

A Probate Primer

Hon. Mark Lindsay
Circuit Judge, Fayetteville

Welcome to Probate Judge Mark Lindsay

PROBATE DIVISION

JURISDICTION OVER:

Administration of Estates and Probate of Wills
Guardianships
Adoptions
Involuntary Admission For Mental Illness
Involuntary Admission for Alcohol and Drug Abuse

Administration of Estates and Probate of Wills:

Venue

- a. decedent's residence at his death
- b. if non-resident, where greater part of property is located
- c. if non-resident and no property, where he died

If venue found improper, transfer to appropriate county. 28-40-102

Statute of limitations:

No will admitted and no administration granted unless within five (5) years from the date of decedent's death. (Some exceptions) 28-40-103

Petition for probate and appointment of personal representative
All pleadings to be verified. 28-1-109

Requirements for petition. 28-40-107

Check any demand for notices. 28-40-108

Hearings may be without or with notice. 28-40-109

Notice of appointment:

to paper-six (6) months from first publication to file claims
to each heir, devisee and known creditor
form of notices: 28-40-111

Contest of will: grounds must be in writing and filed.
various limitation periods
set hearing

Proof of will must be attached.
two witnesses required.
if holographic, three witnesses required: signature. 28-40-117

Probate of will of non-resident:
was it valid in state where executed or where death occurred? 28-40-120

Ancillary proceedings. 28-42-101 et. seq.

Who can serve as personal representative:
person nominated in will
interested party

Who cannot serve:
under twenty-one (21) years of age
unsound
felon
unauthorized corporation
unsuitable person
non-resident unless he appoints agency for process
28-48-101

Two or more can serve. 28-48-104

Bond:
may be waived in will
dispensed with if bank or trust company
distributees give waivers, no unsecured claims
28-48-206

Bond can be corporate or with sureties

Clerk issues Letters of Administration or Testamentary:
written acceptance required if no bond
bond may or may not be required
28-48-102

Compensation for personal representative and attorney:
set out in 28-48-108.

Inventory required within two (2) months after appointment:
unless waived.

Claims filed:
must be within six (6) months
notice must be given if creditor is known
classification of a, b, c, and d
28-50-106

Sales of personal and real property:
28-51-201 and 28-51-301
must have hearing if real estate valued more than \$10,000.00
real property requires three (3) disinterested persons or may be one (1)
private sale at the appraised value
public auction: not less than 3/4 of appraised value
report and confirmation required
will can give power of sale without court approval

Accountings:
required unless waived
file at time of final settlement
revocation of personal representative
annually
28-52-103

Closing estates:
partial distribution allowed
unless waived, notice of hearing given after final account filed
date must be sixty (60) days after filing account
time for filing claims has expired
no claims outstanding
taxes paid
no liability to the estate

Distributees to sign and file receipts before discharge of personal representative

Order of Final Distribution

GUARDIANSHIPS:

Incapacitated Persons - definition: 28-65-101
Minors

- Venue: where incapacitated person's
domicile
residence
where property located if non-resident
28-65-202
- Qualification: resident of state
18 or older
no felon
agency, corporation or bank/trust
28-65-203
- Preferences: parents(s) of minor
others, will, etc.
28-65-201
- Petition: requirements set out in 28-65-205
look for: nature of incapacity
assets
reason for filing
type, scope and duration requested
- Notices: to alleged incapacitated person
minor, if 14 or older
parents of minor
spouse of
if no parent, closest known relative

Statement of rights to be served with petition
- Determination
of incapacity: By professional evaluation
(a) oral testimony
(b) sworn statement

