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CONSUMER
PROTECTION

HANDBOOK



Young Lawyers Section

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PREFACE

Over 15 years ago, the Young Lawyers Section of the Arkansas Bar Association assumed the responsibility of producing the First Edition of the Consumer Law Handbook. In the summer of 1999, the Young Lawyers Section published the Second Edition. Since that time, tens of thousands of copies of the Handbook have been distributed to the people of Arkansas to aid them in understanding the laws that control many of their consumer transactions. This year, the decision was made to revise and update the Handbook to reflect changes in the law.

This Third Edition has new information and provides relevant citations to the law to educate the public about the consumer protections afforded to them under federal and Arkansas law. This Third Edition will also serve as a valuable reference tool for members of the Arkansas Bar Association.

The information contained in this Handbook is derived from the laws of the state of Arkansas and the United States government. We have attempted to address many issues that face Arkansans on a daily basis. The information in this Handbook is current and will help many people find the answers to any questions they might have about their rights as consumers. This Handbook, however, is provided merely as a public service. It is not a complete examination of the many laws affecting consumers. The Young Lawyers Section of the Arkansas Bar Association encourages readers to consult an attorney or the appropriate government agency for specific legal information.

Many members of the Young Lawyers Section donated their time, talents, and energies to author the various sections of this Handbook. Their contributions were made in the spirit of public service and reflect the ideals of the Arkansas Bar Association. The Young Lawyers Section of the Arkansas Bar Association sincerely thanks them for their efforts.

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CONSUMER LEASING ARRANGEMENT

Suppose you have been temporarily transferred to another city by your employer. You've leased an apartment but, unfortunately, it is not furnished. You really have no personal desire or financial inclination to purchase hundreds (or maybe thousands) of dollars of furniture to properly furnish the apartment, but you want to be comfortable during your stay. What are you to do? Fortunately, there exists a popular alternative to purchasing property: leasing.

Leasing gives you temporary use of property in return for periodic payments. In the past decades, it has become quite a popular alternative to purchasing property under certain circumstances. For instance, in the situation above, you might seriously consider furnishing an apartment or house with leased furniture that you will only use for a short period of time. Although the list of property types that can be leased is endless, the more popular types of personal property to lease include home furniture, television and stereophonic equipment, appliances, and automobiles.

Perhaps the most important thing to understand about consumer leasing arrangements is that, in a normal lease arrangement, the lessee does not build up equity in the property. Equity is the value of something that exceeds the money owed on that thing. For example, when you purchase something on credit, the amount you pay on the property increases your personal "stake" in that property until, at the end of the payment period, you own the entire piece of property. However, in a lease arrangement, you make regular lease payments, but at the end of the payment period you have nothing (other than the past "use" of the property) to show for your expenditures. This is an important factor to weigh when you consider whether to purchase or lease property.

Arkansas law provides certain protections for consumers who enter into leasing arrangements.¹ In addition, federal law requires leasing companies to give you the facts about the cost and terms of their contracts to help you decide whether leasing is a good idea.² This requirement applies to leases of personal property for more than four months for personal, family or household use.³ It covers, for example, long-term rentals of cars, furniture, and appliances, but not daily car rentals or leases on apartments.

Before you agree to a lease, the leasing company must give you a written statement of cost, including the amount of any security deposit, the amount of your monthly payments and the amount you must pay for licensing, registration, taxes and maintenance. The company must also give you a written statement about terms, including any insurance you must have, any guarantees made by the company, information about who is responsible for the property, and any standards for wear and tear on the property.

Additionally, the company must give you a written statement about whether you have an option to buy the property. An option-to-buy program means that, at the end of the lease agreement, you may be entitled to purchase the property for little or no additional payments. There are many option-to-buy plans and programs, and the best thing to do is to examine all plans to see which, if any, will be the best for you.

Common sense dictates that no matter what you are considering leasing, how long you intend to lease it or what type of lease is involved, you should inform yourself as to the terms of the lease contract.

Open-End Leases and Balloon Payments

Your costs will depend on whether you choose an open-end lease or a closed-end lease. Open-end leases usually mean lower monthly payments than closed-end leases, but you may owe a large extra payment—often called a balloon payment—based on the value of the property when you return it. (Caution: regardless of whether it is called “balloon payment” or something else, find out if you will be liable for any depreciation or damage to the property before you enter into any lease agreement.)

To illustrate a “balloon payment” scenario, suppose you lease a car under a three-year, open-end lease. The leasing company estimates the car will be worth \$4,000 after three years of normal use. If you bring the car back in a poorer condition than expected, and now it is only worth \$3,500, you may owe a balloon payment of \$500.

The leasing company must tell you whether you may owe a balloon payment at the end of the lease and how it will be calculated.⁴

You have the right to an independent appraisal of the property’s worth at the end of the lease, but you must pay an appraiser’s fee.⁵

A balloon payment is usually limited to no more than three times the average monthly payment.⁶ If your monthly payment is \$100, your balloon payment would not be more than \$300 unless, for example, the property has received more than average wear and tear (for instance, if you drove a car more than average mileage).

Closed-end leases usually have a higher monthly payment than open-end leases, but there is no balloon payment at the end of the lease.

ENDNOTES

1. Ark. Code Ann. § 4-2A-101 et seq.
2. 15 U.S.C. § 1667a.
3. 15 U.S.C. § 1667(1).
4. 15 U.S.C. § 1667a.
5. 15 U.S.C. § 1667b(c).
6. 15 U.S.C. § 1667b(a).

CREDIT PROTECTION UNDER THE FAIR CREDIT BILLING ACT

Your new sofa and recliner are perfect for your living room. Thanks to the easy payment terms extended by Comfort on Credit, your local furniture store, you can enjoy the new furniture while you pay for it. Then the first bill comes. Instead of a \$500 bargain, you've been billed for \$5,000! Can the law help? What should you do? Never fear. The Fair Credit Billing Act (FCB Act),¹ a law passed by Congress to protect consumers who buy on credit, offers a way to solve your problems.

The first thing you should do is notify Comfort on Credit, in writing, about the problem within sixty (60) days of the date of your bill. You should include the following information: (1) your name and account number (if any), (2) your belief that the statement contains a billing error and the amount of such billing error, and (3) the reasons you believe that the statement contains a billing error. If you also purchased a flat screen television on credit and that part of the bill is correct, pay the store for the undisputed part of the bill with your letter, but still explain the other billing problem. Keep a copy of your letter and wait to hear from Comfort on Credit.

Comfort on Credit, or any other creditor, must acknowledge your letter within thirty (30) days. Comfort on Credit then has two billing cycles, or a maximum of ninety days, to correct the error or explain why you owe the full amount billed. If Comfort on Credit did make a mistake, you do not owe finance charges on the disputed amount—in this case, the \$4,500 extra billed to you. If Comfort on Credit maintains you owe all \$5,000, it must explain to you exactly why you owe the full amount billed.

You are also protected if you return the sofa, but it continues to show up on your bill. Again, notify Comfort on Credit in writing and explain that you are entitled to a credit. Simple mathematical errors, a failure to credit payments you have made, and unidentified charges on your bill can all be corrected by following the FCB Act procedures outlined above.

The FCB Act also limits what creditors can do to you while you are attempting to resolve a credit dispute with them pursuant to the FCB Act procedures. Comfort on Credit cannot turn the debt over to a collection agency or threaten your credit rating while you are fulfilling your obligations under the FCB Act until Comfort on Credit has responded to your inquiry. If Comfort on Credit fails to fulfill its duties under the FCB Act, you have a right to sue. Even if the bill was correct, if the store didn't respond to your letter, immediately turned the bill over to a collection agency, or otherwise violated the FCB Act, Comfort on Credit must forfeit up to \$50 of what you owed them.

No one wants to end up in court over a mistake on a bill, so the FCB Act provides a way to resolve billing disputes before they get to court. To maintain a good credit rating, pay all of your bills on time. If you are confronted with a billing error, follow the procedures of the FCB Act and you will be entitled to its protection. Enjoy your new sofa and recliner.

ENDNOTES:

1. P.L. 93-495 was enacted on October 28, 1974, and consists of six titles. Title III Fair Credit Billing amended various provisions of the Act and added to it, as Chapter 4 Credit Billing

sections 161 through 171 (15 U.S.C. §§ 1666–1666 (j)). While the name “Fair Credit Billing Act” is in fact the short title for all of Title III of P.L. 93-495, it is the name popularly given to Chapter 4 of the Truth in Lending Act. (See Historical Notes following text of § 1666 in 15 U.S.C.)

ENFORCING JUDGMENTS

Consumers may, from time to time, find themselves with a judgment being entered against them on a delinquent debt. Judgments are court orders finding that a debtor owes a creditor a certain sum of money and ordering the debtor to pay the creditor. Judgments almost always include post-judgment interest, which will typically be around 10% but may be as high as 17%. Judgments also usually award the creditor certain amounts in addition to the debt; this may include court costs, service fees, and attorneys' fees. Judgments are public records and are required if creditors, or their lawyers and debt collectors, wish to use certain legal procedures for the collection of debts. The most commonly used methods to enforce a judgment are: (1) execution on personal property, (2) garnishment of wages, (3) garnishment of bank accounts, and (4) levy on real property. Each of these will be discussed below.

Writs of Execution

Judgment creditors may attempt to use a writ of execution to enforce a judgment.¹ A writ of execution allows a judgment creditor to send the sheriff to a judgment debtor's home or place of business to confiscate items of personal property, which may include items as large as vehicles, trailers, boats, and ATVs, or as small as electronics, firearms, jewelry, and appliances. Article 9 of the Arkansas Constitution and Arkansas Code Annotated § 16-66-201 et seq. allow judgment debtors to identify certain property as exempt, but this election of exempt property must be expressly made. The sheriff will not typically advise a judgment debtor of his or her exemption rights or the method for making such an exemption. Exempt personal property includes clothes and between \$200 and \$500 worth of other property, depending upon the debtor's family situation. Additionally, if personal property is jointly owned with a non-debtor (*e.g.*, a spouse or a parent) or if the debtor can prove that the property is fully liened (*i.e.*, a separate secured debt owed on the property is more than the value of the property), then the sheriff typically will not take the property pursuant to the writ of execution.

