any engagement, perform any service, or undertake any act that would compromise the mediator's integrity.

(2.) A mediator shall maintain professional competence in mediation skill. This includes, but is not limited to:

- (a.) Staying informed of, and abiding by, all statutes, rules, and administrative orders relevant to the practice of mediation; and
- (b.) Engaging in educational activities promoting professional growth.

(3.) If the mediator decides that a case is beyond the mediator's competence, the mediator shall decline appointment, withdraw, or request technical assistance.

(4.) A mediator shall be courteous toward a co-mediator and avoid any appearance of conflict with or criticism of a co-mediator in the presence of parties in mediation.

(5.) A mediator shall respect and promote cooperation and understanding among all parties involved in mediation, including , but not limited to, disputants, mediators, attorneys, judges, mental health and social service professionals.

(6.) A mediator shall not practice, condone, or facilitate any form of discrimination against any party on the basis of any characteristic, condition, preference, belief, or status of such party.

**B. Concurrent Standards.** Nothing contained herein shall replace, eliminate, or render inapplicable relevant ethical standards not in conflict with these rules that may be imposed upon any mediator by virtue of the mediator's profession.

## **STANDARD 2. RESPONSIBILITIES TO COURTS**

A mediator shall be candid, accurate, and fully responsive to a court concerning the mediator's qualifications, availability, and other matters pertinent to his or her being selected to mediate. A mediator shall observe all administrative policies, procedural rules, and statutes that apply to mediation. A mediator shall refrain from any activity that has the appearance of improperly influencing a court to secure placement on a roster of mediators or appointment to a case.

## **STANDARD 3. THE MEDIATION PROCESS**

**A. Orientation Session.** In order for parties to exercise self-determination they must understand the mediation process. At the beginning of the mediation session, the mediator should explain the mediation process. This explanation should include:

(1.) the role of the mediator is as a neutral party who will assist and encourage the parties to make informed and voluntary decisions that can lead to settlement. The mediator is not an authority of fact or law in the session. All settlement decisions are to be made by the parties, not the mediator.

(2.) the role of the mediator can include, but is not limited to:

- (a.) assisting the parties by facilitating communication;
- (b.) encouraging engagement and autonomy in the process;
- (c.) clarifying and reality testing issues;
- (d.) reducing obstacles to decision making;
- (e.) encouraging parties to evaluate options;

- (f.) encouraging an informed and voluntary agreement;
- (3.) the procedure that will be followed during the mediation session or sessions;
- (4.) the pledge of confidentiality that applies to the mediation process;
- (5.) the fact that the mediator does not represent either party and will not give professional advice. If expert advice is needed, the parties will be expected to consult with experts other than the mediator; and
- (6.) the fact that the mediator is responsible for promoting a reasonable negotiating atmosphere. A safe and neutral environment is expected and shall be controlled by the mediator to the point of stopping the mediation if maintaining safety is in jeopardy.

Further, in the event a party is not represented by an attorney, the mediator should explain:

- (a.) that the parties are free to consult legal counsel at any time and are encouraged to have any settlement agreement resulting from the mediation process reviewed by counsel before they sign it; and
- (b.) that a mediated agreement, once signed, is binding and can have a significant effect upon the rights of the parties and upon the status of the case.

**B. Continuing Mediation.** A mediator shall withdraw from a mediation if the mediator believes the mediation is being used to further illegal conduct. A mediator shall withdraw if the mediator believes any agreement reached would be the result of fraud, duress, overreaching, the absence of bargaining ability, or unconscionability. A mediator shall not prolong a mediation session if it becomes apparent that the case is unsuitable for mediation or if one or more of the parties is unable or unwilling to participate in the mediation process in a meaningful manner.

**C. Avoidance of Delay.** A mediator shall perform mediation services in a timely and expeditious fashion, avoiding delays whenever reasonably possible. A mediator shall refrain from accepting additional appointments when it becomes apparent that completion of mediation assignments already accepted cannot be accomplished in a timely fashion.

