

**WEALTH WARS: Arkansas Estate, Trust,  
Probate And Inheritance Litigation**

**Thursday, June 16, 2016 at 9:00 a.m.  
Arkansas Bar Association Annual Convention  
Hot Springs, Arkansas**

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**TODAY'S TOPICS, FROM A TO Z**

- A . . . . . Is For ANNA NICOLE SMITH**
- B . . . . . Is For BREACH OF FIDUCIARY DUTY**
- C . . . . . Is For CLAIMS AND CAUSES OF ACTION**
- D . . . . . Is For DISCOVERY**
- E . . . . . Is For EXECUTOR ERRORS**
- F . . . . . Is For The FRAUD TRIANGLE**
- G . . . . . Is For GIFTS**
- H . . . . . Is For HOWARD HUGHES**
- I . . . . . Is For INTERPRETATION ISSUES**
- J . . . . . Is For JOINT ACCOUNTS**
- K . . . . . Is For KRAZY KLIENTS**
- L . . . . . Is For LIMITATIONS AND OTHER DEFENSES**

**M.** . . . . . Is For MISTAKES WHEN SERVING AS TRUSTEE

**N** . . . . . Is For NO CONTEST CLAUSES

**O** . . . . . Is For *PIE* ???

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**P.** . . . . . Is For POWER OF ATTORNEY PROBLEMS

**Q.** . . . . . Is For The “QUEEN OF MEAN,” LEONA HELMSLEY

**R** . . . . . Is For REMOVAL OF EXECUTORS AND TRUSTEES

**S** . . . . . Is For STATUTES AND OTHER AUTHORITIES

**T.** . . . . . Is For TRUSTEES

**U** . . . . . Is For UNDUE INFLUENCE AND INCAPACITY

**V.** . . . . . Is For VIDEOTAPING

**W.** . . . . . Is For WILL CONTESTS

**X.** . . . . . Is For EXPERTS

**Y** . . . . . Is For WHY IS THIS AREA OF LAW GROWING?

**Z** . . . . . Is For *Zzzzzz - ANYONE STILL AWAKE? QUESTIONS?*

#### **CHECKLIST OF COMMON CLAIMS AND CAUSES OF ACTION**

- Contest Of Validity Of Will, Trust, Power Of Attorney, etc. (signatures, formalities, coercion, duress, incapacity, undue influence, procurement, etc.)
- Breach Of Trust
- Breach Of Fiduciary Duty
- Breach Of Contract
- Fraud And Abuse
- Conversion

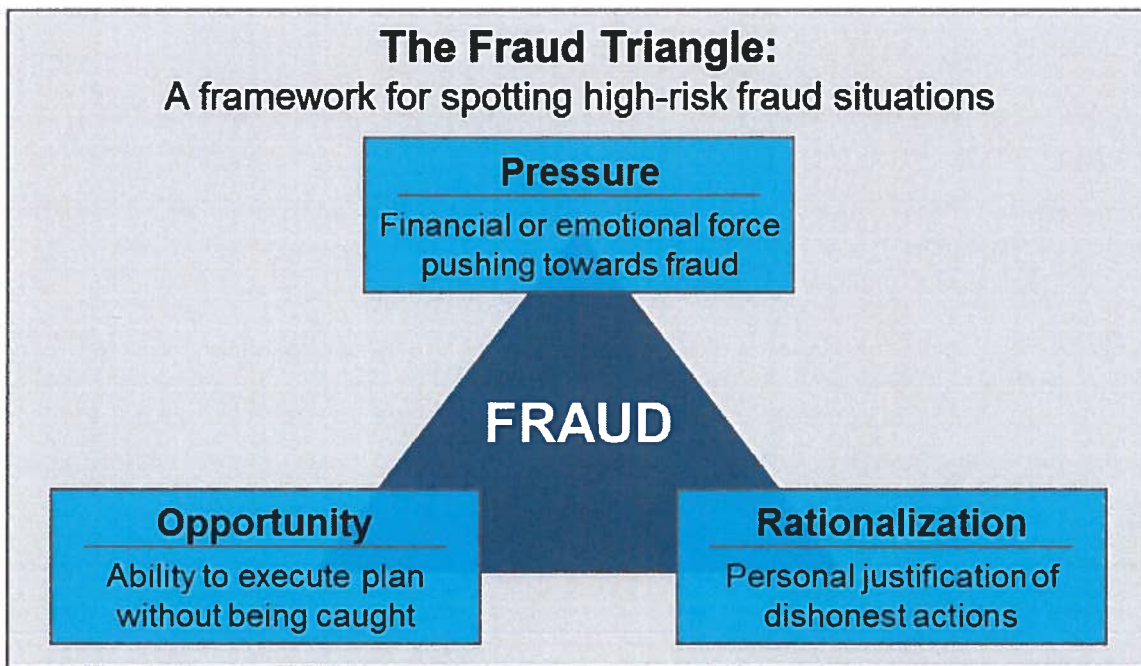
- Claim For Civil Action By Crime Victim (Ark. Code Ann. § 16-118-107) (mandatory damages, attorney fees and costs awards if a felony is proven by a preponderance of the evidence)
- Unjust Enrichment
- Request For Imposition Of Constructive Trust
- Request For Imposition Of Equitable Lien
- Request For Declaratory Judgment
- Petition To Construe A Will Or Trust
- Request For Injunction (mandatory or prohibitive in nature)
- Request For An Accounting
- Petition For Instructions From The Court
- Request For Suspension Or Removal Of Executor Or Trustee
- Request For Attorney's Fees, Costs And Expenses
- Tortious Interference With Inheritance (though not yet officially recognized in Arkansas; see Jackson v. Kelly, 345 Ark. 151, 44 S.W.3d 328 (2001))
- etc., etc., etc. (anything else that you think is appropriate under the applicable facts and law)