Burden is clear and convincing

Guardianship Order - 28-65-214

Finding of incapacity

set type and duration and powers

appoint person(s) - must be married to be co-guardians of person

bond - if any

amount and type of property

waive if depository agreement with bank - Form 33

Guardian files letter of acceptance or bond

Clerk issues letters: either/and Person-Estate 28-65-216

Temporary Guardian:

can be with or without notice to incapacitated person

good up to 90 days

must be imminent danger to life, health or to loss or damage

to incapacitated person's property

Notice to be served after issuance of order

hearing on merits required within three (3) days

Guardian's duties:

take charge of all real and personal property

file inventory

seek court approval on certain actions

account annually

Uniform Veteran's Guardian Act 28-66-101

Administrator of Veteran's Affairs is interested party

same procedures as regular guardianship

Conservators 28-67-102

persons of advanced age and/or physical disability

same procedures as regular guardianship

ADOPTIONS

Petitions:

Venue: Where petitioner, adoptee or person giving consent resides
9-9-205

Captions: designated under name by which child is to be known

Consents: 9-9-207
mother/father
person who has legal custody
minor if 11 or older (court can waive)

No consideration allowed except for incidental expenses

Where consent not required:

person deserted or abandoned
if for one year fails significantly without justifiable cause to
(i) communicate with child; (ii) provide care and support as
required by law or judicial decree
parental rights terminated
parent consents

strong burden of proof
clear and convincing evidence
when in doubt and all things equal - natural parent
wins over others

Forms of

Consent: 9-9-208
in presence of court
notary

Must state person has right to withdraw consent within ten (10) calendar days. Address of Probate Clerk included to send affidavit to withdraw consent. 9-9-209

Petition

Requirements: 9-9-210
watch for where mother not married at time of birth
certificate from putative father registry required

report of expenditures required if adoption other than by
step-parent
9-9-211

Notice

Requirement: 9-9-212
twenty (20) days prior to hearing
(1) to agency or person whose consent necessary
(2) to individual whose consent has not been given but
dispensed
(3) grandparent if a parent of child deceased

DHS home study required except for step-parent, person adopted is an
adult, or related within 2nd degree
criminal background
health history
maltreatment registry

Interlocutory and

Final Decrees: 9-9-213
still look for "what is in best interest of child"
petitioner and adoptee shall appear at hearing 9-9-214
final- after child has been in home for six (6) months
after placement or filing
if step-parent - excused
adult - excused