Once the sheriff has confiscated items of personal property pursuant to a writ of execution, he will schedule and publish notice of a sale of those items by means of public auction. At any time prior to this auction, the judgment debtor may petition for the suspension or stay of the sale. In order to stop the sale, though, the judgment debtor must pay to the court an amount sufficient to satisfy the judgment debt, which will then be paid over to the judgment creditor in lieu of the execution. This is controlled by Arkansas Code Annotated § 16-66-301 et seq. If the judgment debtor does not or cannot do this, then the items will be sold to the highest bidder. The proceeds from this sale will be used, first, to pay for any expenses the sheriff incurred in conducting or advertising the sale, then to pay the sheriff a 10% commission on the sale, and finally to pay off the judgment debt. Only if there are proceeds remaining after the judgment debt has been fully satisfied will any of the money received at auction be returned to the judgment debtor.

Writs of execution are a common means of enforcing a judgment. Depending on a judgment debtor's particular situation, he or she may not have any personal property which the sheriff can or will confiscate. This can only be determined on a case-by-case basis, and judgment debtors are not encouraged to gamble on what the sheriff can or cannot or will or will not take under a writ of execution.

Garnishment of Wages

Another commonly used method for the enforcement of judgments is a garnishment of the judgment debtor's wages. This is controlled by Arkansas Code Annotated § 16-110-401 et seq. Pursuant to a writ of garnishment, a judgment creditor may ask a debtor's employer to state in a public record how much the debtor makes, how frequently the debtor is paid, and any other court-ordered withholdings which are made from the debtor's pay (e.g., child support withholdings). The judgment creditor may then get an order from the court which directs the debtor's employer to withhold from all of the debtor's subsequent pay checks an amount which can equal as much as 25% of the debtor's net pay. Once the employer withholds this garnishment amount from the judgment debtor's pay check, it must then turn the money over to the judgment creditor or its representative to be applied to the judgment debt. This continues until either the debt is satisfied or the debtor no longer works for that employer.

Garnishing wages is an incredibly effective and useful method of enforcing judgments. Debtors have very few defenses to the withholding of their pay, and few debtors can afford to quit their job to avoid the garnishment. Once a wage garnishment is ordered against a judgment debtor, he or she is encouraged to communicate candidly with the judgment creditor; an agreement for the voluntary payment of the judgment debt can often be arranged on terms which will cost the judgment debtor less per month than would be withheld pursuant to a garnishment. There is no guarantee that the judgment creditor will agree to a voluntary payment arrangement, particularly if the debtor has violated such agreements in the past, but it is always worthwhile to make such a request.

Garnishment of Bank Accounts

Garnishing a bank account allows a judgment creditor to freeze a judgment debtor's bank account and then obtain an order from the court directing the bank to turn over to the creditor all of the funds in that account up to the amount of the judgment. Unlike a wage garnishment, a bank garnishment is not continuing; once the bank has turned the funds over to the creditor, it is not obligated to make future payments to the creditor unless another writ of garnishment is provided. Still, judgment debtors rarely want to keep their money in the same bank after having been hit by a garnishment once; the probability of the judgment creditor attempting another garnishment a few months down the road is high, and if the funds have been moved to a different bank, it makes it somewhat more difficult on the judgment creditor to locate the debtor's funds.

There are certain limitations on the rights of a judgment creditor when garnishing a bank account. Of primary importance, the judgment creditor may not be able to take funds to the extent that they are Social Security or disability payments. This benefits many judgment debtors who find themselves with judgment debts largely due to medical issues and disability that prevent them from working. If a judgment debtor is notified of a bank garnishment on an account that holds these types of funds, he or she should immediately contact both the bank and the judgment creditor to fully inform both parties of the nature of the funds held in the account.

Levy on Real Property

When a judgment is entered, it automatically becomes a lien on all real property that the judgment debtor owns in that county. A judgment can also be registered in different counties, and even different states, so that it is also a lien on real property in those locations.² With the judgment as a lien on his or her real property, a judgment debtor cannot sell this property to anyone else without the proceeds being used to pay off the lien. It is very similar in nature to a mortgage, which typically must be paid off from the proceeds of any sale of the land.

Also like a mortgage, a judgment lien can be foreclosed upon, with the court ordering the sale of the property at public auction and the proceeds applied to the debt. Judgment creditors rarely exercise this option due to the expense associated with a foreclosure and due to the fact that most properties have a mortgage which is superior to the judgment lien, meaning the judgment creditor would have to pay off the mortgage first before being able to collect its own debt.

Finally, just as the state constitution makes certain personal property exempt, it also provides a homestead exemption for judgment debtors. If a particular piece of real property is the debtor's primary residence and is less than 80 acres if rural or 1/4 of an acre if urban or suburban, then the judgment creditor may not levy against the property.

Post-Judgment Schedule of Assets

Reading this, the question may be raised: How will the judgment creditor know where I work, bank, and own property? That question is answered by reference to Arkansas Code Annotated § 16-66-221. This statute requires all judgment debtors in Arkansas to prepare a list of all of their real and personal property, whether held by them or by someone else on their behalf, and specify which property is claimed to be exempt. This list must be signed in front of a notary and filed with the circuit clerk within 45 days of the entry of the judgment; a copy should also be given to the judgment creditor or its representative. This is required in all cases, but in many cases, it is also made in the court order. Judgment debtors are encouraged to review the judgment against them and determine whether this language is included. If it is in the judgment, and it typically will be, then failure to comply with this requirement may result in the judgment debtor being held in contempt of court, which can potentially result in penalties such as fines or jail time, though such penalties are typically not enforced unless the debtor repeatedly ignores the court's demand for a schedule of assets.

Conclusion

Judgment debtors reading this are reminded that this is only a brief overview of the law governing the enforcement of judgments. This area of the law is governed by a combination of statutes, cases, and constitutions. In most situations, debtors, whether or not a judgment has already been entered against them, are advised to seek legal counsel. Having a competent lawyer to assist in interpreting the rights of the debtor and ensuring that those rights are respected by the creditor can be invaluable in the long term.

ENDNOTES:

1. Ark. Code Ann. § 16-66-101 et seq.
2. Ark. Code Ann. § 16-65-117.

FAIR DEBT COLLECTION UNDER THE FAIR DEBT COLLECTION PRACTICES ACT

Generally, credit-card-carrying Americans are indebted, on average, \$2,000 per card. In addition to credit-card debt, most of us are paying on home mortgages, automobiles, medical debts, and other consumer loans. Unfortunately, there are times when we fall behind in meeting these financial obligations. In such times, the last thing we need is harassing phone calls from debt collectors to collect on a debt we supposedly owe to a creditor we do not know. But, what is fortunate is that the Federal Trade Commission enforces the Fair Debt Collection Practices Act (FDCPA). This Act restricts unfair actions taken by debt collectors and, in some instances, attorneys.

To whom does the FDCPA apply?

The FDCPA applies to debt collectors. The term “debt collector” means any person whose primary business purpose is the collection of any debt, and any person whose business includes debt collection, directly or indirectly, on a regular basis.¹ The following people are not considered “debt collectors” even though they may be collecting a debt from you: 1) a creditor, the person to whom the debt is owed; 2) a creditor’s affiliate²; 3) a nonprofit organization; 4) any person collecting a debt that was not in default at the time the debt was obtained.³ This last exception to the debt-collector definition is particularly important because there is a business trend where many companies are purchasing large amounts of debt for pennies on the dollar and attempting to collect on these debts for the full amount of the debt, including other fees and charges. In particular, the FTC issued a 1993 opinion letter defining a debt collector and specifically calling Midland Credit Management, Inc., a debt collector. The letter states, “A party that purchases delinquent accounts from the party to which the debts were originally owed and attempts to collect them from the consumer debtors fit clearly within the definition.”⁴

What actions violate the FDCPA?

Communication. The FDCPA prohibits debt collectors from contacting you before 8:00 am or after 9:00 pm local time, and prohibits the debt collector from contacting you at your place of business, if the debt collector has reason to know that such contact may jeopardize your employment in any way.⁵ Additionally, a debt collector may not contact you by postcard.⁶ A debt collector cannot contact or speak with a third party about your debt, unless it is your attorney or a consumer reporting agency.⁷

Harassment. Debt collectors may not harass, oppress or abuse any person.⁸ It is a direct violation of the FDCPA for a debt collector to: 1) use or threaten to use violence or criminal means to harm you, your reputation, or your property; 2) use obscene or profane language; 3) publish a list of consumers who *allegedly* refuse to pay debts; 4) advertise for the sale of your debt to coerce you to pay the debt; 5) cause your phone to ring repeatedly or continuously with intent to annoy, abuse, or harass you—this is commonly known as auto-dialing; or 6) call you without meaningfully identifying the caller.⁹

False Statements. A debt collector is prohibited from making any false statement or misrepresentation of any kind. It is a direct violation of the FDCPA for a debt collector to: 1) falsely imply that he/she is affiliated with the government; 2) falsely represent the type of debt owed, the amount owed, or that the debt has been reduced to a judgment by a court; 3) falsely imply that he/she is an attorney or communicating for an attorney; 4) report credit information that is false; 5) use any written communication that looks like a court document or that looks like it is from a government agency; 6) use deceptive means to gain information about you; 7) send you letters without telling you they are attempting to collect a debt; 8) use a false business name; or 9) falsely imply they are a credit reporting agency.¹⁰ Additionally, a debt collector cannot make express or implied threats of legal action, such as falsely implying that nonpayment will result in arrest, seizure or garnishment of your property, or that you have committed a crime by not paying.¹¹ You cannot be jailed for nonpayment of a debt, and any threats to that effect are obvious violations of the FDCPA. (Fortunately, the Debtor's Prison may now be found only in Dickens' novels.)

Unfair Practices. There are certain less obvious collection practices that are unfair or harmful enough to be prohibited by the law. A debt collector cannot collect money for fees, interest, or other expenses that are not expressly authorized by the agreement that created the debt.¹² It is unlawful for the debt collector to accept a check postdated for more than five days, unless you are notified in writing of the debt collector's intent to deposit the check 3-10 days prior to the deposit.¹³ It is also unlawful for the debt collector to deposit a postdated check prior to the date on the check.¹⁴ A debt collector cannot require you to accept collect calls or telegram fees.¹⁵

What are your rights against a "debt collector"?