#### **CHECKLIST OF COMMON DEFENSES AND AVOIDANCES**

- Statute Of Limitations (careful, the Arkansas Probate Code and the Arkansas Trust Code [e.g., Ark. Code Ann. § 28-73-1005] allow for shortened statutes of limitations in some circumstances based upon notice, etc.)
- Laches
- Waiver
- Estoppel
- Consent, Release Or Ratification (Ark. Code Ann. § 28-73-1009)

- Reliance On Trust Instrument (Ark. Code Ann. § 28-73-1006)
- Exculpatory Clauses (in the instrument in question) (e.g., Ark. Code Ann. § 28-73-1008)
- Burden Of Proof Clauses (in the instrument in question)
- Unclean Hands
- Failure To Plead “Fraud,” “Mistake,” “Condition Of The Mind,” “Duress,” Or “Undue Influence” With Particularity (Ark. R. Civ. P. 9(b) addressing “pleading special matters”)
- Lack Of Standing
- Breach Of Contract
- Failure To State A Claim Or Sufficient Facts In Support Of A Claim (Ark. R. Civ. P. 12(b)(6))
- etc., etc., etc. (anything else that you think is appropriate under the applicable facts and law)

#### **THE “FRAUD TRIANGLE”: EXEMPLARY CASE THEME AND ANALYSIS**



## **COMMONLY USED ESTATE STATUTES IN LITIGATED CASES**

### **General Provisions**

- Definitions for the Arkansas Probate Code (Ark. Code Ann. § 28-1-102) (the Probate Code, enacted in 1969, is found in Title 28, Chapters 1 to 54, of the Arkansas Code and is the statutory authority for probate administration in Arkansas)
- Notice requirements (Ark. Code Ann. § 28-1-112)
- Waiver of notice (Ark. Code Ann. § 28-1-113)
- Appellate matters and procedures (Ark. Code Ann. § 28-1-116)

### **Intestate Succession**

- Definitions for the Arkansas Inheritance Code (Ark. Code Ann. § 28-9-202) (the law of intestate succession was codified in 1969, under the Arkansas Inheritance Code, and is found embedded in Subchapter 2 of Title 28, Chapter 9, of the Arkansas Code)
- Person dying intestate (Ark. Code Ann. § 28-9-203)
- Inheritable interest of intestate heirs (Ark. Code Ann. § 28-9-206)
- Descent table for intestate inheritances (Ark. Code Ann. § 28-9-214)

### **Dower And Curtesy**

- Dower and curtesy---intestate estate (Ark. Code Ann. § 28-11-301)
- Personal estate (Ark. Code Ann. § 28-11-305)
- Surviving spouse with no children (Ark. Code Ann. § 28-11-307)

### **Wills**

- Contracts to make a will (Ark. Code Ann. § 28-24-101)
- Minimum age and sound mind needed for will execution (Ark. Code Ann. § 28-25-101)

- Competency, etc. of witnesses (Ark. Code Ann. § 28-25-102)
  - Execution of wills (Ark. Code Ann. § 28-25-103)
  - Handwritten wills (Ark. Code Ann. § 28-25-104)
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- Revocation of wills (Ark. Code Ann. § 28-25-109)

### **Administration Of Decedents' Estates**

- Statutory allowances (Ark. Code Ann. § 28-39-101)
- Quarantine (Ark. Code Ann. § 28-39-102 to -104)
- Homestead rights to survivors (Ark. Code Ann. § 28-39-201; 28-51-104; Ark. Const. IX, § 6, 10)
- Scope and assignment of dower and curtesy (Ark. Code Ann. § 28-39-301)
- Election by surviving spouse to take against the will (Ark. Code Ann. § 28-39-401)

