



A Will Contest? Yes, It Can Happen to You

Contesting Wills and Trusts in Arizona

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Tom Murphy and John Goodson practice preventive law and do everything possible to avert a will contest; however, so often we run into situations where somebody did not use the right procedures in preparing a will. Some of the most bitter cases we have litigated were between family members fighting over a will or a trust. Therefore, it is worthwhile to take some time and read this study to prevent will contests or process them quickly and expeditiously if a contest occurs. Whenever you are dealing with an elderly individual, a very sick person or have a situation where the maker of the will wants to disinherit someone or when inheritances are not given relatively equally to the children or grandchildren – great care must be taken in preparing and supervising the will execution ceremony. Since the cost of litigation is so expensive we recommend using alternative dispute resolution arrangements such as mediation and arbitration to prevent long and expensive trials. Also, experienced attorneys representing the family members are very prone to quickly analyze the situation and settle as soon as possible before legal turmoil sets in to the will contest.

When a will contest likely occurs. Sooner or later, someone other than the clients will be reviewing your work and it may not be a pleasant experience. Many children or other family members do not understand the post-mortem administrative issues and too many simply view this as a lawyer's opportunity to line his pockets with unnecessary legal work.

Many children and family members also labor under gross misunderstanding of the decedent's estate. They think it is either much larger or smaller than it really is. This can lead to all sorts of outsized expectations that will never come to fruition. Too often, the attorney becomes the person on which their frustration is vented.

Unequal or unusual bequests have trouble written all over them. My practice is to have the client execute a series of wills over an extended period of time, usually one year, to eliminate the argument that the testator was acting impulsively when a will was executed. And make sure there is something in your file or stated in the will that explains why the bequest was made, ie a "forgotten" loan that was not forgotten by the testator.

Also, protect the caregiver child. Children not involved in the care of their parents' last illness have no idea how expensive and time-consuming a last

illness can be. Warn the client and caregiver that someone will have questions. Keep all receipts and time logs to substantiate any allegations of improprieties.

Qualifications of a valid will. For a document to qualify as a will, it must meet the following requirements as set forth in ARS 14-2501 et seq. In other words, a will contest will involve allegations that at least one of the following requirements are lacking:

- Must be 18 years of age
- Must be of sound mind
- Must be in writing
- Must be signed by the testator or someone else at testator's direction
- Must have two witnesses who signed the will within a reasonable time unless the will is holographic. See Gonzalez v. Satrustegui, 178 Ariz 92 (CA1, 1993)

An exception to the above requirements is a holographic will, which simply requires that the document have the testator's signature and that "the material provisions are in the handwriting of the testator". ARS 14-2503. It does not take much for a writing to qualify as a holographic will. For instance, a post-script to a handwritten letter that simply stated "P.S. You can have my entire estate." qualified as a holographic will. Estate of Blake v. Benza, 120 Ariz 552 (CA1, 1978). Fill-in-blank will forms are considered holographic wills, so that the other formalities of ARS 14-2501 are not required. Matter of Estate of Muder, 159 Ariz 173 (1988).

These are requirements for wills executed in Arizona. A will executed outside Arizona is valid if its execution complied with the laws of the jurisdiction where it was executed. ARS 14-2506.

Dealing with questionable will makers. There are times when you will feel that the preparation of a will is suspicious, when normal beneficiaries are being disinherited. You are not sure the person making the will is not competent. You have a feeling that the testator is being strongly influence or pushed by someone. The maker of the will is elderly. You have a feeling the client is not mentally stable. In all cases when you have a gut feeling that the will is likely to be challenged we recommend that you take all or some of these steps:

1. Have the person examined by a physician and obtain a written report.
2. Bring in persons who know the individual making the will as witnesses.