Just because you get a call from a debt collector does not mean you should start looking to rob Peter to pay Paul. You have rights. After you have communicated with a debt collector, it has five (5) days to send you a written notice with: 1) the amount of the debt; 2) the name of the creditor to whom the debt is owed; 3) a statement that, unless you dispute the validity of the debt within thirty (30) days after receipt of the notice, or any portion thereof, the debt will be assumed to be valid by the debt collector; 4) a statement that if you dispute the debt, or any portion thereof, in writing within the 30-day period, the debt collector will obtain verification of the debt, and a copy will be mailed to you by the debt collector; 5) and a statement that, upon your written request within the 30-day period, the debt collector will provide you with the name and address of the original creditor, if different from the current creditor.¹⁶

If you dispute the debt in writing within the 30-day period or if you request the name and address of the original creditor, the debt collector must stop collection of the debt until the debt collector obtains a verification of the debt or the name and address of the original creditor, and sends you a copy.¹⁷ Even if you do not dispute the validity of a debt, a debt collector cannot use the fact you didn't dispute the debt as an admission of liability in a court proceeding.¹⁸ You also have the right to stop communication with the debt collector if you notify the debt collector in writing. In that case, the debt collector must stop all communication with you, except to say that some specific action will be taken, and only if the creditor intends to take such action.¹⁹ Of course, the debt collector may not contact anyone else concerning the debt other than you or your attorney.

One caveat: a debt collector may begin collection activities again if he is able to produce proof of the debt, such as a copy of the bill or receipt.

What can I do if a debt collector violates my rights?

The State Attorney General's office can provide information and assistance in determining your rights and whether there has been a violation of the FDCPA or the state debt collection laws. You may also report the company to the State Board of Collection Agencies. The complaint forms are online at http://www.asbca.org/pdf/complaint_form.pdf, and should be mailed to State Board of Collection Agencies at 523 Louisiana Street, Suite 460, Little Rock, AR 72201. You may file a lawsuit against a wrongful debt collector in state or federal court within one year from the date of the violation.²⁰ If you prevail, you will recover damages, court costs, and, attorney's fees.²¹ If a class of people sue a debt collector, they can recover money for damages of up to \$500,000, or one percent of the debt collector's net worth, whichever is less.²²

ENDNOTES:

1. 15 U.S.C. § 1692(a)(6).
2. *Wood v. Capital One Servs., LLC*, 718 F. Supp. 2d 286 (N.D.N.Y. 2010) (“[A]n affiliate exception applies to any entity acting as debt collectors for another entity related by common ownership or corporate affiliation, so long as the party acting as a debt collector does so only for its affiliates and if its principal place of business is not collecting such debts.”).
3. 15 U.S.C. § 1692(a)(6).
4. Federal Trade Commission Staff Opinion Letter, Brincherhoff-Arbuckle (Dec. 12, 1993), located at <http://www.ftc.gov/os/statutes/fdcpa/letters/arbuckle.htm>.
5. 15 U.S.C. § 1692c(a).
6. 15 U.S.C. § 1692f(7).
7. 15 U.S.C. § 1692c(b).
8. 15 U.S.C. § 1692(d).
9. *Id.*
10. 15 U.S.C. § 1692e.
11. *Id.*; 15 U.S.C. § 1692f(6).
12. 15 U.S.C. § 1692f(1).
13. 15 U.S.C. § 1692f(2).
14. 15 U.S.C. § 1692f(4).
15. 15 U.S.C. § 1692f(5).
16. 15 U.S.C. § 1692g(a).
17. 15 U.S.C. § 1692g(b).
18. 15 U.S.C. § 1692g(c).
19. 15 U.S.C. § 1692c(c).
20. 15 U.S.C. § 1692k(d).
21. 15 U.S.C. § 1692k.
22. *Id.*

GUARDIANSHIP

Guardianship is a legal procedure whereby one person, “a guardian,” petitions a probate court to act on behalf of another person, referred to as an “incapacitated person” or “ward.” An incapacitated person is one who is impaired by reason of a disability such as mental or physical illness, drug or alcohol dependence, or minority, to the extent that he or she lacks the ability to make essential decisions concerning his or her well-being, health, safety, or to manage his or her property. In general, a person is qualified to be a guardian if he or she is a resident of Arkansas, at least eighteen (18) years old, of sound mind, and is not a convicted and unpardoned felon.

In order to obtain a guardianship, a person must file a petition for the appointment of himself or herself or some other qualified person as guardian of an incapacitated person. The petition must include, among other things, the name and address of the incapacitated person and the person seeking the appointment, a description of the property owned by the incapacitated person and its value, the nature of the incapacity, the reason the appointment is sought, and the interest of the petitioner in the appointment. The fact of minority of the incapacitated person must be established by satisfactory evidence at a hearing before the Court. Other forms of incapacity require an evaluation of the incapacitated person by a doctor or other qualified professional and testimony or a sworn written statement regarding the incapacity by a doctor or qualified professional.

There are two basic types of guardianships: a guardianship of the person and a guardianship of the estate. The Court may appoint a guardian to serve in either or both capacities, depending on the circumstances. A guardian of the person may be appointed to care for and maintain the incapacitated person. This type of guardianship is particularly useful when a person is unable to make decisions concerning health care due to a disabling disease. A guardian of the estate may be appointed to protect and preserve an incapacitated person’s property, to invest it, and to use it for the benefit of the incapacitated person. In this type of guardianship, the guardian must make periodic accountings for all assets and how those assets are used. Likewise, the Court will require that the guardian give a bond to assure that the affairs of the incapacitated person are properly administered.

Arkansas law also provides for the appointment of a “temporary” guardian in certain instances. Such a guardian may be appointed where there is imminent danger to the life or health of an incapacitated person or where his property is subject to loss, damage, or waste due to the person’s incapacity. A temporary guardianship is of short duration, no more than 90 days. The Court may also appoint a “limited” guardian. Such guardian’s authority is limited to those specific powers and duties set by the Court in the order of appointment.

REFERENCES:

Ark. Code Ann. § 28-65-101
Ark. Code Ann. § 28-65-104
Ark. Code Ann. § 28-65-105
Ark. Code Ann. § 28-65-201
Ark. Code Ann. § 28-65-203

Ark. Code Ann. § 28-65-205
Ark. Code Ann. § 28-65-211
Ark. Code Ann. § 28-65-212
Ark. Code Ann. § 28-65-213
Ark. Code Ann. § 28-65-214
Ark. Code Ann. § 28-65-218
Ark. Code Ann. § 28-65-301

LANDLORD TENANT RELATIONS

At the outset, it should be pointed out that the law governing the landlord/tenant relationship is vast. It is governed by both statute and case law handed down by the appellate courts of Arkansas. Please keep in mind that the law provided in this section is very general and is only intended to provide the basic law governing the landlord/tenant relationship. Regardless if you are a landlord or a tenant, if you have a problem or a question in this area, you should consult an attorney.

Generally, a landlord/tenant relationship arises from an agreement, or lease, under which the tenant or lessee takes possession of property belonging to the landlord or lessor. This agreement can be express or implied.¹ In exchange for the use of the landlord's land, the tenant usually pays the landlord money in the form of rent.

Not all leases or agreement creating a landlord/tenant relationship need to be in writing. In fact, many are not. It is only those leases that will last a year or longer that must be in writing.²

Once an agreement is formed, the tenant is said to have a "tenancy." There are three major types of tenancies. As will be seen, the primary difference among the three turns on how long they last and what kind of notice is needed to terminate the tenancy.

The first tenancy is a tenancy for years. The primary feature of this tenancy is that it lasts for a fixed period of time.³ A tenancy for years can be for a week, a month, or a year, as long as it provides a definite beginning and a definite end. No notice need be given to the tenant that the lease is going to expire.⁴ Keep in mind, however, that a lease for years must be in writing if the term is greater than one year.⁵

The second tenancy is a periodic tenancy. This tenancy exists from period to period until the landlord or the tenant provides proper notice that the lease will terminate.⁶ For example, Ann may agree to rent Bob's land on a monthly basis. Ann would then pay Bob every month for the use of the land. This is a month-to-month periodic tenancy. Year-to-year, week-to-week, or day-to-day tenancies can also be created.⁷

In order to terminate a periodic tenancy, the terminating party must notify the other party no later than one full period prior to the termination date.⁸ If the tenancy is month-to-month, one month's notice must be given prior to termination. If week-to-week, one week's notice must be given. However, in no event must one give notice in excess of six months prior to termination. Thus, if the tenancy is year-to-year, six months' notice is sufficient.⁹

The final tenancy is a tenancy at will. Tenancies at will can terminate at any time without notice.¹⁰ Keep in mind, however, that a tenancy at will commonly transforms into a periodic tenancy depending on how often the tenant pays rent.¹¹ As a result, landlords and tenants would be wise to give notice when terminating a lease that began as a tenancy at will.

Before entering into any lease agreement, both parties should clarify what type of tenancy is being created. Once the type of tenancy is ascertained, each party will know what type of notice he or she is entitled to in the event that termination is sought.

Landlords and tenants should be aware that failure to vacate the premises by the termination date can result in liability on the part of the tenant.¹² Regardless of whether the landlord or the tenant terminates the tenancy, the tenant must be off the premises by the date stated in the notice.¹³ Therefore, a tenant should not give a landlord notice of termination unless he or she is able to vacate the premises on time. A tenant remaining after the termination date can be held liable for up to three months' periodic rent or twice the actual damages suffered by the landlord, whichever is greater, and reasonable attorney's fees.¹⁴

Duties

When a landlord/tenant relationship is created, each party becomes obligated to perform certain duties as well as entitled to certain rights. It is very important that all parties in such a relationship have a basic idea of the duties and rights afforded to them by law. Listed below are some of the duties required of both tenants and landlords.

*Duties of the Tenant*¹⁵

- Pay rent on time.
- Keep the premises safe and reasonably clean.
- Refrain from deliberately destroying or damaging the premises.
- Refrain from unreasonably using the premises' appliances and its electrical, plumbing, heating, and air conditioning equipment.
- Refrain from engaging in illegal activities on the premises.
- Give notice before leaving a periodic tenancy.
- Inspect the premises before leasing it to ensure it will fit your needs.
- Surrender the premises at the end of the lease term.

*Duties of the Landlord*¹⁶

- Comply with the landlord's obligations under the rental agreement.
- Refrain from collecting a security deposit in excess of two months' periodic rent.
- Promptly return, within 60 days, any security deposit remaining after applying the deposit to the tenant's unpaid rent and any damages sustained by the landlord because the tenant did not comply with the rental agreement.
- Conduct all duties in good faith.