#### **STANDARD 4. SELF-DETERMINATION**

**A. Parties' Right and Obligation to Decide.** A mediator is to assist the parties in reaching an informed and voluntary agreement. Substantive decisions made during mediation are to be made voluntarily by the parties.

**B. Prohibition of Coercion.** A mediator shall not coerce or unfairly influence a party into entering into a settlement agreement.



**C. Misrepresentation Prohibited.** A mediator shall not intentionally misrepresent material facts or circumstances in the course of a mediation.

**D. Balanced Process.** A mediator shall encourage a reasonably balanced process and encourage the parties to participate in the mediation proceedings in a non-adversarial manner.

**E. Responsibility to Nonparticipating Parties.** A mediator may promote consideration of the interests of persons who may be affected by an agreement resulting from the mediation process and who are not represented in the mediation process.

## **STANDARD 5. IMPARTIALITY AND CONFLICTS OF INTEREST**

**A. Impartiality.** A mediator is expected to be impartial and advise all parties of any circumstances that may result in possible bias, prejudice or impartiality on the part of the mediator. Impartiality means freedom from favoritism or bias in work, action, and appearance. Impartiality implies a commitment to aid all parties, as opposed to one or more specific parties, in moving toward an agreement.

(1.) a mediator shall maintain impartiality while raising questions for the parties to consider concerning the fairness, equity, and feasibility of proposed settlement options.

(2.) a mediator shall withdraw from mediation if the mediator believes he or she can no longer remain impartial.

### **B. Required Disclosures and Conflicts of Interest.**

(1.) A mediator shall disclose to the disputing parties the following:

(a.) any current or past representation of, or consulting relationship with, any party or the attorney of any party involved in the mediation.

(b.) any monetary interest the mediator may have in common with any of the parties or that may be affected by the outcome of the mediation process.

(c.) known potential conflicts, including membership on a board of directors, full or part-time service as a representative or advocate, consultation work performed for a fee, arrangements, or any other form of managerial, financial, or immediate family interest with respect to a party involved. A mediator who is a member of a law firm is obligated to disclose any representation of any of the disputing parties by the mediator's firm or a member of that firm of which the mediator is aware.

(d.) any close personal relationship or other circumstances, in addition to those specifically mentioned in this Standard, that might reasonably raise a question as to the mediator's impartiality.

(2.) Mediators establish personal relationships with many representatives, attorneys, other mediators, and members of various other professional associations. Mediators should not be secretive about such friendships or acquaintances, but disclosure of these relationships is not necessary unless the relationship is one of those mentioned in this Standard or some feature of a particular relationship which might reasonably appear to impair impartiality.

(3.) Prior service as a mediator in a mediation involving a party or an attorney for a party does not constitute representation of the party or consultation work for the party. However, mediators are strongly encouraged to disclose such prior relationships. Mediators are expected to disclose any ongoing relationship with a party or an attorney for a party involved in a mediation, including membership on a panel of persons providing mediation, arbitration, or other alternative dispute resolution services to that party or attorney.

(4.) A mediator shall not provide counseling, therapy, or give legal advice to any party during the mediation process

(5.) A mediator who is a lawyer shall not represent a party involved in the mediation or any case related to the mediation.

(6.) All disclosures required by this Standard shall be made as soon as practical after the mediator becomes aware of the interest or the relationship.

(7.) The burden of disclosure rests on the mediator and continues throughout the mediation process. After appropriate disclosure, the mediator may mediate the dispute if all parties to the mediation agree to the mediator's participation and that agreement is reduced to writing. If the mediator believes that the relationship or interest would affect the mediator's impartiality, he or she shall withdraw, irrespective of the expressed desires of the parties.

(8.) A mediator shall not use the mediation process to solicit any party to the mediation concerning future professional services.

(9.) A mediator shall avoid the appearance of a conflict of interest both during and after the mediation. Without the consent of all parties, a mediator shall not subsequently establish a professional relationship with one of the parties in the same or a substantially related matter.