Hearings and

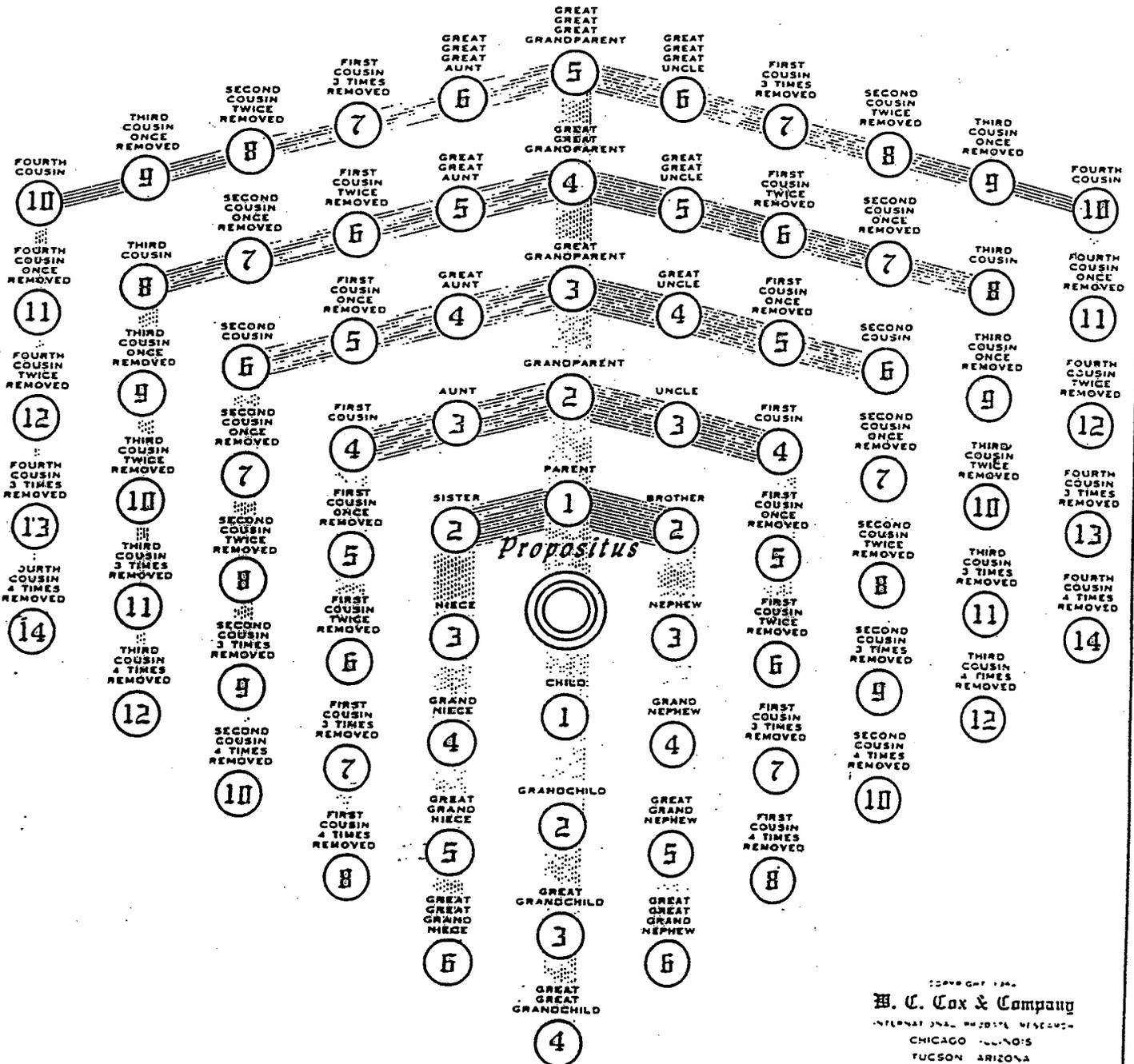
Records: closed and confidential
records are sealed
new birth certificate authorized 9-9-219

Watch out for: Act 1779 of 2001 or 9-9-220(c)
Before terminating parental rights: child support order must set
out what will happen if non-custodial parent does not pay
support.

If not included, non-custodial parent has three (3) months to pay substantial amount of back support and to establish relationship with child.

RELATIONSHIP and DEGREES of KINDRED

The Cox Chart



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 INTERNATIONAL BUSINESS MACHINES
 CHICAGO ILLINOIS
 TUCSON ARIZONA

Numerals indicate the degree of kindred to the propositus or decedent. Full cousins are indicated in red. Cousins below full cousins are "in the descendancy", all above are "in the ascendancy". Consult an Attorney regarding rights of persons of each degree of kindred in the various jurisdictions.

INVOLUNTARY ADMISSION FOR MENTAL ILLNESS

Who can file: Any person who believes person meets criteria

Must have condition which poses clear and present danger to self or others:

attempted suicide

threatened to inflict serious bodily injury on self

inflicted, attempted to, or threatened to inflict harm on others

29-47-207(c)

Petition to be filed within 72 hours if:

taken into custody

delivered to hospital or receiving facility

if reasonable cause to detain, you can sign order, hearing within 72 hours

20-47-209

If not confined at time of filing petition:

notice to appear within three (3) days

statement of rights must be served at same time of petition

20-47-211

Initial hearings:

appoint attorney

burden is clear and convincing

court can waive appearance of person

Send for initial evaluation:

have hearing within seven (7) days

Forty-five (45) day hearing:

within seven (7) days of being sent for evaluation

if clear and convincing evidence shown, order commitment up to 45 days

20-47-214

Additional periods:

treatment staff may petition up to 180 additional days if person needs

continued treatment 20-47-215

INVOLUNTARY ADMISSION FOR ALCOHOL AND DRUG ABUSE

Good luck.