Eviction

A landlord may evict a tenant if the tenant fails to pay rent when due, the tenant's term has ended, or the tenant has violated the terms and conditions of the rental agreement.¹⁷ For

residential rental agreements, nonpayment of rent after five days of the due date constitutes legal notice that the landlord has the right to evict the tenant.¹⁸

An eviction proceeding begins when the landlord, or her agent, commences an eviction proceeding in district court.¹⁹ Once commenced, the landlord must serve the eviction notice on the tenant, generally by leaving a copy of the eviction proceedings with a person residing at the tenant's residence, if the person is over the age of 14.²⁰ Alternatively, if service has been attempted and no person is found in possession of the premises, a copy of the eviction notice may be served by placing it on the most conspicuous part of the premises (typically the front door).²¹ Tenants are still liable for rent while eviction proceedings are pending.²²

Some Good Things To Know

- Keep receipts of rent payments, copies of lease agreements, records of damages, and any correspondence between you and the landlord.
- A landlord may not demand or receive a security deposit in an amount greater than two months' rent.
- When the lease terminates, whether voluntarily or involuntarily, the landlord has the right to dispose of any property left in or on the premises as he or she sees fit, without consulting the tenant.²³
- All property placed on the premises by the tenant is subjected to a lien in favor of the landlord to ensure payment of all amounts the tenant has agreed to pay.²⁴
- The landlord must return your security deposit within 60 days after your lease ends. The landlord may deduct from your security deposit, however, any unpaid rent, necessary repair costs, or cleaning costs. Should your landlord fail to return your security deposit, or fail to provide you a written explanation for any deductions, you should contact your landlord in writing. If you receive no satisfaction after contacting your landlord in writing, you may wish to consult an attorney to consider filing a claim against your landlord in small claims court.
- The landlord does not always have to pay for repairs. Landlords are only required to pay for repairs if agreed to in the rental agreement.²⁵ Before you perform any repairs, or hire someone to do them, get a written agreement from the landlord stating that the landlord will reimburse you. If you are responsible for the damage, the landlord has no obligation to reimburse you.
- If an apartment is found to be, or is suspected of being, substandard (*i.e.*, in violation of housing codes), a tenant should:
 - Call the landlord and ask for repairs
 - Make a written request of the landlord for repairs
 - Call the health department or building inspector if the landlord does nothing
 - Contact a lawyer

ENDNOTES:

1. See 49 Am. Jur. 2d *Landlord and Tenant* § 28 (1995).
2. Ark. Code Ann. §§ 4-59-101(a)(5), 4-59-102(a).

3. See, e.g., *Beeson v. La Vasque*, 144 Ark. 522, 223 S.W. 355, 356 (1920) (“It is well settled that a lease for years must be for a definite term.”).
4. See 49 Am. Jur. 2d *Landlord and Tenant* § 114.
5. See Ark. Code Ann. §§ 4-59-101(a)(5), 4-59-102(a).
6. See 49 Am. Jur. 2d *Landlord and Tenant* § 117.
7. See *id.* § 115.
8. See *Gregory v. Walker*, 239 Ark. 415, 417, 389 S.W.2d 892, 894 (1965) (“[N]otices to terminate tenancies must require that the tenant vacate at the end of one of the recurring periods of holding.”).
9. See *Seidenstricker Farms v. Warren N. Doss & Etta A. Doss Family Tr.*, 372 Ark. 72, 77, 270 S.W.3d 842, 846 (2008).
10. See 49 Am. Jur. 2d *Landlord and Tenant* § 118.
11. See *id.* § 115.
12. See Ark. Code Ann. § 18-17-704.
13. See Ark. Code Ann. § 18-17-704(c)(1).
14. See Ark. Code Ann. § 18-17-704(c)(2).
15. See Ark. Code Ann. §§ 18-17-401(b), 18-17-601 et seq.
16. See Ark. Code Ann. §§ 18-16-304, 18-16-305(a)(1), 18-17-302, 18-17-401(a).
17. See Ark. Code Ann. § 18-17-901(a).
18. See Ark. Code Ann. § 18-17-901(b).
19. See Ark. Code Ann. § 18-17-902(a)(1).
20. See Ark. Code Ann. § 18-17-903(a); Ark. R. Civ. P. 4(d)(1).
21. See Ark. Code Ann. § 18-17-903(b).
22. See Ark. Code Ann. § 18-17-911.
23. See Ark. Code Ann. § 18-16-108(a).
24. See Ark. Code Ann. § 18-16-108(b).
25. See Ark. Code Ann. § 18-17-401(a).

LIVING WILL AND HEALTH CARE DECLARATION

The terms living will and health care declaration are often used interchangeably. Both terms describe the same thing. Their intent is to allow an individual to make a present decision about his or her future medical care or treatment.

A living will is not a substitute for a will that disposes of property upon one's death. A living will is a written document that, when properly drafted and executed by a person of sound mind and at least 18 years old, allows the person to direct his physician to withhold or withdraw life-sustaining treatment that only prolongs the process of dying.¹ The declaration could be put into effect if one develops an incurable or irreversible condition that will cause death within a relatively short time or if one becomes permanently unconscious.²

One may be reluctant to make this declaration while still alive and in good health. If so, he or she may wish to give a spouse or a child the authority to make such a healthcare decision in the event he or she is no longer able to do so. By declaring someone as your "health care proxy," you can avoid some of the conflict that frequently tears family members apart.³

In order to assure that one's wishes are followed, it is important that you communicate and provide a copy of your health care declaration to your regular attending physician.⁴ You should also provide a copy to your health care proxy and your spouse, an adult child, or other responsible person. In all cases, you should let the involved person know where you have placed the original copy of the declaration.

Much of the complication has been removed from health care declarations by the Legislature's passage of the Arkansas Rights of the Terminally Ill or Permanently Unconscious Act.⁵ With the passage of this Act, any individual who desires to assure that his or her wishes concerning the right to die will be followed can do so with a health care declaration.

ENDNOTES:

1. Ark. Code Ann. § 20-17-202.
2. Ark. Code Ann. § 20-17-203.
3. Ark. Code Ann. § 20-17-202.
4. Ark. Code Ann. § 20-17-203.
5. Ark. Code Ann. § 20-17-201 et seq.

POWER OF ATTORNEY

A power of attorney is an instrument which authorizes an individual to make certain decisions on your behalf.¹ The authority granted in a power of attorney can be endless but examples include permitting someone else to sell your property or authorizing someone to transact banking business on your behalf. The effect of a power of attorney is to substitute another individual in your place. The individual who gives the power of attorney is called the principal. The individual or agent to whom the power is given is called the attorney in fact.

The authority of a power of attorney may be either general or specific. The general power is very broad and typically authorizes the attorney in fact to transact any and all business for the principal. The specific power relates to a particular transaction such as the sale of a particular piece of property. If the power is specific, the attorney in fact's authority would be limited solely to the specified transaction.

The attorney in fact may be a friend or relative, but it should be someone you know very well and in whom you place the utmost trust. If you are considering executing a power of attorney, remember that it can be used to your disadvantage and great caution should be exercised when choosing your attorney in fact.

Both the general and specific powers of attorney may be revoked at any time by the principal.² Notification of revocation should be given in writing to the attorney in fact and any known individuals, banks or institutions with whom he or she has been doing business.³

If not expressly revoked prior, the power of attorney is revoked upon the death of either the attorney in fact or principal or upon the incapacity of either party.⁴ As a practical matter, it is a good idea to appoint at least one successor attorney in fact in the event that the original attorney in fact dies, becomes incapacitated, or resigns.⁵ For the power of attorney to be useful after the principal is declared incapacitated, it must be a durable power of attorney. Unless the power of attorney specifically states otherwise, a power of attorney will be durable by default.⁶

A durable power of attorney is not affected by the subsequent disability or incapacity of the principal.⁷ If you wish to plan for the possibility that you may someday be incapable of making your own decisions, you should have a durable power of attorney. Remember that a durable power of attorney must be executed while you are still competent and able to make your own decisions. A power of attorney becomes effective when executed, but the durable power of attorney can also be drafted so that it does not become effective until you become incapacitated.⁸ Absent an executed durable power of attorney, subsequent incapacitation will require a court to appoint a conservator or a guardian to manage your affairs over which you will have no control.

ENDNOTES:

1. Ark. Code Ann. § 28-68-102.
2. Ark. Code Ann. § 28-68-110.
3. *Id.*

4. *Id.*
5. Ark. Code Ann. § 28-68-111.
6. Ark. Code Ann. § 28-68-104.
7. Ark. Code Ann. § 28-68-102.
8. Ark. Code Ann. § 28-68-109.

PRACTICAL GUIDES FOR THE PURCHASE OF A USED VEHICLE

Each year, millions of American consumers purchase used automobiles. Most, if not all, of the potential purchasers have certain apprehensions concerning the legal rights they have in connection with a used car purchase. Certainly, the old maxim “Caveat Emptor”—let the buyer beware—is of great importance to any used car buyer.

Simply because you purchase a used car does not, however, necessarily mean that you are without certain legal rights. Many state and federal laws provide consumers with a degree of protection in the purchase of a used car. What is most important is that you understand the basics of the transaction.

The following questions and answers are designed to provide you with some basic legal principles that apply to used-car purchases. While not exhaustive, these questions and answers should assist the potential used-car purchaser in understanding the transaction from a legal standpoint.

QUESTION: Should I get a warranty when I purchase a used car?

ANSWER: It depends.

Examine a piece of paper, attached to the vehicle, called “The Buyer’s Guide.”¹ The Buyer’s Guide will generally have one of the following boxes marked:

- As Is – No Warranty
- Warranty
- Implied Warranties Only

When a box is marked “As Is – No Warranty,” the purchaser of the automobile is responsible for all repairs and expenses that may occur after purchase.² The purchaser is at greatest risk when buying a car with a tag marked “As Is – No Warranty.”

If the box is marked “Warranty,” then it will either be a “full” warranty or a “limited” warranty.³

A full warranty consists of the following:

- Warranty service will be provided to anyone who owns a vehicle during the warranty period. When a problem is reported, the warranty service will be provided to the owner free of charge, including such costs as returning the vehicle or removing and reinstalling a system covered by the warranty.⁴
- At your choice, the dealer will provide either a replacement or a full refund if the dealer is unable, after a reasonable number of times, to repair the vehicle or system covered by the warranty.⁵
- Warranty service is provided without requiring you to do anything as a precondition for receiving service, except notifying the dealer that service is needed.

A limited warranty is a dealer's way of telling you that it will pay the cost for some parts of the vehicle, but it will not pay for everything. Listed on the Buyer's Guide will be the systems covered by the limited warranty and the time period for which it is in effect.⁶

"Implied warranties only" are the warranty of fitness for a particular purpose and the warranty of merchantability. The warranty of merchantability means the dealer promises that the product will do what it is supposed to do.⁷ For example, if a hardware store sells you a hammer, it should be suitable for driving nails. The warranty of fitness for a particular purpose applies when you buy the vehicle on the dealer's suggestion that it is suited for a particular purpose.⁸ For example, a used car dealer that sells you a Jeep might sell it to you on the promise that it is suitable for running in rough terrain.