## **STANDARD 6. CONFIDENTIALITY**

**A. Confidentiality.** A mediator shall preserve and maintain the confidentiality of all mediation proceedings as permitted by state statute except where required by law to disclose information gathered during the mediation.

**B. Mandated Reporters.** A mediator who is a mandated reporter must disclose that status to all parties prior to the mediation and again during the mediator's opening statement at the mediation.

**C. Records and Research Data.** A mediator shall store and dispose of records relating to mediation proceedings in a confidential manner and shall ensure that all identifying information is removed and the anonymity of the parties is protected when materials included in those records are used for research, training, or statistical compilations.

## **STANDARD 7. MEDIATOR REPORTS**

**A. Prohibited Mediator Reports.** Except as permitted in section (B), a mediator shall not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

**B. Permitted Disclosures.** A mediator may disclose whether the mediation occurred or has terminated, whether a settlement was reached, and attendance.

## **STANDARD 8. PROFESSIONAL ADVICE**

**A. Generally.** A mediator shall not provide information which he or she is not qualified by training or experience to provide.

**B. Independent Legal Advice.** When a mediator believes a party does not understand or appreciate how a potential agreement reached through the mediation process may adversely affect the party's legal rights or obligations, the mediator shall advise the participants to seek independent legal advice.

**C. Participation of Parties.** If any party to the mediation is unrepresented or unable to participate in the mediation process for psychological or physical reasons, a mediator shall postpone or cancel mediation until such time as all parties are able to participate.

**D. Personal or Professional Opinion.** A mediator may discuss possible outcomes of a dispute, but a mediator shall not offer a personal or professional opinion regarding the likelihood of any specific outcome.

## **STANDARD 9. FEES AND EXPENSES; PRO BONO SERVICE**

**A. General Requirements.** A mediator occupies a position of trust with respect to the parties and the court system. In charging for services and expenses, the mediator shall be governed by the same high standards of honor and integrity that apply to all other phases of the mediator's work. A mediator shall be scrupulous and honest in billing and should avoid charging excessive fees and expenses for mediation services.

**B. Records.** A mediator shall maintain adequate records to support charges for services and expenses and shall make an accounting to the parties or to the court upon request.

**C. Referrals.** No commissions, rebates, or similar remuneration shall be given to or received by a mediator for referral of persons for mediation or related services.

**D. Contingent Fees.** A mediator shall not charge or accept a contingent fee or base a fee in any manner on the outcome of the mediation process.

**E. Minimum Fees.** A mediator may specify in advance minimum charges for scheduling or conducting a mediation session without violating this Standard.

**F. Disclosure of Fees.** When a mediator is contacted directly by the parties for mediation services, the mediator has a professional responsibility to respond to questions regarding fees by providing a copy of the basis for charges including all fees and expenses.

**G. Pro Bono Service.** Mediators are encouraged to meet the needs of those unable to pay for their services by offering their services pro bono or at a reduced rate of compensation whenever appropriate.

## **STANDARD 10. TRAINING AND EDUCATION**

**A. Training.** A mediator is obligated to acquire knowledge and training in the performance of the mediation process, including an understanding of appropriate professional ethics, standards, and responsibilities. Upon request, a mediator shall disclose the extent and nature of the mediator's education, training, and experience to the parties, the parties' attorneys, the judge in the case or the Arkansas Alternative Dispute Resolution Commission.

**B. Continuing Education.** It is important that mediators continue their professional education as long as they are actively serving as mediators. A mediator shall be personally responsible for ongoing professional growth, including participation in such continuing education as may be required by law or rule of the Arkansas Alternative Dispute Resolution Commission or any other appropriate authority.

**C. New Mediator Training.** An experienced mediator should cooperate in the training of new mediators, including serving as a mentor.

## **STANDARD 11. ADVERTISING**

Advertising or any other communication with the public concerning mediation services offered by the mediator or regarding the education, training, and expertise of the mediator shall be truthful. Mediators shall refrain from making promises and guarantees of results.