3. Have an estate planning attorney meet with the person making the will before it is executed to cross examine the person without anyone else present to make sure they know all the members of their family, they know the property in their estate, and that they understand the significance of making a will. After doing so write a report as an affidavit to place in the file so that if you are ever examined on the stand the affidavit will refresh your memory.
4. Tape record or video the signing ceremony and be sure that no portion of the tape is edited. The danger in doing this is that the person making the will may say the wrong thing and the validation backfires.
5. Always have three witness, a notary with acknowledgment and verification language, and a certificate from the attorney preparing the will indicating the will is valid.
6. If interlineations are made at the time of signing they are initialed in front at after the interlineations and the maker includes the date that matches the date of the will.
7. The original will is kept in the attorney's fireproof safe with copies to the testator and the persons named as the personal representatives.

If the above checklist is followed at the time of execution it will be very difficult for someone to attack the will.

Procedure to prove a will. Normally, a will is admitted to probate via the informal proceeding set forth in ARS 14-3301. This means that there is no hearing unless there is an objection filed within four months of receipt of notice of the informal application. ARS 14-3306. Otherwise, a formal proceeding with notice and hearing will have to be commenced. ARS 14-3401 et seq. A formal proceeding most often occurs when the original copy of the will has been lost and the admittance of a copy of the will is sought. ARS 14-3415.

Discovery. The Rules of Civil Procedure apply to probate proceedings “unless specifically provided to the contrary”. ARS 14-1304. This includes the wide-open disclosure requirements of Rule 26.1, which is very misunderstood by probate practitioners. A duty to disclose is triggered when a person “may” have relevant knowledge or a document “may” have relevant content. For these purposes, “relevance” is broadly defined and is not limited to only that evidence that would be admissible at trial. Norwest Bank v. Symington, 197 Ariz 181, 185 (CA1, 2000).

Right To Jury Trial. The applicable statute governing the right to jury trial in a probate proceeding is ARS 14-1306(a) that states:

“If duly demanded a party is entitled to trial by jury in any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.”

As to the demand for trial by jury, Rule 38 of Civil Procedure essentially requires that the demand be made prior to the date of setting the case for trial.

It is not entirely clear if any party in a probate proceeding has a constitutional right to a jury trial. Section 23 of Article 2 of the Arizona State Constitution states, in part, that “(t)he right of trial by jury shall remain inviolate.” There is a long line of Arizona cases holding that “either party to any litigation in the superior court is entitled to a jury trial as a matter of right....The right is applicable to cases in equity as well as in law”. Shaffer v. Insurance Company of North America, 113 Ariz 21, 22 (1976); Stuckey v. Stephens, 37 Ariz 514, 516 (1931); Mounce v. Wightman, 30 Ariz 45, 48 (1926). However, since the enactment in 1956 of the Civil Rules of Procedure, such distinctions between law and equity courts have been abolished. Rule 2 of Civil Procedure. “(I)n Arizona, there is no such thing as a distinct probate court”. Marvin Johnson, PC v. Myers, 184 Ariz 98, 100 (1995).

This author has seen courts decide this issue both ways. For cases in Maricopa County Superior Court where a jury trial was granted in a probate proceeding, see the September 14, 1994 minute entry in *Estate of Lois F. Henry*, PB 93-04766 and the September 18, 2001 minute entry in *Estate of Bernice B. Richards*, PB 2000-004987.

An advisory jury appears to be a matter of right. ARS 14-1306(b) states, in part, that a "court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only". While an initial review of that statute would indicate that this is always discretionary with a trial court, the case law holds that it is not discretionary if there are controverted issues of fact. Slonsky v. Hunter, 17 Ariz App 231,232 (CA1, 1972); Zimmer v. Salcido, 9 Ariz App 416, 417-418 (CA1, 1969); Stuckey, supra, 37 Ariz at 516

Attorney-Client Privilege. The holder of the privilege is the decedent's personal representative. Swidler & Berlin v. United States, 524 US 399 (1998); State v. Macumber, 112 Ariz 569, 571 (1976); State v. Hunt, 2 Ariz App 6, 18 (1989); Schornick v. Schornick, 25 Ariz 563 (1923); Lewin v. Jackson, 108 Ariz 27, 31 (1972) (In Lewin, it was held that the guardian of a ward held the privilege).