QUESTION: Are all used cars offered for sale required to have a Buyer's Guide on them?

ANSWER: No.

Only dealers who sell five or more cars per year are required to post a Buyer's Guide on the cars they sell.⁹ Thus, an individual selling a single used vehicle is not required to provide a Buyer's Guide to you.¹⁰ Furthermore, certain types of vehicles, such as motorcycles and recreational vehicles, do not require a dealer to post a Buyer's Guide on them.¹¹

QUESTION: Is a verbal agreement from a dealer for certain repairs or services enforceable?

ANSWER: Generally, yes, but for dealers who are otherwise required to put Buyer's Guides on the vehicles they sell, the best advice is to have the dealer put the verbal agreement in writing and include it on the Buyer's Guide.¹²

If the agreement is not included on the Buyer's Guide, then the dispute becomes your word against the written contract. The dealer very likely will present the written contract as evidence that your verbal agreement does not exist. The written contract will almost certainly prevail in court. The same is true for a dealer's statement about the condition of the car. If the dealer tells you that the car has not been wrecked or that it was involved only in a minor "fender bender," ask her to put those terms in writing. If a car dealer misleads you about the condition of a car, you may be able to sue for misrepresentation.¹³ A written document containing the dealer's description of the car's condition will enable you to "prove" your word against the dealer's.

QUESTION: Are the terms of the Buyer's Guide the only protection used car purchasers have?

ANSWER: Not necessarily.

A used vehicle may still be covered by the manufacturer's original warranty.¹⁴ Usually the unexpired warranty on a vehicle can be transferred to the new owner upon payment of a fee. Remember that the provisions of a Buyer's Guide relate to warranties made by the seller, whereas a manufacturer's warranty is a guarantee from the manufacturer of the vehicle.¹⁵ For the most part, the two are not interchangeable.

QUESTION: What is a Service Contract?

ANSWER: A Service Contract is an agreement between the dealer and the buyer that generally relates to certain repairs on a vehicle.¹⁶

If a used vehicle is covered by a service contract, the dealer will so indicate on the Buyer's Guide.¹⁷ Additionally, if you purchase a service contract within 90 days of buying a vehicle, federal law prohibits the dealer from disclaiming implied warranties on the systems covered in the service contract.¹⁸

QUESTION: Is a dealer required to inform me of prior damage to a car?

ANSWER: Yes, if the damage is equal to or exceeds 70% of the car's average retail value.¹⁹

A dealer selling a salvaged car must inform any prospective buyer, prior to sale, that the car is salvaged and provide a description of the damage.²⁰ Note that this requirement only applies to persons or businesses who have sold five or more motor vehicles in the previous twelve months.²¹ Note also that this requirement does not apply to certain vehicles, such as motorcycles and recreational vehicles.²²

The dealer's disclosure will be located on a buyer's notification form affixed to a side window of the vehicle with the title, "Buyer's Notification" facing toward the outside.²³ The form may be removed from the window during any test drive, but must be replaced immediately thereafter.²⁴ The form will contain an acknowledgement section, indicating that the dealer shall require the buyer to sign the form prior to purchasing the vehicle, which the dealer will retain after purchase.²⁵

A dealer who fails to obtain a buyer's signature on the form prior to sale renders the sale voidable, at the buyer's election, for up to 60 days after purchase.²⁶ This means the buyer may return the vehicle within 60 days and have her purchase price refunded.²⁷ A dealer who conceals, or attempts to conceal, the fact that the vehicle has been damaged from any prospective buyer is guilty of a Class A misdemeanor.²⁸

QUESTION: Are there other precautions to take to ensure the quality of a used vehicle?

ANSWER: Yes.

There are any number of smart moves that a potential buyer can take to ascertain the quality of a used vehicle prior to purchase. One of the best methods of ascertaining a vehicle's quality is to take it in for an independent, pre-purchase inspection. Ask the dealer to allow you to take the vehicle and have it inspected by a mechanic of your choice. Not only will this afford the mechanic the ample opportunity to inspect the vehicle, but it will also allow for a straightforward conversation between you and the mechanic as to the quality of the vehicle.

Some dealers have insurance that prevents them from allowing the vehicle to be taken off the lot. In that case, the next best thing is to have your mechanic come on the dealer's lot to inspect the car. If you request a pre-purchase inspection and the dealer refuses your request, this may tell you something about the car you plan to buy.

Another useful device for determining the quality of the prospective vehicle is to ask for maintenance records that reflect the dates of any and all service on the car. These records would also reveal mileage on the car at various service dates, thus revealing whether the mileage has been turned back at any point in the vehicle's life. Of course, if the mileage has been turned back, it is unlikely that the dealer would present any maintenance records to you. Also, before purchasing the vehicle, ask the dealer to allow you to examine any applicable warranty or service contracts.

Last, but certainly not least, take the car for a test drive. A good test drive includes driving the vehicle over both rough and smooth surfaces, driving the vehicle up steep terrain, and testing its braking ability. When driving the vehicle over various grades of surfaces, notice the smoothness of the ride. Obviously, you do not want a vehicle that you plan to drive for several years that has a very rough ride. Likewise, you will want a vehicle that will pull a steep grade as well as a flat grade. To test the power of the vehicle, find a steep hill and, beginning from a stop, proceed up the grade. Determine whether or not the vehicle has adequate power to pull the steep grade without straining or stalling the engine. Finally, to test the braking ability on the automobile, find an empty parking lot and, utilizing a 40 mile per hour rate of speed, apply the brakes and determine whether the braking ability of the car is adequate.

As with all types of transactions, use common sense. If a price of a car seems too good to be true, it probably is. Be sure to have automobiles advertised at extremely low prices checked by a mechanic you trust.

QUESTION: Whom do I contact if I have a complaint with my automobile?

ANSWER: It depends.

First, try to work the problem out to the satisfaction of all those concerned. The direct approach to the dealer will avoid bringing in third parties which might antagonize or otherwise prevent the dealer from reaching an amicable agreement with you. Before going in to discuss your complaints, however, be sure of your objective. Remember, this person is a professional salesperson and it is likely that he or she will, once again, attempt to utilize this talent in dealing with you. So, determine your goal before airing your complaint to the dealer.

In the event a direct approach fails, you may consult organizations listed at the end of this book. In the event that those agencies are unable to render effective assistance to you, you should consider the possibility of taking legal action against the dealer. To this extent, you may bring a claim of your own without having to invest in an attorney.

If the problem can be corrected for less than \$3,000, then you can bring your claim against the dealer in small claims court. Most small claims cases are heard in local district courts. To bring

a small claim, you should contact the district court clerk in your county and ask for further information. In the event that small claims court is unavailable as an option to you because of the size of your claim, your only other available option may be to retain an attorney to represent you against the person who sold the vehicle.

QUESTION: When is a dealer required to repair my car or refund my money?

ANSWER: If your car qualifies for protection under Arkansas's lemon law statutes.

Arkansas's "lemon law" requires automobile manufacturers to repair "non-conformities" covered under warranty within 24 months or 24,000 miles after purchase, whichever comes later.²⁹ A "non-conformity" is defined as a defect that "substantially impairs the use, market value, or safety of a motor vehicle [or] renders the motor vehicle nonconforming to the terms of an applicable manufacturer's express warranty or implied warranty of merchantability."³⁰

At the time of sale, the dealer shall provide you with a written statement of your rights and obligations under Arkansas's lemon law statutes. The statement will inform you that written notice of the non-conformity to the manufacturer is required before you will be eligible for a refund or replacement. These statutes also establish an informal dispute procedure that allows both parties to appear before an "administrator" appointed with the advice and consent of the Consumer Protection Division of the Attorney General's office. If you do not use this procedure before filing suit against your dealer for selling you a "lemon," or if you do not give notice to the manufacturer, the manufacturer is not required to provide you with a refund or a replacement.³¹

After three attempts have been made to repair the same non-conformity that substantially impairs the motor vehicle, or after one attempt to repair a non-conformity that is likely to cause death or serious injury, you should give written notification to the manufacturer in order to give the manufacturer one final attempt to cure the problem.³² The manufacturer shall then give you the opportunity to have your vehicle repaired within ten days at a reasonably accessible repair facility.³³

If the manufacturer has not conformed the motor vehicle to the warranty after a reasonable number of attempts and you have given the proper notice and followed the informal dispute procedures, the manufacturer is required to either replace the vehicle or repurchase it from you.³⁴ The replacement or refund will include payment of all collateral charges (including manufacturer installed items, earned finance charges, sales taxes, title charges, and warranty charges), and incidental charges (such as towing charges and costs of obtaining alternative transportation), but shall not include loss of use, loss of income, or personal injury claims.³⁵ Also, the manufacturer has the right to set off, against either a replacement or repurchase, a reasonable fee for use or damage by the consumer.³⁶

A manufacturer may defend against your claim by arguing the following:³⁷

- The non-conformity does not impair the use, value, or safety of the vehicle.
- The non-conformity is the result of accident, abuse, neglect, or the unauthorized alteration of the vehicle by someone other than the manufacturer or its authorized agent.

- You did not file your claim against the manufacturer in good faith.

If you have problems with your vehicle that you believe qualifies you for protection under the “lemon law,” contact the dealer from whom you purchased the car. Be sure to keep copies of all repair records. If you have additional questions about protection under these statutes or the informal dispute procedure, contact the Consumer Protection Division of the Office of the Attorney General at the location listed in the last section of this handbook.

QUESTION: Where is information related to “used car buying” available on the Internet?

ANSWER: The following websites should provide information to help you.

- Tips For Buying a Used Car (Federal Trade Commission):
<https://www.consumer.ftc.gov/articles/0055-buying-used-car>
- Used Vehicles (Consumer Protection Division, Arkansas Attorney General):
<http://gotyourbackarkansas.org/vehicle/used-vehicle/>

ENDNOTES:

1. 16 C.F.R. § 455.2(a).
2. 16 C.F.R. § 455.2(b)(1).
3. 16 C.F.R. § 455.2(b)(2).
4. *See* Ark. Code Ann. § 4-90-401 et seq.
5. *See* Ark. Code Ann. § 4-90-406.
6. 16 C.F.R. § 455.2(b)(2).
7. *See* Ark. Code Ann. § 4-2-314.
8. *See* Ark. Code Ann. § 4-2-315.
9. 16 C.F.R. § 455.1(d)(3).
10. *Id.*
11. 16 C.F.R. § 455.1(d)(1).
12. 16 C.F.R. § 455.2.
13. 16 C.F.R. § 455.1(a)(1).
14. 16 C.F.R. § 455.2(b)(2).
15. *Id.*
16. 16 C.F.R. § 455.1(d)(7).
17. 16 C.F.R. § 455.2(b)(3).
18. *Id.*; *see also* Ark. Code Ann. § 4-90-501 et seq.
19. *See* Ark. Code Ann. §§ 27-14-2301(6); 27-14-2302(a)(1), (b); 27-14-2303(a).
20. *See* Ark. Code Ann. § 27-14-2303(a)(1).
21. *See* Ark. Code Ann. § 27-14-2301(1)(A).
22. *See* Ark. Code Ann. § 27-14-2301(2).
23. *See* Ark. Code Ann. § 27-14-2303(a)(2), (3).
24. *See* Ark. Code Ann. § 27-14-2303(a)(3)(B).
25. *See* Ark. Code Ann. § 27-14-2303(c).