### **Probate Administration Proceedings**

- Venue for probate of a will and administration (Ark. Code Ann. § 28-40-102)
- Time limitations for will probate and administration (Ark. Code Ann. § 28-40-103)
- Custodian of will (Ark. Code Ann. § 28-40-105)
- Interested persons entitled to petition in probate court (Ark. Code Ann. § 28-40-107)
- Notice of appointment of personal representative (Ark. Code Ann. § 28-40-111)
- Contesting probate of will---generally (Ark. Code Ann. § 28-40-113)
- Contesting probate of will---notice (Ark. Code Ann. § 28-40-114)
- Proving a will (Ark. Code Ann. § 28-40-117)

- Proving a lost or destroyed will (Ark. Code Ann. § 28-40-302)

### **Personal Representatives**

- Authorization and priority of personal representatives (Ark. Code Ann. § 28-48-101)
- Appointment of special administrators (Ark. Code Ann. § 28-48-103)
- More than one representative (Ark. Code Ann. § 28-48-104)
- Removal of personal representative (Ark. Code Ann. § 28-48-105)
- Compensation of personal representative, attorney, and agents (Ark. Code Ann. § 28-48-108)
- Necessary expenses and disbursements (Ark. Code Ann. § 28-48-109)

### **Management Of Assets**

- Personal representative's right to possession of personal property, and management of real property (Ark. Code Ann. § 28-49-101)
- Discovery proceedings (Ark. Code Ann. § 28-49-103)
- Property subject to recovery (Ark. Code Ann. § 28-49-105)
- Setting aside conveyances (Ark. Code Ann. § 28-49-109)
- Property subject to inventory (Ark. Code Ann. § 28-49-110)
- Operation of business (Ark. Code Ann. § 28-49-112)
- Investments (Ark. Code Ann. § 28-49-115)

### **Claims Against Estates**

- Time limitation for claims against estates (Ark. Code Ann. § 28-50-101)
- Survival of actions (Ark. Code Ann. § 28-50-102)
- Claim contents (Ark. Code Ann. § 28-50-103)

- Presentation, verification, etc. of claims (Ark. Code Ann. § 28-50-104)
- Claim determination (Ark. Code Ann. § 28-50-105)
- Claim priority, payment, etc. (Ark. Code Ann. § 28-50-106)

### **Transfers Of Property**

- Sale, mortgage, lease, exchange of estate property, Court order, etc. (Ark. Code Ann. § 28-51-103)
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- Petition for sale of personal property (Ark. Code Ann. § 28-51-201)
- Petition for sale of real property (Ark. Code Ann. § 28-51-301)

### **Accounting**

- Charges to personal representative (Ark. Code Ann. § 28-52-101)
- Closing of estate (Ark. Code Ann. § 28-52-102)
- Timing of accountings (Ark. Code Ann. § 28-52-103)
- Duty to account (Ark. Code Ann. § 28-52-104)

### **Distribution And Discharge**

- Heirs and distributees (Ark. Code Ann. § 28-53-101)
- Partial distribution of property (Ark. Code Ann. § 28-53-102)
- Final distribution (Ark. Code Ann. § 28-53-103 and -104)
- Discharge of personal representative (Ark. Code Ann. § 28-53-118)

## **COMMONLY USED *TRUST* STATUTES IN LITIGATED CASES**

### **General**

- Definitions for the Arkansas Trust Code (Ark. Code Ann. § 28-73-103)



- Default and mandatory rules (Ark. Code Ann. § 28-73-105)
- Nonjudicial settlement agreements (Ark. Code Ann. § 28-73-111)
- Trust rules of construction (Ark. Code Ann. § 28-73-112)

### **Judicial Proceedings**

- Role of court in administration of trust (Ark. Code Ann. § 28-73-201)
- Jurisdiction over trustee and beneficiary (Ark. Code Ann. § 28-73-202)
- Subject matter jurisdiction (Ark. Code Ann. § 28-73-203)

### **Creation, Validity, Modification And Termination Of Trusts**

- Methods of creating trust (Ark. Code Ann. § 28-73-401)
- Requirements for creation (Ark. Code Ann. § 28-73-402)
- Creation of trust induced by fraud, duress, or undue influence (Ark. Code Ann. § 28-73-406)
- Modification or termination of trusts (Ark. Code Ann. § 28-73-410 to -414)
- Reformation to correct mistakes (Ark. Code Ann. § 28-73-415)
- Capacity of settlor of revocable trust (Ark. Code Ann. § 28-73-601)
- Revocation or amendment of revocable trust (Ark. Code Ann. § 28-73-602)
- Settlor's powers---powers of withdrawal (Ark. Code Ann. § 28-73-603)
- Limitation on action contesting validity of revocable trust (Ark. Code Ann. § 28-73-604)

