

NEWSLETTER
of the
PROBATE AND TRUST LAW
SECTION

Announcements:

Please visit the Probate & Trust Law Section website at www.myazbar.org/secomm/sections/pt for further information.

**PROBATE & TRUST EXECUTIVE COUNCIL
2008-2009**

Lauren L. Garner, Chair
Janice L. Bernardini, Past Chair
Gregory L. Cygan, Treasurer
Kenneth J. Peace, Secretary
Lawrence L. Deason
Roger D. Curley
William M. Conway
Benjamin J. Burnside, Newsletter Editor

David L. Case, Chair Elect
Hon. Lindsay Best Ellis
Hon. Julia K. Connors
Bruce W. Martin
Angela C. Moore
Les Raatz
James W. Ryan

Legislative Update:

Arizona Trust Code

The new Arizona Trust Code (ATC), signed by the governor on May 27, 2008, is set to go into effect on January 1, 2009. It is lengthy and various in its provisions, but some significant provisions are highlighted below. The full text of the new ATC (Senate engrossed House Bill 2806) is available at:

<http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/bills/hb2806s.htm>

The new ATC replaces statutory provisions concerning trusts, the Prudent Investor Act, spendthrift trust provisions, etc.

Some highlights include:

- Section 14 - 2901 (technically not part of the ATC) extends the perpetuities period to 500 years.
- A.R.S. Section 14-5652 (technically not part of the ATC) clearly indicates that there is a requirement of privity between the attorney for the fiduciary and a beneficiary separate and apart from the mere fact that the attorney represents the fiduciary in a fiduciary capacity. This removes uncertainty in the wake of cases such as *Shano, Fickett and Fogelman* as to the nature of the duty owed by the attorney for the fiduciary to the beneficiaries of a trust or heirs or devisees of an estate. Absent that privity, there is no duty in contract, tort or otherwise to the beneficiary.
- Section 14-10105 states that the terms of a trust control over the provisions of the ATC, except for certain instances enumerated in subsection B, which are:

B. The terms of a trust prevail over any provision of this chapter except:

1. The requirements for creating a trust.
2. The duty of a trustee to act in good faith and in accordance with the purposes of the trust.
3. The requirement that a trust and its terms be for the benefit of its beneficiaries and that the trust have a purpose that is lawful, not contrary to public policy and possible to achieve.
4. The power of the court to modify or terminate a trust under Sections 14-10410, 14-10411, 14-10412, 14-10413, 14-10414, 14-10415 and 14-10416.
5. The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Article 5 of this chapter.
6. The power of the court under Section 14-10702 to require, dispense with, modify or terminate a bond.
7. The power of the court under Section 14-10708, subsection b to adjust a trustee's compensation specified in the terms of the trust that is unreasonably low or high.
8. The duty to respond to the request of a qualified beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust.
9. The effect of an exculpatory term under Section 14-11008.
10. The rights under Sections 14-11010, 14-11011, 14-11012 and 14-11013 of a person other than a trustee or beneficiary.
11. Periods of limitation for commencing a judicial proceeding.
12. The power of the court to take action and exercise jurisdiction as may be necessary in the interests of justice.
13. The subject matter jurisdiction of the court and venue for commencing a proceeding as provided in Sections 14-10203 and 14-10204.
14. The notice provisions of section 14-10110, subsection B.

Obviously, the language of subsection B.12. allowing the court to take action and exercise jurisdiction as may be necessary in the “interests of justice” leaves considerable uncertainty in how much the courts may override the terms of the trust.