26. *See* Ark. Code Ann. § 27-14-2303(d).
27. *Id.*
28. *See* Ark. Code Ann. § 27-14-2304(a).
29. *See* Ark. Code Ann. §§ 4-90-403(12), 4-90-405.
30. Ark. Code Ann. § 4-90-403(13).
31. *See* Ark. Code Ann. § 4-90-401 et seq.
32. *See* Ark. Code Ann. § 4-90-406(a).
33. *Id.*
34. *See* Ark. Code Ann. § 4-90-406(b)(1)(A).
35. *See* Ark. Code Ann. §§ 4-90-407, 4-90-408.
36. *See* Ark. Code Ann. § 4-90-407(a)(2).
37. *See* Ark. Code Ann. § 4-90-413.

THE REAL ESTATE SALE

The purchase of a home is by far the largest single purchase made by people today. Even so, people are still relatively uninformed on who is involved in such a purchase and their roles.

The Real Estate Agent

To begin the real estate sale, a seller will often contact an agent to list real property for sale. A real estate agent is a “go-between” for a buyer and seller of real estate. He or she must be licensed by the state in which he or she is operating. The agent will receive his compensation through a predetermined percentage of the sales price. The agent usually represents only one party, the seller. However, the agent may represent both parties upon consent.

The listing is typically a written contract stating that the agent is entitled to his/her fee upon presenting a buyer ready, willing, and able to purchase the property for the listed price. Please note: Most listing agreements state that the fee is earned regardless of whether the sale is completed or not.

As stated previously, the agent is the “go-between” relaying price and terms to the buyer and seller. In many cases, the buyer and seller only see each other at the closing, which is where the deal is completed.

Because the real estate agent normally receives compensation from the seller, he or she is an agent of the seller. As an agent, he or she owes a duty of loyalty to the seller. For example, if you offer to purchase real property for a stated amount, but tell the real estate agent that you would be willing to pay an additional \$10,000 if your first offer is rejected, the real estate agent has a duty to disclose that comment to the seller.

The Lender

While the lender may also be the seller, it is usually a financial institution loaning money to the buyer. Once an offer has been accepted, it is submitted to the lender for financing. Conventional financing is usually 80% of the appraised value. Financing is available up to 100% of the appraised value; however, the lender will usually charge the buyer mortgage insurance on a loan in excess of 80% of the appraised value.

The lender may also charge points and an origination fee. Points are an up-front charge, which reduces the annual percentage rate (APR) of the loan. Therefore, a lender may offer the purchaser a loan at 8% APR for 30 years at par or 8% APR for 30 years with 1 point. This one point equals one percent of the loan amount. By increasing the points paid, the purchaser can reduce his or her APR by what is called a “buy-down.” An origination fee is typically 1% of the loan amount, and represents the fee for making the loan. Points and origination fees are paid at closing and are not refundable.

As far as other closing costs, the lender will usually require an appraisal, a survey, termite insurance, and title work. The appraisal is an evaluation of the property and what it is worth. A

survey shows the dimensions of the property, all improvements located within the boundaries of the property, any encroachment by other property owners, whether the property is located within certain flood plains, easements, and various other recorded information.

A termite certification is a simple certification by a licensed and bonded termite controller indicating the property is free from an active infestation of termites. The controller also indicates whether there has ever been any damage to the structure because of termites. This guarantee is usually good for one year from the date of inspection.

What title work is required will depend upon the lender's requirements. Traditionally, abstracts and attorney's opinions were utilized. An abstract is a short summary of the chain of title, and everything affecting title, from the original owner (usually from the United States Government) to the present. The attorney reviews the abstract and pronounces that in his/her opinion the property has clear title or is encumbered by mortgages, judgments, delinquent taxes, etc.

As abstracts have faded, title insurance has become a more popular way of insuring clear title. Title insurance is an insurance policy issued by an approved insurance company. A one-time premium is charged for this insurance. The title policy covers the insured for defects in the chain of title, unless those defects are excepted, such as setbacks and utility easements. Title insurance can be purchased only to cover the lender (a mortgagee's policy), or to cover both the lender and the owner (a combination policy). Just remember, these policies have an exceptions page. Be sure to review the exceptions page because your title insurance policy could be worthless if your property's defect is excepted.

Real estate is a large purchase. You are encouraged to ask questions and become fully informed before finalizing your real estate sale.

WHAT IS A CONSUMER “SCAM”?

Consumer “scams” are fraudulent schemes to separate a consumer from money or property. Turning a quick and easy profit is usually a high priority for the schemer. Some schemers are best described as “thieves,” but these thieves rarely use a gun or knife. Their greatest weapon is deception. Other schemers may consider themselves to be sharp business executives, but they use misleading tactics or take advantage of the ignorance of others to accomplish their purposes. Some of these tactics may be legal in that no criminal laws are broken, but the consumer is pressured into making a foolish or legally binding decision. The elderly are often the target of consumer scams. Whether young or old, however, consumers become victims because they do not recognize a scam until the schemer is long gone. Often, victims are ashamed that they allowed themselves to be fooled, but even the smartest of consumers can be the victim of a clever scam if proper precautions are not taken. Scammers are always coming up with new tricks and twists to steal your hard-earned money. Therefore, as a consumer, you should be aware of certain “red flags” and other common methods to identify scams and protect yourself. The best defense is a good offense.

Recognizing a Consumer “Scam”—The “Red Flag” Approach

No matter how clever the schemer may be, you can protect yourself by recognizing the “red flags” that often fly high above most consumer scams. These “red flags” are actually symbols of the tactics used by schemers for consumer rip-offs. Not every “red flag” is a sure sign of a consumer scam. However, when a “red flag” is spotted, you should be more careful in your dealings, even if you think you are dealing with a person who seems sincere and trustworthy. Listed below are some of the most common “red flags.”

- If it seems too good to be true, it probably is. Most consumer scams take advantage of the basic human desire to get a good deal. Whether the scam involves cheap products, miracle cures, free vacations, or risk-free investments, you must immediately heighten your awareness and realize that few people will exchange something of value for little or nothing. Failure to recognize this “red flag” and to cautiously investigate the facts behind the deal is probably the biggest mistake that victims make.
- Schemers often hesitate to answer specific questions about their identity, their product or past customers. This “red flag” only becomes obvious after the schemer is questioned about the origin of the products or services being offered and whether previous customers have been satisfied with the results they have obtained. Do not be shy about insisting that such information be provided. If the name of the company or a customer is provided, investigate further to verify the information. Remember that an elaborate scheme may include a fake “home office” or maybe even fake customers.
- Schemers may refuse to put their “great deal” in writing. Always insist that any offer be put in writing, and read it before committing. Oral contracts can be binding, and you can risk bad credit by refusing to pay for goods or services simply because the terms of the deal were not fully disclosed. You have an obligation to ask questions about exactly what will be received and how much it will cost. Of course, a writing will not always

protect you. There are thieves who would be happy to give their victim a brochure or even a receipt.

- Schemers may use high pressure to “act now” while the offer is still good. Always be wary of being forced to make quick decisions about a deal that is good for a “limited time only” or that is only offered to a privileged few. Although not all such deals are illegitimate, you should recognize this “red flag” as a possible means by which the schemer is hoping that you will make an uninformed decision. Also, be wary of any requirements of paying money up front. If you hand out your money to anyone without first gathering enough information about that person, you are asking for trouble.
- The schemer wants personal information. The surest way to become the victim of a consumer scam is to give out personal information to someone who turns out to be a thief. Specifically, information such as social security numbers can be extremely valuable to a scam artist. If anyone attempts to obtain such information, for whatever reason, you should see a “red flag” waving. Social security numbers have become more of a problem in recent years because so many financial institutions use the numbers for identification. Unfortunately, a lost check with both an account number and a social security number can pose great problems for the consumer. Never give out personal information to unknown persons.

The “red flags” listed above are common elements of many consumer scams. There are others, of course. See if you can spot additional warning signs in the kinds of scams listed below. If your license lists your social security number as your identification, replace it with an identification number. Have your social security number removed from your checks also.

Common Types of Consumer Scams

A. Door-to-door sales.

These types of sales can offer you a variety of choices and specialized services. As always, however, the key to satisfaction is understanding your consumer rights. The “red flags” mentioned above must be considered. Are you satisfied that the salesperson has answered your questions about what you are buying and how much it costs? Can the salesperson provide you with enough identification to assure you that this is not just an attempt to gain entry to your home?

The salesperson should be willing to put the terms and warranties offered into writing and provide you with a copy. This is especially important since the Federal Trade Commission’s “Cooling Off Rule” requires that most door-to-door sales contracts contain specific information about your rights to cancel. You may cancel a sale of goods or services exceeding \$25.00 in value by mailing written notification to the seller before midnight on the third business day following the sale. In fact, a seller should provide you with a form that can be used to cancel the sale.

There are some exceptions to the “Cooling Off Rule.” Remember that the purchase price must be at least \$25.00 or more. Also, the rule does not apply to emergency home repairs or maintenance initiated by you. Further, the rule also does not apply to real estate, insurance or securities.

B. Charities.

Some charity schemes operate with the belief that “it is better to receive than to give.” These types of consumer scams hurt not only the generous giver, but also harm reputable, legitimate charitable organizations. The best way for you to make sure that you are giving to a reputable organization is to contact the Better Business Bureau or the Arkansas Attorney General’s Office. Besides having documented experience with various charities, these organizations look at certain factors which help determine whether a charity is legitimate. These factors include:

- (i) Public Accountability - Does the organization publicize its costs and expenses along with the general purposes for which the money is to be spent?
- (ii) Fund Raising Costs - A legitimate charity should not expend greater than 35% of its revenue on fundraising costs and should spend at least 50% of revenues for programs directly related to the charity’s purpose.
- (iii) Solicitation Materials - Are they truthful and do they provide enough information about the charity?
- (iv) Fundraising Practices - A legitimate charity should not use high pressure tactics involving harassment, coercion or emotional appeals that distort the charity’s purpose.