## **STANDARD 12. ADVANCEMENT OF MEDIATION**

A mediator should support the advancement of mediation by encouraging and participating in research, evaluation, or other forms of professional development and public education.

## **REQUIREMENTS AND PROCEDURES FOR INCLUSION ON THE ROSTER OF CERTIFIED MEDIATORS FOR CIRCUIT COURTS**

### **A. *Scope of Requirements***

All mediators on the Roster of Certified Mediators for Circuit Courts shall be qualified pursuant to these Requirements. Persons included on this Roster are eligible to serve as compensated mediators in and for circuit courts pursuant to Ark. Code Ann. § 16-7-104 (3). The Roster will indicate in which divisions of circuit court the mediator is qualified to serve, depending on the mediator's qualifications as set forth in part C below.

### **B. *Procedures for Inclusion on the Roster of Certified Mediators***

1. A mediator seeking certification shall make application on a form to be provided by the Commission.
2. The application for certification shall be accompanied by a \$75 application fee.
3. The application shall contain or be accompanied by the following:
  - a. Statement of educational background;
  - b. Evidence of successful completion of the appropriate mediation training for the Roster;
  - c. Statement of experience/areas of expertise;
  - d. Statement of adherence to the *Arkansas Alternative Dispute Resolution Commission's Requirements for the Conduct of Mediation and Mediators*; and
  - e. Statement certifying accuracy of information contained in the application and a statement of adherence in which the applicant agrees to submit to the jurisdiction of Arkansas Courts and the ADR Commission.
4. Application for certification shall be acted upon by the Coordinator of the Commission. Any applicant denied certification shall have the right to request reconsideration of such a denial by the Commission.
5. Applicants may request a waiver of one or more requirements. Such waiver is to be made in writing and addressed to the Coordinator of the Commission. The Commission, at its discretion, may waive any of the certification requirements set forth in Section C of these standards.
6. Notification of certification shall be made by letter and shall indicate in which categories the person is certified: Domestic Relations matters, Juvenile matters, and/or Civil and Probate matters. A letter denying certification, or certification as to one class

of case, shall state the grounds for the denial and make reference to the right of the applicant to request reconsideration of the denial. Such request by the applicant must be in writing and addressed to the Coordinator of the Commission and must be made within 30 days of receipt of notification of denial. Within 15 days of the reconsideration, the Commission shall render a final decision.

7. An applicant denied certification may reapply six months after the date of denial.
8. In order to maintain certification, each mediator must renew annually on a form supplied by the Commission which must be accompanied by a \$75 renewal fee. The renewal fee is set by the Commission annually. Recertification applications must be received by the Commission office by August 31<sup>st</sup> of each year. The date for renewal will be September 1<sup>st</sup> of each year.
9. Applicants who reside outside the state of Arkansas must agree to submit to the jurisdiction of Arkansas courts and designate an agent of service in Arkansas.

C. *Standards for Inclusion on Roster of Certified Mediators*

1. Civil Division Mediators

a. Training

1. Have completed a minimum of 40 hours in a mediation training approved by the Commission;
2. Applicants who complete a mediation training course outside of Arkansas must also complete the Commission's course on Arkansas Law for Mediators.
3. Applicants must complete the certification process within five years of completing basic mediation training. If a complete certification application has not been submitted to the Commission within the five year period, the applicant must retake all training required for certification in the civil division. If the applicant can demonstrate that they have actively mediated since receiving the basic mediation training, this requirement may be waived at the Commission's discretion.

b. Education

1. Have a master's level degree or higher; or
2. Have a bachelor's degree plus a graduate level certificate in conflict resolution or mediation from an accredited college, university, or law school that has been approved by the Commission; or
3. Have a juris doctorate or equivalent; or
4. Have substantial, demonstrated, and satisfactory knowledge, skills, abilities, and experience as a mediator in the applicable field of mediation

c. Practical Experience

1. Have observed, mediated, or co-mediated two mediations involving

issues that would be heard in circuit court, other than domestic relations or juvenile matters;