Occasionally in an ugly, litigated probate proceeding, the PR may try to invoke the privilege to prevent the disclosure of embarrassing information. This is improper. The holder of the privilege must exercise it in a conflict-free manner. Otherwise, the privilege cannot be claimed. For example, in the Hunt case, the parents who were charged with assaulting their young daughter sought to invoke the physician-patient privilege concerning statements made during medical treatment. The Hunt court did not allow the parents to invoke the privilege, holding:

“We do not believe its purpose is to exclude otherwise admissible evidence obtained from a third party whose interests in suppressing the evidence are patently adverse to the patient”.

2 Ariz App at 18. Similarly, in State v. Gause, 107 Ariz 491 (1971), a husband who was charged with murdering his wife could not use the attorney-client privilege to preclude admission of certain statements made by the wife to her attorney. Where:

“a husband will be using the privilege to exclude evidence that he may have committed a crime against his wife, the privilege cannot be conferred upon him.”

107 Ariz at 495. Other courts have reached the same result by taking a slightly different approach in which the privilege is deemed waived when the party claiming the privilege “pursues a course of conduct inconsistent with the observance of the privilege”, Bain v. Superior Court, 148 Ariz 331, 334 (1986).

Presumptions. There is a public policy favoring testacy, Estate of Vermeersch, 109 Ariz 125, 127 (1973), and the burden is on the contestants to prove by a preponderance the will is invalid. In Re Walters’ Estate, 77 Ariz 122, 125 (1954), ARS 14-3407

A will is self-proven if there are notarized affidavits from witnesses indicating that the requirements of ARS 14-2502 was complied with. ARS 14-2504. Note that Division Two of the Court of Appeals has held that the statutory form set forth in ARS 14-2504 is deficient in that the statutory affidavit form does not specifically state that ARS 14-2502 was complied with or that the testator signed in their presence. Matter of the Estate of MacKaben, 126 Ariz 599 (CA2, 1980).

A properly completed self-proven will means that the “compliance with the signature requirements for execution is conclusively presumed”. ARS 14-

3406(b). In other words, the validity of the signature cannot be contested. MacKaben, supra, 126 Ariz at 601.

Lost Will. One of the more frustrating aspects of the probate code concerns the presumption of revocation when the original copy of the will cannot be found and was last seen in the possession of the testator. ARS 14-3415. See Estate of Schade, 87 Ariz 341 (1960) where the presumption was overcome. The fact that a person who was omitted in the will may have had an opportunity to destroy it will not negate the presumption of revocation. In Re Travers, 121 Ariz 282 (CA2, 1978). Note that if the will is believed to be in a safe deposit box and only the decedent's name was on the box, any interested party can have the box opened but only the person nominated as Personal Representative can remove a will or other "document which appears to be of a testamentary nature". ARS 6-1008.

Capacity. When challenging a will on capacity grounds, the following quote from Justice Lockwood should be kept in mind:

"No matter how much we may reprobate the conduct of a testator from the standpoint of natural justice, or even humanity, we may not on that account permit his will to be set aside unless it clearly appears that he did not fully realize what he was doing with his property, for it is his to dispose of as he pleases"

Estate of Smith, 53 Ariz 505, 509 (1939). A person is presumed to have testamentary capacity. Vermeersch, supra, 109 Ariz at 127 (1973). There are three elements: 1) the ability to know the nature and extent of one's property, 2) the ability to know the natural objects of one's bounty and 3) the ability to understand the nature of the testamentary act. Vermeersch, supra.

The burden is on the contestant to prove by a preponderance of the evidence that one of these three elements did not exist. Matter of Estate of Thorpe, 152 Ariz 341, 343 (CA1, 1986); Smith, supra. This is not an easy thing to do since a contestant must show more than a "generally deteriorating mental condition". Evans v. Liston, 116 Ariz 218 (CA1, 1977). Furthermore, it must be shown that these conditions existed at the time the will was executed. Arizona courts have long taken a dim view of experts and other witnesses who attack a will by relying on acts or statements that made by the testator days or weeks before or after the will was signed. Thorpe, supra; In Re Walters' Estate, 77 Ariz 122 (1954); In Re O'Connor's Estate, 74 Ariz 248 (1952); In Re Stitt's Estate, 93 Ariz 302 (1963). This means that practitioners must keep in mind that critical time is not when the client meets with the lawyer for the first time – it is when the document is signed.