### **Trustees And Their Duties And Powers**

- Removal of a trustee (Ark. Code Ann. § 28-73-706)
- Compensation of a trustee (Ark. Code Ann. § 28-73-708)

- Reimbursement of trustee expenses (Ark. Code Ann. § 28-73-709)
- Duty to administer trust (Ark. Code Ann. § 28-73-801)
- Duty of loyalty (Ark. Code Ann. § 28-73-802)
- Duty of impartiality (Ark. Code Ann. § 28-73-803)
- Duty of prudent administration (Ark. Code Ann. § 28-73-804)
- Duty to control and protect trust property (Ark. Code Ann. § 28-73-809)
- Duty to keep records and identify trust property (Ark. Code Ann. § 28-73-810)
- Duty to enforce and defend claims (Ark. Code Ann. § 28-73-811)
- Duty to collect trust property (Ark. Code Ann. § 28-73-812)
- Duty to inform and report (Ark. Code Ann. § 28-73-813)
- General powers of trustee (Ark. Code Ann. § 28-73-815)
- Specific powers of trustee (Ark. Code Ann. § 28-73-816)
- Prudent investor rule (Ark. Code Ann. 28-73-901)
- Prudent investor standard of care (Ark. Code Ann. § 28-73-902)
- Prudent investor diversification (Ark. Code Ann. § 28-73-903)
- Prudent investor duties at inception of trusteeship (Ark. Code Ann. § 28-73-904)

### **Liability Of Trustees**

- Remedies for breach of trust (Ark. Code Ann. § 28-73-1001)
- Damages for breach of trust (Ark. Code Ann. § 28-73-1002)
- Damages in absence of breach (Ark. Code Ann. § 28-73-1003)
- Attorney fees and costs (Ark. Code Ann. § 28-73-1004)
- Limitation of actions against trustee (Ark. Code Ann. § 28-73-1005)

- Reliance on trust instrument (Ark. Code Ann. § 28-73-1006)
- Exculpation of trustee (Ark. Code Ann. § 28-73-1008)
- Beneficiary's consent, release or ratification (Ark. Code Ann. § 28-73-1009)
- Limitation on personal liability of trustee (Ark. Code Ann. § 28-73-1010)
- Protection of person dealing with trustee (Ark. Code Ann. § 28-73-1012)

## **EXEMPLARY, HELPFUL SECONDARY SOURCES IN LITIGATED CASES**

### **General**

- Bogert, Trusts and Trustees (Thomson Reuters)
- California Trust and Probate Litigation (Dominic J. Campisi and Thomas W. Latham)
- Commentaries on the Model Rules of Professional Conduct, ACTEC (American College of Trust and Estate Counsel)
- Inheritance Hijackers: Who Wants To Steal Your Inheritance And How To Protect It (Robert C. Adamski)
- Loring and Rounds: A Trustee's Handbook (Wolters Kluwer Law & Business)
- Probate Wars of the Rich & Famous: An Insider's Guide To Estate Planning And Probate Litigation (Russell K. Fishkind)
- Restatement (Third) of Trusts (American Law Institute)
- Scott and Ascher on Trusts (Wolters Kluwer Law & Business)
- The Family War: Winning The Inheritance Battle & What You Need To Know About Estate Disputes (Jordan M. Atin, Barry Fish & Les Kotzer)
- Trial & Heirs: Famous Fortune Fights (Andrew W. Mayoras & Danielle B. Mayoras)
- Trust And Probate Litigation: Leading Lawyers On Managing Client Expectations, Handling Complex Cases, And Navigating Recent Legal Developments (Thomson Reuters)

## **Arkansas**

- Arkansas Elder Law Desk Manual (Arkansas Bar Association)
- Arkansas Practice Series: Arkansas Probate and Estate Administration (Lynn Foster, Brant Perkins and Renee Brida)

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- Arkansas Probate and Trust Law Review (Arkansas Bar Association Probate and Trust Law Section)
- Handbook For Personal Representatives (Arkansas Bar Association)
- Revocable Trust Handbook For Arkansas Practitioners (Arkansas Bar Association)
- The Arkansas Trust Code: Good Law for Arkansas, 27 U. Ark. Little Rock L. Rev. 191 (Lynn Foster)
- Wealth Wars: An Arkansas Estate, Trust, Probate And Inheritance Litigation And Dispute Resolution Blog (Matt House) [www.arkansaswealthwars.com](http://www.arkansaswealthwars.com)