Consider all of these factors before you part with your hard-earned dollars.

C. Travel Scams and Free Prizes.

You should always be wary of letters or phone calls that offer goods or services at little or no cost. Many times the so-called “free prize” can turn out to be very costly. Sometimes you will be told to send in money to find out what prize you have won. Perhaps a phone call to a 900 number will tell you whether you have won a new car or \$500.00 in coupons. The catch: the phone call may cost \$4.95 a minute, and the coupons may be for savings on merchandise that is of no value. If you have won a free gift, you should not have to spend any money to receive it.

D. Home Repair.

If a generous person offers to paint your house or to fix that hole in the roof, make sure you are not giving your money to a scam artist. Some will ask you to advance money for supplies and then disappear. Many “red flags” often appear in home repair scams. Does the person require payment in advance? Will the names of satisfied customers be provided? Will the repairer let you arrange to furnish the needed materials? Do you really need the repairs that are being

offered? Can you verify the quality of the work by having an experienced person inspect it? Consult friends or neighbors for referrals.

The best way to avoid this scam is to decline the services of unknown persons who contact you with an offer of home repair and find your own repairman. The elderly are particularly vulnerable to this type of “scam,” but everyone should make sure to ask these important questions before parting with their money.

E. 900 Numbers.

Although previously mentioned in connection with other scams, 900 numbers require a category of their own since they have become so much more common in recent years. These numbers can be a legitimate way of carrying on business, but you should follow some simple rules to keep from being the victim of a scam.

Always know what the 900 call will cost up front. For instance, some 900 calls may list their cost as \$3.00 per minute, but the message fails to state you are being billed for a minimum of five minutes just for making the call. Furthermore, 900 numbers can be marketed toward children and teenagers who may run up an outrageous bill at their parents’ expense.

If you have a problem with a 900 number charge, you should let your telephone company know immediately. Although you are probably legally obligated to pay the bill, some companies will not shut off your service while you attempt to resolve the dispute. Other companies now offer consumers the choice of “blocking” their telephone line so that no 900 numbers can be called.

F. Investment Fraud.

Investment scams are too numerous to count. Needless to say, the opportunity to make a quick profit at relatively low risk is usually a sure sign that trouble is brewing. You should always be particularly careful when putting your money into the hands of others for investment purposes when promised extraordinary profits. Some of these investment opportunities may turn out to be pyramid schemes, which are illegal in Arkansas. Be sure that the company you choose is a reputable one and has been highly recommended by others before entrusting it with your money.

G. Phishing Scams.

“Phishing” is the use of fraudulent e-mails designed to steal identities as well as vital personal information such as credit card numbers, bank account PINs, and passwords. Phishing e-mails often ask you to verify this type of information. Similarly, scammers conduct “SMishing,” scams which is phishing by using text messages. In these situations, scammers will send to you a text message that asks you to verify or confirm sensitive information. A legitimate company will never ask for your password or account number via e-mail or text message. You can protect yourself in the following ways:

1. Call the company directly to determine if the email is trustworthy;
2. Forward the e-mail to the Federal Trade Commission at spam@uce.gov;
3. Do not reveal personal or financial information in e-mails or text messages;

4. Contact the company directly. Do not use contact information provided in an e-mail or text message; instead, use contact information from account statements that you already have; and
5. Do not reply to the e-mail or text message, even if it threatens to disable your account.

A Short List of Current Scams

In addition to the most common scams, below is a list of some newer scams:

A. Benefits and Grants Scams

- i. Free Grants. In these scams, an ad claims you will qualify to receive a free grant for your education, your home repairs, your home business, or your unpaid bills. The ad says your application is guaranteed to be accepted, and you never have to repay the money. However, the Federal Trade Commission warns that “money for nothing” grant offers often are a scam: the grant is not free, is not guaranteed, and often, is not even available to you.
- ii. Medicare Beneficiary Phone Scams. Seniors and people with disabilities need to be aware of a current scheme that asks Medicare beneficiaries for money and checking account information to help them enroll in a Medicare Prescription Drug Plan. **NO** Medicare drug plan can ask a person with Medicare for bank account or other personal information over the telephone.
- iii. Social Security E-Mail Scam. The Social Security Administration has received several reports of an e-mail being circulated with the subject “Cost-of-Living for 2007 update” that looks like it is from the Social Security Administration. The e-mail directs recipients to a phony website where the individual is asked to register for a password and to confirm his or her identity by providing personal information, including social security numbers, bank account information, and credit card information. This is a scam.

B. Car Scams

- i. VIN Cloning – Purchasing A Stolen Car. Some law enforcement agencies are reporting that Vehicle Identification Number (VIN) cloning, which targets used car buyers, is on the rise; accordingly, used car buyers should do their research, or they could unknowingly purchase a stolen car and subsequently have the car confiscated by the police.
- ii. Salvage Titles. Used car purchasers should research the history of a used vehicle and try to determine whether the used vehicle ever had a salvage title. In some cases, scammers will “title wash” a vehicle that has a salvage title – which means the vehicle was deemed a total loss by insurance companies – by moving vehicles across state lines to a state that does not recognize the salvage title. When that state issues a new title, it may no longer show that the vehicle has been salvaged. A vehicle with a

salvage title can still be driven, but it has a lower market value and is more difficult to sell.

- iii. Gas-Saving Schemes. With no end to high gas prices in sight, the Better Business Bureau warns consumers to not fall for tempting products and schemes said to help save money at the gas pump. Most of them are simply too good to be true.

C. Computer and Internet Scams

- i. eBook Scams. There is a new scam, known as ebook fraud, on the internet. This scam comes in two forms: books quickly created from automatically gathered content crawled from the Web, and books generated from stealing legitimate printed books, scanned and sold by someone who does not own the copyright. If you purchase ebooks on the internet, please make sure you are purchasing them from a legitimate source.
- ii. Phantom Online Stores. Beware of too-good-to-be-true bargains on no-name online electronic shops. Some of these websites are phantom stores trying to obtain your personal information.
- iii. Malware. Computer viruses and malware are designed to infiltrate or damage a computer system without the computer owner's consent. Beware of "Free Security Scan" pop-up messages, e-mails, or any other ad claiming that malicious software has already been found on your computer. Unfortunately, the ad or e-mail, while alarming, is likely a scam.

For more information on scams and to file consumer complaints, visit the Consumer Protection Division of the Arkansas Attorney General's Office at the following address: <http://gotyourbackarkansas.org/>.

WILLS AND ESTATE PLANNING

A well-prepared Will is one of a number of effective tools that can be used to assure that your property, called your estate, passes as you wish to your family and loved ones after your death. Your estate consists of property and cash assets that you own at your death. Included would be bank accounts, land, furniture, buildings, cars, stocks, bonds, proceeds of life insurance payable to your estate, and pension plan benefits payable to you.¹ In Arkansas, in order to execute a valid Will: (a) the maker (testator) must be 18 years of age or older; and (b) the testator must be of “sound mind” at the time the Will is prepared with the intention that the document be his/her Will.²

Execution of a Will

If a Will is typewritten (attested), it must be signed by the testator and at least two disinterested witnesses attesting to the testator’s signature.³ A disinterested witness is an individual not receiving property in the will.⁴ The testator must sign at the end of the Will in the presence of the witnesses (any writing below a signature on an attested will is ineffective).⁵

A handwritten (holographic) Will is valid in Arkansas if it is entirely in the handwriting of the testator and signed by the testator. There is no requirement that a holographic will be witnessed. To be admitted into court after the testator’s death, three disinterested individuals familiar with the testator must testify that the handwriting and signature is the testator’s.⁶ The danger of a holographic Will is that you may inadvertently create an instrument which is invalid or which has unintended consequences.

Changing Your Will: Codicils and Revocation

A properly executed Will, as described above, is valid until it is changed or revoked by you.⁷ Changed circumstances may require an addition or correction by codicil (a document stating additions or changes to the original Will) to the Will. If a codicil is used, it must be in writing, signed by you, and witnessed, just like the Will itself. A Will can be revoked only by execution of another Will or by being burned, torn, canceled or destroyed with the intent to revoke by the testator or another individual in his presence and at his direction.⁸ If a married individual makes a Will and later gets divorced or the marriage is annulled, the Will remains valid, but any bequest to the divorced spouse is revoked automatically.⁹ Marriage after a Will is made does not affect the Will, but the testator will probably make a new Will or add a codicil to his or her old one to include bequests to his or her new spouse. Similarly, births and deaths of children or grandchildren may affect your wishes for distribution of your estate. A child (or grandchild in certain cases) who is omitted from the Will remains entitled to a statutory share of the estate.¹⁰ A Will that is revoked or which becomes invalid can only be revived by re-execution of the former Will or by execution of a new Will in which the revoked or invalid Will is incorporated by reference.¹¹

Separate Bequests of Tangible Property

Arkansas law allows reference in a Will that certain specific personal property bequests may be found on a separate list kept with your Will. This list may be made before or after you execute your Will and may be changed without affecting the provisions or validity of your Will. This allows for more flexibility in disposing of individual items. This procedure is limited to tangible personal property and excludes real estate. It cannot be used to dispose of money bequests, evidences of indebtedness, documents of title, securities, or property used in a trade or business. It is a good idea to date such a list and, when a new list is made, to destroy any old lists.¹²

Who Administers Your Estate?

Most Wills name an executor (male) or executrix (female) to administer the Will. A financial institution with trust powers can also serve as an executor. The executor is the individual whom the testator chooses to oversee his or her Will during probate proceedings. The executor is responsible for closing the estate by paying all debts and taxes of the deceased as well as distributing the estate assets according to the testator's wishes as expressed in the Will. If the executor dies before the testator, is ill or is otherwise unable to carry out his or her duties, or if the testator fails to name an executor in his or her Will, the court will appoint an administrator to do the executor's task. The court also does this when an individual dies without a Will. To avoid this situation, it is a good idea to name a successor executor just in case the first choice is unable to perform the job. An executor or administrator may also be known as a personal representative.¹³

Probate: What To Do When Someone Dies

When there is a death in a family, frequently the last thing the surviving relatives attend to is the legal distribution of the deceased's estate. When there is a valid Will, the survivors may know how to handle the distribution – but not always. When there is no Will, which is often the case, the family members may not know the proper steps to take. (If you wish to make anatomical gifts, or if you have specific burial instructions, it is best not to make such provisions in your Will, as by the time your Will is produced, it may be too late.) If an individual dies leaving property that is not transferred by other means (joint ownership, right of survivorship, trust, etc.), it must go through probate court proceedings. When a valid Will exists, the executor or executrix named by the Will should be contacted (if he or she is not already aware of the testator's death) and that individual should get in touch with a lawyer (preferably the one who prepared the Will) who will initiate proceedings in the probate court. In the absence of a Will, administration is still required, and a friend or relative should contact a lawyer to commence the probate proceedings.