And even if a lack of capacity exists, it must be shown that the lack of capacity impacted the terms of the will, eg, that the testator devised property in a manner that she would not have otherwise done. Smith, supra, Evans, supra at 220. The O'Connor case is a good example of this. The testator thought that her husband and sister, both deceased, were still alive when executing her will. But the court ruled that, even if Ms O'Connor believed this, it would not have changed the terms of her will.

On the other hand, in the case of In The Matter of the Estate of Killen, 188 Ariz 562 (CA1, 1996), a will was invalidated because the testator clearly was seriously mentally ill and delusional. The proponents of the will maintained that she had capacity since she met the three-pronged test: she knew she was executing a will, she knew the natural objects of her bounty and she was aware of the nature and extent of her property. But the trial court's finding of lack of capacity was upheld because the testator's false and irrational beliefs that her nephews were trying to kill her affected the terms of the will. In other words, the testator lacked capacity because her delusions rendered the testator unable to understand the true relationship with her family members and friends.

But the Killen court emphasized that the inquiry was limited to the existence of unfounded delusions. No inquiry was needed or allowed regarding the testator's feelings or motivations:

“if the testator is eccentric or mean-spirited and dislikes family members for no good reason, but otherwise meets the three-prong test, leaving the family members out of the will would not be due to lack of testamentary capacity”.

Killen, supra, 188 Ariz at 55. See also Estate of Smith, supra, 53 Ariz at 510 where the testator omitted a daughter because she appeared to be financially well-off when in fact she was experiencing serious financial difficulties. (“It must appear not merely that the testatrix was mistaken in the facts, but that the mistake was caused by a mental derangement”.)

Yet, a will can still be validly executed by someone laboring under a mental impairment. The testator in In Re Teel's Estate, 14 Ariz App 371 (CA1, 1971), was mentally retarded, functioning at an age level of ten to twelve years old. The court upheld the trial court's finding that testamentary capacity existed. Likewise, in In Re Thomas' Estate, 105 Ariz 186, 189 (1969), the court held that the appointment of a guardian does not necessarily equate with the lack of capacity to execute a will and that a person who had a guardian could still perform a valid testamentary act.

Another recent case is Estate of Gillespie, 183 Ariz 282 (1996) where the court invalidated a will made by a testator who was heavily medicated after a recent cancer surgery. The parties argued the case on capacity grounds but the Supreme Court never reached that issue, ruling that the testator did not know what she was signing. The largely undisputed facts were that the testator's son had his lawyer prepare a will without meeting with her that substantially changed her prior will. There was no record before the trial court that she had ever approved or intended these changes and there was some serious overreaching by the son. At the hospital, the will was simply put in front of the testator by the son who signed it, sight unseen and without having it read to her. There was nothing in the record to show the testator was made aware of the changes.

The Court emphasized that a will can be challenged on many grounds. Lack of capacity is only one of them. Here, the testator not only lacked understanding of the terms of the will but was actually misled about them. "The 1992 Will was the will of James, not Grace."

Do not tiptoe around healthcare issues. The elderly are constantly talking about their health. It is usually their foremost concern. They have no problem having a frank discussion about it.

Confirm any current conditions. Ask them what medications they are on and what they are for. This may tip you off to potential issues of incapacity or susceptibility to undue influence. Ask about any hospitalizations or significant medical treatments in the previous several years. Are there any future major treatments in the foreseeable future.

When considering the capacity issue, practitioners should be aware that four to five million people have some form of dementia. Three percent of all persons age 65 to 74 suffer from dementia. It escalates to 19% for persons 75 to 84 and 47% for those over 85. But the pathology of the disease is much more subtle and sinister, beginning 10 to 20 years before the earliest symptoms are detected. There is no proven genetic link to dementia, although there continues to be considerable research in this area.

Counsel needs to be familiar with the various forms of dementia and how it impacts capacity. There are many excellent sources. One is the newly published *Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers* by the American Bar Association in conjunction with the American Psychological Association. Another is *Assessing Competence to Consent To Treatment; A Guide For Physicians and Other Health Professionals* by Paul Appelbaum and Thomas Grisso, published by Oxford University Press.