2. Observations and co-mediations must be of a case that is, or would be, filed in the civil division of the Arkansas Circuit Courts. Observations and co-mediations must be completed with a mediator who is certified by the Arkansas ADR Commission .

d. Ethics

1. Be of good moral character; and
2. Accept and follow the Arkansas Alternative Dispute Resolution Commission's *Requirements for the Conduct of Mediation and Mediators*

e. Examination

1. Prior to granting certification, the Commission may require applicants to successfully complete an examination on mediation concepts, ethics, and other topics relevant to mediation in the Arkansas Circuit Court system.

2. Domestic Relations

a. Training

1. Have completed a minimum of 40 hours in a family mediation training program approved by the Commission; or
2. Have completed 40 hours of basic mediation training with an additional 20 hours of family mediation training in a program devoted entirely to family or parenting mediation which is approved by the Commission;
3. Applicants who complete a basic or family mediation training course outside of Arkansas must also complete the Commission's course on Arkansas Law for Mediators.
4. Applicants must complete the certification process within five years of completing basic mediation training. If a complete certification application has not been submitted to the Commission within the five year period, the applicant must retake all training required for certification in the domestic relations division. If the applicant can demonstrate that they have actively mediated since receiving the basic mediation training, this requirement may be waived at the Commission's discretion.

b. Education

1. Have a bachelor's level degree with at least two years work experience in family and marriage issues; or
2. Have a master's degree or higher; or
3. Have a bachelor's degree plus a graduate level certificate in conflict resolution from an accredited college, university, or law school that has been approved by the Commission; or
4. Have a juris doctorate or equivalent; or
5. Have substantial, demonstrated, and satisfactory knowledge, skills, abilities, and experience as a mediator in the applicable field of



mediation

- c. Practical Experience
  1. Have observed, mediated, or co-mediated two domestic relations mediations;
  2. Observations and co-mediations must be of a case that is, or would be, filed in the domestic relations division of the Arkansas Circuit Courts. Observations and co-mediations must be completed with a mediator who is certified by the Arkansas ADR Commission.
- d. Ethics
  1. Be of good moral character; and
  2. Accept and follow the Arkansas Alternative Dispute Resolution Commission's *Requirements for the Conduct of Mediation and Mediators*.
- e. Examination
  1. Prior to granting certification, the Commission may require applicants to successfully complete an examination on mediation concepts, ethics, and other topics relevant to mediation in the Arkansas Circuit Court system.
3. Probate Division
  - a. Any mediator who is certified in, or meets the certification requirements of either the civil division or the domestic relations division is eligible for certification in the probate division.
4. Juvenile Division Mediators
  - a. Training
    1. Have completed a minimum of 40 hours in a family mediation training program approved by the Commission; or
    2. Have completed 40 hours of basic mediation training with an additional 20 hours of family mediation training in a program devoted entirely to family or parenting mediation which is approved by the Commission; and
    3. Have completed a course on the Arkansas juvenile court system approved by the Commission.
    4. Applicants who complete a basic or family mediation training course outside of Arkansas must also complete the Commission's course on Arkansas Law for Mediators.
    5. Applicants must complete the certification process within five years of completing basic mediation training. If a complete certification application has not been submitted to the Commission within the five year period, the applicant must retake all training required for certification in the juvenile division. If the applicant can demonstrate that they have actively mediated since receiving the basic mediation training, this requirement may be waived at the Commission's discretion.

- b. Education
  - 1. Have a bachelor's level degree with at least two years work experience in family issues; or
  - 2. Have a master's degree or higher; or
  - 3. Have a bachelor's degree plus a graduate level certificate in conflict resolution from an accredited college, university, or law school that has been approved by the Commission; or
  - 4. Have a juris doctorate or equivalent; or
  - 5. Have substantial, demonstrated, and satisfactory knowledge, skills, abilities, and experience as a mediator in the applicable field of mediation
  
- c. Practical Experience
  - 1. Have mediated at least five Arkansas circuit court cases within the past three years
  - 2. Have co-mediated two dependency-neglect cases, one Families in Need of Services case, and one delinquency case;
  - 3. Co-mediations must be completed in Arkansas with a mediator who is certified by the Arkansas ADR Commission and designated as a juvenile mediation mentor, and the applicant must received acceptable evaluation by the mentor.
  