- Section 14-10106 directs courts to use the Restatement (Second) of Trusts in interpreting trusts, thus rejecting the Restatement (Third) of Trusts and by implication the Uniform Trust Code in its original form (which was based in part on the third restatement).
- Section 14-10110 requires notice to the Attorney General of charitable trusts (those created on or after January 1, 2009) of its creation (within 60 days) or other occurrences (either 30 or 60 days depending on the event).
- Section 14-10111 spells out the circumstances under which non-judicial settlements may be entered into, and may encourage settlement of certain issues without court involvement.
- Section 14-10411, regarding modification of irrevocable trusts, requires court approval in order to avoid the estate tax inclusion feared by some practitioners under the originally proposed UTC, whereby a settlor and beneficiaries could have made such changes absent court approval.
- Section 14-10603 clarifies that while a trust remains revocable by the settlor, the rights of the beneficiaries are subject to the control of the settlor and the trustee’s duties are owed strictly to the settlor.
- Section 14-10813, covering the formerly controversial subject of notice (under the UTC) to qualified beneficiaries (defined elsewhere in the ATC), requires that the trustee keep the beneficiaries reasonably informed (nothing new under Arizona law) and spells out the circumstances under which such information is to be given and the manner of giving out such information. The trust language may remove the requirement of notice except for qualified beneficiaries being entitled, upon request, to trustee reports and other information reasonably related to the administration of the trust.
- Sections 14-10501 to 14-10507 give greater spendthrift protection than current law, or at the very least are quite specific about such creditor protection, including protection for discretionary trusts and the highest level of protection for special needs trusts.
- Section 14-10818 recognizes trust protectors and indicates their role (to some extent), including the power to remove or appoint trustees, change trust provisions for tax purposes, or other powers, and their status not being that of a fiduciary (at least for trusts that become irrevocable on or after the effective date of the ATC).
- Section 14-11013 is helpful in requiring third parties to rely on certifications of trust and imposing liability for damages from a third party demand for the trust instrument itself, in addition to the certification, not made in good faith.
- Section 14-11014 allows total return “unitrusts” and allows disinterested trustees to convert an income trust to a total return trust and vice versa. The section gives specifics about the requirements for making such a conversion and allows the surviving spouse

who is beneficiary of a QTIP trust to prevent the change to a total return trust. The section applies to trusts in existence on September 1, 2008 or created after that date.

Supreme Court Rules:

Arizona Probate Rules

The Probate Rules Committee of the Arizona Supreme Court, established October 6, 2006 by Chief Justice Ruth V. McGregor, was charged with establishing statewide uniform rules of practice in probate matters for all counties. Please see:

http://www.dnnsupremecourt.state.az.us/Portals/0/NTForums_Attach/1115103453171.pdf

Comments were due by May 20, 2008, and, after receiving many comments, which may be viewed on the Supreme Court website, the Rules were amended as indicated at:

http://www.dnnsupremecourt.state.az.us/Portals/0/NTForums_Attach/172127551671.pdf

Since the Committee has nicely summarized the changes in the foregoing July 2008 report, those changes will not be summarized here. Many of the changes addressed issues of maintaining privacy of Social Security numbers and other information, avoiding duplication of reporting for certified fiduciaries, limited the scope of the rules by avoiding the need for an annual conservatorship plan, and ensuring compliance with statutory law. The rules are intended to supplant existing local rules with uniform rules statewide. However, the rules are meant to merely supplement and not replace the Rules of Civil Procedure, Rules of Evidence and other court rules. The effective date of the new rules is January 1, 2009.

Caselaw Update:

Newman v. Newman, 1 CA-CV 07-0373, considers claims by a personal representative/child of decedent against another child of the decedent, for violation of A.R.S. Section 14-3709(D), breach of fiduciary duty and A.R.S. Section 46-456. The defendant had withdrawn funds from the decedent's IRA and placed them into a joint account of which he was the joint owner and had used funds from the decedent to purchase real property in joint tenancy with himself. The decedent had left a will and trust. The court found that A.R.S. Section 14-3709(D), providing for double damages if an order of disclosure is issued, will apply only if an action is successful under subsection (A) of the same statute in obtaining a predicate order from the court for the recovery of property where a defendant has wrongfully concealed, embezzled, conveyed or disposed of that property. The court also ruled that forfeiture under A.R.S. Section 46-456 applies to benefits received from a trust as the result of the forfeiture of a devise under a will and is not limited to forfeiture merely of benefits received directly from the estate. The court stated that: "...it would be inappropriate for Max to recover trust benefits that he would only have received because of a bequest under the probate Estate which has been forfeited as a result of A.R.S. §46-456(D)." The court also clarified and reiterated the general proposition that there is no right to a jury trial in a probate or breach of fiduciary duty matter, absent the granting of such a right by statute. Without statutory authority, there is only a right to a jury trial if there is a constitutional right to a jury trial, meaning there was a common law right to such a jury trial in such a matter prior to the adoption of the Arizona constitution, or the court in its discretion calls a jury to decide an issue of fact (in which case the jury verdict is advisory only). The court found that probate matters and claims for breach of fiduciary duty were equitable actions at the time of adoption of Arizona's constitution and are not entitled to trial by jury absent specific statutory authority. The court also found that A.R.S. §46-456 does not contain authority for a jury trial.