Less technical books geared toward the general public are *The Forgetting* by David Shenk and *The 36-Hour Day* by Nancy L. Mace and Peter V. Rabins.

Undue Influence. One crucial point that practitioners and their clients must keep in mind is that, when challenging a will, it is not whether influence was exerted but rather *undue* influence. Another is that undue influence must be proven by clear and convincing evidence rather than by a preponderance. Taken together, this often means that any litigation alleging undue influence is an uphill battle but, as discussed below, the Mullins case may have drastically changed the landscape if a fiduciary relationship can be proven.

Evans v. Liston, supra is the case most often cited regarding undue influence. “A person exercises undue influence over a testator in executing a will when that person through his power over the mind of the deceased make’s the latter desires conform to his own so that the will does not conform to the wishes of the testator but to those of the person exercising the undue influence.” Evans, supra 116 Ariz at 220. The opinion sets out eight factors tending to establish undue influence:

- Fraudulent representations
- Hasty execution of the will
- Concealment of the execution of the will
- Active involvement in procuring the will by the party exerting the influence
- Prior statements that are consistent with the terms of the will
- Unusual or unreasonable terms of the will
- Testator’s susceptibility to undue influence
- Existence of a confidential relationship

Until the Mullin case, the test was that if a confidential relationship existed and that person was active in procuring the will in which he was a principal beneficiary, then undue influence was presumed to exist. However, the presumption disappeared when the person alleging undue influence denies it. Evans, supra 116 Ariz at 220; In Re Pitt’s Estate, 88 Ariz 312, 317 (1960). The trier of fact does not have to believe that the denial is true, only that it was made. O’Connor, supra, 74 Ariz at 260. See also In Re Estate of Harber, 102 Ariz 285 (1967) and In Re Estate of Thompson, 1 Ariz App 18 (1965).

But the recent case of Mullin v. Brown, 210 Ariz 545, 115 P 3d 139 (CA2, 2005) appears to have dramatically changed this. For estate planners, this case should be setting off alarm bells. It is the first case to discuss the ramifications of Estate of Shumway, 198 Ariz 323 (2000) regarding the shifting of the burden of proof in a will contest. At issue was the following jury instruction, which the Court upheld:

If Chris Mullin Jr. and/or Dr. David Mullin had a confidential relationship with Ralph Mullin; was/were active in procuring the execution of the 1995 will; and was/were a principal beneficiary under its terms, then the 1995 will is presumptively invalid and the defendants must prove by clear and convincing evidence that Chris Mullin Jr. and/or Dr. David Mullin did not unduly influence Ralph Mullin.

Shortly before death, Chris Jr. had his grandfather change his will, leaving the entire estate to him and disinheriting Chris' brother, who under a prior will was a 50% beneficiary. Chris Jr. also emptied a joint account and had the decedent issue a new deed for certain, unspecified gas and oil interest. The will in question had been prepared by an attorney.

The Court began by noting that "A presumption of undue influence arises when one occupies a confidential relationship with the testator and is active in preparing or procuring the execution of a will in which he or she is a principal beneficiary. See *In re O'Connor's Estate*, 74 Ariz. 248 (1952). The precise issue on appeal was under what circumstances does this presumption cease? The Court emphasized the statement made in *Shumway* that "[W]here a confidential relationship is shown the presumption of invalidity can be overcome only by clear and convincing evidence that the transaction was fair and voluntary." *Id.* ¶ 16 (alteration in *Shumway*), quoting *Stewart v. Woodruff*, 19 Ariz. App. 190, 194 (1973). The court noted that "[t]his is a difficult standard of proof".

Omitted spouse or child. In regards to a will executed before marriage, the surviving spouse is entitled to a share of the estate that is equal to what the intestate share would have been if there was no will. ARS 14-2301; *Matter of Estate of Beaman*, 119 Ariz 614 (CA1, 1978); *Estate of Beauchamp*, supra, 115 Ariz at 220-221. There is one convoluted exception – this rule does not apply to any devise to a child from a prior marriage (ie, the child's portion is not included in the intestate computation) unless a) the spouse has been provided for outside the will or 2) the will was made in contemplation of marriage.