- d. Ethics
  - 1. Be of good moral character; and
  - 2. Accept and follow the Arkansas Alternative Dispute Resolution Commission's *Requirements for the Conduct of Mediation and Mediators*.
  
- e. Examination
  - 1. Prior to granting certification, the Commission may require applicants to successfully complete an examination on mediation concepts, ethics, and other topics relevant to mediation in the Arkansas Circuit Court system.

Note: all degrees must have been obtained at an accredited college, university or law school.

D. *Requirements for Annual Renewal*

- 1. In order to maintain certification, each mediator must renew annually. Certified mediators will receive a renewal packet each year from the Commission. The date for renewal is September 1 of each year.
  
- 2. In order to qualify for certification renewal, each mediator must provide the following to the Coordinator of the Commission:

- a. Completed and signed renewal form
  - b. Evidence of completion of 6 hours of continuing mediation education (CME)
  - c. Mediation statistical reports (provided by the Commission)
  - d. Updated profile form
  - e. Renewal fee
3. *Continuing Mediation Education:* Certified Mediators must receive 6 hours each year of continuing mediation education. This CME requirement may be met by attending a CME program conducted by the Commission, or by attending some other mediation related program which is approved by the Commission to qualify for CME.
  4. *Mediation Statistical Reports:* All certified mediators are required to maintain certain information on each court ordered case they mediate. The information is to be recorded on a form provided by the Commission. All such forms must be submitted to the Commission when the mediator applies for renewal of certification. None of the information required will violate the terms of confidentiality. The information will be used to generate a statistical report that will be distributed to the circuit courts, and available to anyone who requests it.  
  
Statistical reports should be submitted to the Commission at the conclusion of each court ordered mediation. Any reports not submitted by the time of renewal must be included with the renewal application.
  5. *Mediator Profiles:* The Commission maintains a profile of each certified mediator. The profiles are provided to circuit court judges, attorneys, and parties who would like additional information when selecting a mediator. At renewal each year, mediators are given an opportunity to update information on their profiles.
  6. *Active Status:* Completion of all renewal requirements and submission of the recertification application in a timely manner maintains active certification status.
  7. *Suspended Status:* Failure to provide proof of continuing mediation education hours or submit recertification fees with the renewal application, or for other good cause shown, may result in suspended certification status. If suspended for failure to submit CME or fees, the mediator is not eligible for active status until the following September 1<sup>st</sup>. If suspended for good cause shown, the suspension remains in effect until the date specified by the Commission.
  8. *Lapsed Certification:* Failure to renew certification will result in a mediator being

placed in lapsed certification status. To renew certification, the mediator must submit a renewal application, proof of continuing mediation education hours for the lapsed period, and certification fees and late fees for the lapsed period. Lapsed status may last for no more than three years. After three years, the Commission will review the recertification application to determine if the mediator will be required to complete the application process as a new applicant. Completing the application process includes retaking the required mediation training and completing new mediation observations, as well as all other certification requirements.

9. *Inactive Status:* A mediator desiring to be placed on inactive status for personal or professional reasons may petition the Commission. The Commission may grant inactive status for good cause shown. When inactive status is granted, the mediator is not required to complete continuing mediation education or pay certification fees.

Note: If anything in these requirements and procedures conflict with previous publications promulgated by the Arkansas Alternative Dispute Resolution Commission, the requirements and procedures in this document override the previously promulgated publications.