In Re MH, 1 CA-MH 07-0017, is a case in which the Court of Appeals ruled that the anti-marital fact privilege applied in a court ordered treatment proceedings under A.R.S. §36-533 to allow K.M. to bar the testimony of her husband, E.M., as one of the two required acquaintance witnesses required under A.R.S. §36-539(B). The court ruled that the testimony did not fall under the exceptions provided in A.R.S. §12-2232, such as divorce, criminal matters, alienation of affections or adultery. The court rejected the contention that the privilege applies only to non-adversarial proceedings, but pointed out that the court order treatment proceeding is nonetheless adversarial. The legislature would have to specifically exclude such court ordered treatment proceedings from the anti-marital fact privilege.

Mathews v. Life Care Centers, 1 CA-CV 07-0228. The court ruled that a binding arbitration agreement voluntarily entered into by an agent under a general power of attorney for an incapacitated person was valid. The agreement for admission to the care facility stated: "The execution of this Arbitration Agreement is voluntary and is not a pre-condition to receiving medical treatment at or for admission to the Facility." The agent later filed a complaint against the facility alleging negligence and violation of A.R.S. §46-455. The defendant filed a motion to compel arbitration. The trial court had denied the defendant's motion to compel arbitration, and the court of appeals reversed. The court of appeals did not agree with appellee's argument that §46-455(O), providing that civil remedies of the statute are supplemental and remedial, precluded binding arbitration, since an arbitrator in applying substantive law would have the power to apply APSA in resolving the case. The court ruled that the language of subsection (O) is intended only to avoid having other statutory provisions limit the application of APSA. The court of appeals agreed with the trial court that A.R.S. §12-1503 allows for substitution of another arbitrator where a AAA arbitration panel, called for in the arbitration agreement, is unavailable in the case.

Parker v. Dometri Investments, LLC, 1 CA-CV 07-0072, confirmed that a purchaser of property from a claimant, who had acquired the real property under an affidavit executed and filed according to A.R.S. §14-3971(E), relying on that affidavit, takes title to the real estate under A.R.S. §14-3972(C) in the same manner as a purchaser acquiring property from a personal representative under A.R.S. §14-3910, free of the rights of any person interested in the estate, regardless of the propriety of the sale or the actual rights of the person acquiring the property by affidavit. Those interested in the estate must pursue the affiant. This was true even though the affiant had disclaimed any interest in the property years earlier and was not entitled to the property upon the death of the decedent. Instead, the property was to pass by pourover will to the separate property trust of the decedent and then to his children by a former marriage. However, affiant acquired the real property by affidavit, and then subsequently conveyed the property to Dometri Investments, LLC, for value. The LLC was therefore entitled to rely on the affidavit and had no duty to inquire into the affiant's actual legal entitlement to the property.

Stephenson v. AHCCCS, 1 CA-CV 06-0785. The court of appeals held that a secured creditor could foreclose on its security interest by trustee's sale without first seeking permission from the personal representative, with was the Arizona Health Care Cost Containment System (AHCCCS), or from the probate court. AHCCCS had recorded a Notice of Medical Assistance Lien against the real property in June 2004, AHCCCS filed a petition for appointment as PR in July 2004 and was appointed in December 2004, and the trustee under the deed of trust recorded a notice of trustee's sale in October 2004. The trustee's sale was conducted on January 18, 2005. The court ruled that secured creditors do not have to use probate proceedings to enforce any security even after the appointment of a personal representative.

In re Friedman Family Trust, 1 CA-CV 06-0723. The court of appeals applied a standard of "malice" in determining whether the costs of a special administrator appointed to investigate an APSA claim under A.R.S. §46-456 should be borne by the beneficiaries of the trust or estate that are bringing the claim. The court cited the provisions of APSA giving immunity from civil liability to those bringing an APSA claim in good faith, and absent malice, in finding that the costs of a special administrator appointed to investigate such claims should be borne by the

parties bringing that claim only if the parties acted maliciously, meaning with a primary purpose other than safeguarding a vulnerable adult from abuse or exploitation.

Articles, announcements or ideas for the Probate & Trust Law and Mental Health & Elder Law Newsletter are welcome and may be submitted to ben@bogutzandgordon.com or by mail to Benjamin J. Burnside at: Bogutz & Gordon, P.C., 3503 N. Campbell Ave., Suite 101, Tucson, AZ 85719. Unfortunately, we cannot return any materials sent to us. All submissions are subject to editing, and the acceptance of a submission does not guarantee publication.