A petition must be submitted to the court to have the Will (if there is one) admitted into probate and to have a personal representative appointed. If there is no Will, the petition simply asks for the appointment of an administrator for the estate. Notice of probate proceedings are published in the newspaper. Following the publication of this notice, there is a six-month period for unknown creditors to make their claims against the estate. The personal representative has an affirmative duty to give actual notice of the claims period to any creditor who is known or reasonably ascertainable, at which point such known creditor shall have a two-year period to file their claim

against the estate with the probate court. With the assistance of the lawyer and the personal representative, the value of the estate is assessed, and owed taxes are paid, along with other costs of the administration. Once this is completed, and valid claims have been paid, the court confirms the distribution of the remaining property to the beneficiaries. The entire process of administering an estate takes at least six months to complete, but it is not uncommon for estates to be open much longer.¹⁴

Costs of Probate

Filing fees for probate administration in Arkansas are approximately \$165 although additional costs may be incurred. The executor is entitled to receive a fee, which is approximately 3% of the value of personal property in your estate.¹⁵ Additionally, the attorney hired by your personal representative is entitled to a fee based on a percentage of the total property in the estate, although it is also acceptable for the personal representative to make a contractual fee arrangement with the attorney in lieu of the statutory fees.¹⁶ Regardless of the basis of fees, their reasonableness is subject to approval of the probate court.

Avoiding Probate

With or without a Will, if your estate undergoes probate administration, your family will be faced with a probate court proceeding before your property is legally distributed following your death. Although it is not always best to avoid probate, several different methods exist which may accomplish this.

Low Estate Valuation: If the value of a deceased individual's estate does not exceed \$100,000 excluding homestead and certain allowances to the surviving spouse and minor children, and there are no claims against the estate, then an individual entitled to a distributive share may file an affidavit with the probate court, listing the property of the deceased and its value, along with the names of relatives and their relationship to the deceased, the individuals entitled to receive the property, or the individuals having possession of the property and all their heirs. Use of this affidavit, where applicable, eliminates the need for probate administration.¹⁷

Joint Ownership as a Will Replacement: Joint ownership of property with the right of survivorship presents a major restriction to the normally lenient Arkansas laws of property distribution through Wills. In such a relationship, the surviving party automatically becomes the sole owner of all jointly owned property, real estate, bank accounts, motor vehicles, and household goods when the other party dies. Joint ownership between husband and wife in Arkansas is called tenancy by the entirety. Property in joint ownership does not pass through probate. Because of this, you may be tempted to use joint ownership to distribute your estate, instead of a Will, with the idea of sparing your family the delay of probate court proceedings. This may or may not be wise. Joint ownership is a fixed and rigid system that does not allow for changes in circumstances. It gives another individual equal control over whatever property you decide to place under that arrangement. For example, a joint owner of your bank account can draw on or deplete that account while you are still living, without your permission, even though you may only intend for that individual to have the money in that account after your death. One remedy to this problem is to create a "payable on death" account where the beneficiary will only

receive the proceeds of the account upon your death. This type of account allows desired dispositions while simultaneously avoiding any probate proceedings. Used in conjunction with a Will, joint ownership can be a useful legal device in helping distribute your estate after you die, but be certain you are acting wisely. Remember also that a husband and wife who own everything jointly may still need a Will in the event that they die simultaneously. Additionally, probate administration will still be necessary for the estate of the surviving joint tenant when that individual eventually dies.

Living Trusts: A living trust (also called a revocable trust) is an arrangement whereby one individual (the “trustee”) manages property for the benefit of another individual (the “grantor”), who transfers all or part of his or her property into the trust prior to his death. A living trust may also be created jointly by a husband and wife. Many people prefer the trust to a Will because the trust’s terms do not become public at the grantor’s death, and the assets owned by the living trust do not pass through probate court. The greatest disadvantage is that title to certain assets may inadvertently never be transferred to the trust, thus remaining outside the trust at the grantor’s death which will inevitably necessitate a probate administration. Many companies who market living trusts promote tax savings as an incentive, but unless your estate exceeds \$5,250,000.00 your estate will not be subject to federal estate tax and the living trust will not provide any extra savings. Even if a trust does not provide an estate tax benefit, it provides for an extremely flexible method to distribute property upon your death while simultaneously allowing you to maintain a large amount of control over the ultimate disposition of property after your death. If you are interested in a living trust, it is advisable to contact an attorney to draft a trust instrument which will be tailor-made to your particular needs and circumstances.

Lapse

In Arkansas, if you leave property in a Will to someone who dies before you do, the gift lapses and goes into the residue of your estate (the residue consists of all of the property of a testator which is not specifically mentioned in his Will). An exception to this occurs when you leave property to a descendant (a child or grandchild), and your descendant has surviving children or grandchildren. In that case, if your descendant dies before you, the gift passes to his or her descendant or descendants and does not lapse.¹⁸

Rights of the Surviving Spouse: Elective Share or Taking Against the Will

Arkansas law provides for “taking against the Will” in some circumstances. Those who may take against the Will are: (1) a surviving spouse (provided the husband and wife have been married at least one year) who is excluded or omitted from his/her spouse’s Will or is given less than he/she would have received by law if the spouse had died without a Will; (2) a child who is born or adopted after a Will was executed (unless the Will makes provision for after born or adopted children); (3) a child who is living at the time the Will is executed but is not mentioned in the Will. (A parent may disinherit a child in a Will by listing him or her by name and making it clear that he or she is to receive nothing from the testator’s estate.)¹⁹

Dying Without a Will: Intestate Succession

Dying without a Will, called dying intestate, means that all of your property – other than that which is held jointly - will be distributed among your surviving relatives according to Arkansas law.²⁰ For example, if you are the sole owner of a piece of real property and you die intestate, leaving children, this property would descend to your children, which may or may not be your intent. Your spouse would be limited to a life interest in one-third of the property pursuant to his or her statutory “dower” interest.²¹ If the children wish to sell the property, they have to prove their legal right to the property to “clear the title” and work out an agreement as to the life interest of the surviving parent. (If there had been a Will, title to the property would have been established without the need for additional proceedings.) Absent a Will, if your children are minors, a guardian may be appointed for them by the court, and the estate will remain under court supervision until the children are 18. The guardian is required to post bond. With a Will, if you leave property to a minor child, you can (1) suggest a guardian of your choice and request the elimination of the bond requirement or (2) leave the property in trust for the children. If you die without a Will, the statutory descent tables dictate the ultimate disposition of your estate which cannot arbitrarily be distributed to your friends or to your favorite charity.²²

Estate Taxes

Whether an estate must pay an estate tax depends upon the size of the estate and whether the estate is left to a surviving spouse. The estate is subject to federal estate tax only insofar as its value exceeds \$5,250,000. Additionally, under present law, the portion of an estate left to a surviving spouse is exempted from the estate tax (the unlimited marital deduction). Your gross estate for tax purposes is all property owned at death, certain property transferred during your lifetime and, in some circumstances, property transferred within three years of your death. Your taxable estate consists of your gross estate less certain deductions and exemptions. The state of Arkansas imposes an estate tax, but the Federal tax allows a credit for state death taxes. Under Arkansas law the estate tax due to Arkansas equals the Federal tax credit.²³

Having Your Will Declared Valid Before You Die

Arkansas law makes it possible for you to present your Will to the probate court during your lifetime, requesting that the court rule on the validity of the Will (a procedure known as ante-mortem probate). If the court finds that the Will is properly executed, that you are of sound mind and free of undue influence and that the Will is otherwise valid, the court may declare it valid. The Will is then placed on file with the court. If you change your Will, or write a new one, this procedure will not validate the new or changed Will. A new proceeding must be commenced. The purpose of this procedure is to prevent a Will contest after your death. All individuals who may have an interest in your estate must be made parties to such a proceeding. A Will may also be filed with the probate court without any ruling made as to its validity, as a means of safekeeping the document.²⁴

ENDNOTES:

1. Ark. Code Ann. § 28-1-102(a)(7).
2. Ark. Code Ann. § 28-25-101.

3. Ark. Code Ann. § 28-25-103.
4. Ark. Code Ann. § 28-25-102.
5. Ark. Code Ann. § 28-25-103.
6. Ark. Code Ann. § 28-25-104.
7. Ark. Code Ann. § 28-25-109.
8. *Id.*
9. Ark. Code Ann. § 28-25-109(b).
10. Ark. Code Ann. § 28-39-407.
11. Ark. Code Ann. § 28-25-110.
12. Ark. Code Ann. § 28-25-107.
13. Ark. Code Ann. § 28-40-106.
14. Ark. Code Ann. § 28-40-101 et seq.
15. Ark. Code Ann. § 28-48-108.
16. *Id.*
17. Ark. Code Ann. § 28-41-101.
18. Ark. Code Ann. § 28-26-104.
19. Ark. Code Ann. § 28-39-401 et seq.
20. Ark. Code Ann. § 28-9-201 et seq.
21. Ark. Code Ann. § 28-11-301.
22. Ark. Code Ann. § 28-9-214.
23. Ark. Code Ann. § 26-59-106.
24. Ark. Code Ann. § 28-40-201 et seq.

REFERENCES AND INFORMATION

If you desire the services of an attorney, but do not know how to locate one to represent you, legal representatives can be obtained by logging on to www.arkbar.com. The “Arkansas Find-A-Lawyer” section of the website allows you to search for an attorney by name, city, county, or type of service.

Consumer Complaint Agencies

Arkansas Agencies:

Arkansas Attorney General’s Office
Consumer Protection Division
323 Center Street
Suite 200
Little Rock, AR 72201
Telephone: (501) 682-2007
Toll-Free: (800) 482-8982

Arkansas Public Service Commission
P.O. Box 400
Little Rock, AR 72203
Telephone: (501) 682-1718
Toll-Free: (800) 482-1164

Better Business Bureau of Arkansas
12521 Kanis Road
Little Rock, AR 72211
Telephone: (501) 664-7274
Toll-Free: (800) 482-8448

Federal Trade Commission
For Consumers Call
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