## **Procedures for the Discipline of Mediators**

### **Disciplinary Action**

The Commission may take disciplinary, adverse, or other action against any applicant or mediator included on the Commission's Roster of Certified Mediators for any of the following:

1. Fraud, deceit, material misrepresentation or omission, in application to the Commission's Roster of Mediators or any other information provided to the Commission whenever discovered.
2. Any gross negligence, incompetence, or misconduct in the practice of mediation.
3. Any felony; or any misdemeanor involving violence, threatened violence or moral turpitude or adversely affecting the practice of mediation.
4. Any violation of the Commission's *Requirements for the Certification of Mediators for Circuit Courts*.
5. Any violation of the *Requirements for the Conduct of Mediations and Mediators*.
6. A violation of the policies or procedures of any program administered by the Commission.

### **Method for Hearings**

*Complaints/Allegations*-- Complaints or allegations made against any person shall be in writing, and signed by the person or persons making them, and shall be filed with the Coordinator for the Commission. Reports, complaints, or allegations may also be made to the Commission by the Coordinator or Commission members.

Unless dismissed by the Commission as unfounded or trivial, all charges shall be heard by the Commission within a reasonable time.

*Investigation* - The Commission may appoint an investigation committee. The Committee may include one member of the Commission, the Coordinator, Assistant Coordinator for the Commission, and may be advised by the Assistant Attorney General assigned to advise the Commission. The Committee may serve in the following capacities: 1) to gather information to determine if a complaint or allegation is founded or legitimate; and 2) to provide evidence to be used in presenting the case; and 3) such other capacities as permitted or not prohibited by law or regulation.

*Notice*- All parties shall be given an opportunity for hearing after reasonable notice consistent with the Administrative Procedures Act codified at Ark. Code Ann. § 25-15-201 et seq.

*Continuances*-- A continuance shall be granted only for good cause. Requests for continuances must be made to the Commission in writing and received no less than 10 working days prior to the scheduled hearing.

*Hearing*--Opportunity shall be given to all parties to respond and present evidence and argument

on all issues involved.

1. at any hearing, the party shall have the right to appear in person. The party may also be represented by counsel.
2. to cross examine witnesses and evidence in his or her defense

*Failure to Appear*-- If, after being served notice, the party fails to appear and has not been granted a continuance, the Commission may conduct the proceedings without the party's presence.

*Panel to Hear Case* - Four of the seven Commission members must be present to conduct a hearing. Any member of the Commission who has served on the investigation committee for the case, or who initiated the complaint, is prohibited from sitting on the panel.

*Presiding Officer* – The Chair of the Commission may be the presiding officer at hearings, or the Commission may elect to have a hearing officer preside over any hearing. If the Chair is unavailable, a majority of the Commission members present may select a presiding officer from among the Commission members present or elect to have a hearing officer preside over the hearing.

The presiding officer shall have the power to maintain order and generally regulate and guide the course of the pending proceeding.

*Legal Assistance* - The Attorney General of the State of Arkansas or one of his or her assistants may act as legal advisor to the Commission and render legal assistance needed in fulfilling the provisions of the Commission's Rules

## **Decisions**

If, after hearing the evidence, a majority of the Commission members present and participating sustain the disciplinary, adverse, or other action the Commission may reprimand, suspend, revoke, limit or otherwise condition the mediator's certificate, remove or refuse to include his or her name on the Commission's Roster of Certified Mediators.

A final decision will be made in writing within 15 days of the hearing. A final decision shall include findings of fact and conclusions made in the hearing. Findings of fact shall include a concise and explicit statement of the underlying facts supporting the findings. A copy of the findings shall be served to the party by registered mail.

## **Appeal**

The decision of the Commission may be appealed within 30 days of service of the same upon respondent as specified in the Administrative Procedures Act codified at Ark. Code Ann. § 25-15-201 et seq.

### **Informal Disposition of Complaints**

Nothing contained herein shall prohibit informal disposition of complaints or allegations by settlement, consent or agreement of parties.

### **Amendments to the Procedures**

These rules, regulations, and definitions may be modified, added to, or deleted as deemed appropriate by the Arkansas Alternative Dispute Resolution Commission in the method prescribed for such changes by the laws of the State of Arkansas.