While Arizona does not recognize common law marriages, Arizona courts will recognize a common-law marriage validly formed in another state. *Gonzalez v. Satrustegui*, supra, 178 Ariz at 1000.

Divorce (and not merely a decree of separation) revokes any testamentary bequest or power of appointment. ARS 14-2804.

A child can be omitted if it was intentional or if the child is provided for outside of the will. Otherwise, the omitted child will generally receive the intestate share. ARS 14-2302.

Medical Records and HIPAA. Since much of the proof regarding a decedent's mental capacity may be found in medical records, HIPAA will rear its ugly head. The privacy rules of the Health Insurance Portability and Accountability Act of 1996, 42 USC 1320d and 45 CFR 160-164, sets forth the process for obtaining medical records through court orders. Disclosure is permitted in response to a court order but is limited to that information "expressly authorized" by the order. 45 CFR 164.512(e)(1)(i)

This means care must be used in two aspects. One is the obvious need for greater specificity in a court order. The second point is to make sure the order complies with the civil procedure rules. For instance, this will usually require that the judge sign the order. A minute entry or a pleading issued by the court clerk is not sufficient.

The process for obtaining medical records through the issuance of subpoenas has also been greatly impacted by HIPAA yet it has received surprisingly little attention in Arizona. The requirements are quite lengthy and detailed and will require considerable additional efforts by the attorney issuing the subpoena. The thrust of the HIPAA regs in this regard mandate that the health care provider who has been served with a subpoena must be given "satisfactory assurance" by the attorney issuing the subpoena that "reasonable efforts" have been made to notify the patient of the request made in the subpoena. 45 CFR 512(e)(1)(ii)(A)

The regs are very specific about what must be provided. Accompanying the subpoena must be a written statement setting forth the following:

- a. a good faith attempt was made to provide written notice to the patient or, if the patient's location is unknown, that a notice was mailed to the patients last known address.
- b. the written notice contained sufficient information about the litigation to permit the patient to raise an objection
- c. the time to raise an objection has elapsed, and
- d. no objections have been filed or that any objection has been resolved.

The regs also provide for an alternative method of proving satisfactory assurance by means of a "qualified protective order". 45 CFR 164.512(e)(1)(iv). This order

can be either issued by the court or entered as a stipulation by the parties. Its terms must prohibit the parties from disclosing the medical records for any purpose other than for the litigation and, after the litigation has ended, the parties must agree to destroy all copies of the records or return them to the health care provider.

There are many aspects of HIPAA that are not covered by this article. The best source of information is the “OCR Privacy Brief, Summary of the HIPAA Privacy Rules” found on the HHS’s website, www.hhs.gov/ocr/privacysummary.pdf, which has nearly 500 FAQs and many useful links. There is also an excellent HIPAA web blog, located at <http://hipaablog.blogspot.com>.

Revocation. A will can be revoked by a) executing a subsequent will that revokes the prior will either “expressly or by inconsistency” or b) by performing a “revocatory act” – burning, tearing, obliterating or destroying the will or any part of it. ARS 14-2507. If a subsequent will does not expressly revoke a prior will, then the inconsistencies between the two wills are resolved in favor of the subsequent will. ARS 14-2507(b). If the new will makes a complete disposition of the testator’s estate, then revocation is presumed. This presumption can only be overcome with clear and convincing evidence. ARS 14-2507(c).

A written revocation must have the equivalent formalities of a will. A typewritten letter will not suffice. Estate of Feir, 145 Ariz 295 (CA2, 1985). A holographic will meets these requirements. In Re Estate of Morris, 15 Ariz App 378 (CA1, 1971); Estate of Blake, supra, 120 Ariz at 554. Revocation of the subsequent will does not revive the prior will unless “it is evident from the circumstances of the revocation.... Or from the testator’s contemporary or subsequent declarations that the testator intended the previous will to take effect”. ARS 14-2509(a).

Where joint or reciprocal wills contain a clause that neither will be revoked without the consent of the other party, such agreements are binding to prevent a unilateral revocation. Estate of Moore, 137 Ariz 176 (CA1, 1983)

Revocation of a trust is governed by the terms of the trust. In Re Estate of Pilafas, 172 Ariz 207, 211 (CA1, 1992).

WILL CONTESTS THAT DO NOT INVOLVE THE WILL

Contract to Make A Will. Arizona courts have taken a dim view of allegations regarding a contract to make a will by a decedent. The statutory requirements of ARS 14-2514 create a “mini statute of frauds” that is strictly enforced since the courts are well aware of the mischief that could otherwise exist. Gonzalez v.

Satrustegui, supra, 179 Ariz at 99-100; Estate of Moore, 137 Ariz 176 (CA1, 1983). Those requirements essentially require written verification of the materials terms or reference to the contract in the will with extrinsic evidence to prove its terms. Estate of Beauchamp, 115 Ariz 219 (CA2, 1977)

However, there is a case prior to the enactment of ARS 14-2514 that holds that partial performance by the promisee will take the agreement out of the Statute of Frauds. Turley v. Adams, 14 Ariz App 515, 519-520 (CA1, 1971)

The allegation of a contract to make a will is treated as a creditor's claim, falling within the four-month creditors claim period. Estate of Levine, 145 Ariz 185, (CA2, 1985)

Creditor's Claim As Disguised Inheritance – Dead Man's Statute. This counsel has had several recent cases whereby the decedent's children do not contest the will by simply alleging that they had an agreement with the decedent from a business deal or demanding payment for services rendered to the decedent. Proving the existence of this agreement or claim invariably raises the issue of the applicability of the Dead Man's Statute, ARS 12-2251, that states, in part, that in a probate action "neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party". It applies to interested parties as well, such as heirs and devisees. Condos v. Felder, 92 Ariz 366, 372 (1962); Cachenos v. Baumann, 25 Ariz App 502, 505-506 (CA1, 1976).

The Statute is designed to apply to "persons who will gain from inaccurate distortions of a transaction with (a) decedent...where death has rendered decedent incapable to giving the lie to the inaccuracies". Carillo v. Taylor, 81 Ariz 14, 25 (1956). See also Fridena v. Evans, 127 Ariz 516, 521 (1980)

In applying the Statute, courts look for corroboration or some other indicia of reliability that "strengthens or confirms that either the statement was made or that the statement was true". Troutman v. Valley National Bank of Arizona, 170 Ariz 513, 517 (CA1, 1992).

Most practitioners overlook the fact that, even if the admission of a statement is not precluded by the Dead Man's Statute, the statement is still subject to a hearsay objection. Rules 803 & 804 of Evidence.

Gifts. A frequently litigated issue concerns alleged gifts from the decedent to a child or other related person. Arizona courts have long held that the burden of proving a gift must be proven by "certain, clear, complete, direct, positive, express and satisfactory" evidence. Stewart v. Damron, 63 Ariz 158, 163 (1945).

Less evidence is required if a familial relationship exists, Elkins v. Vana, 25 Ariz App 122, 125 (1975), but if a confidential relationship exists, the donee has the burden to show “by clear evidence” that the donor “acted independently, with full knowledge and of his own volition free from undue influence”, In Re Guardianship of Chandos, 18 Ariz App 583, 585 (1972); Eagerton v. Fleming, 145 Ariz 289, 292 (CA2, 1985); Amado v. Aguirre, 63 Ariz 213, 219 (1945).

Litigation After The Estate Is Closed. It ain't over till it's over. Simply closing an estate does not end the potential for future litigation. A claim against the Personal Representative for a breach of fiduciary duty can be made within six months after the closing statement was filed. ARS 14-3935. Tovrea v. Nolan, 178 Ariz 485 (CA2, 1993). If a claim is made that estate property was wrongly distributed, a claimant has three years after the decedent's death or one year after the date of distribution to file a claim. ARS 14-3936. Note that this claim must be made against the distributee and not the Personal Representative. Estate of Meyer, 160 Ariz 535 (CA1, 1989).

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