

APPLICANT NO. _____

ARKANSAS BAR EXAMINATION
FEBRUARY, 2005

2 Pages
WILLS, ESTATES, AND TRUSTS

Terrie executed a will in 1990 naming a former stepson and stepdaughter as the sole beneficiaries of her estate. Late in the afternoon of February 1, 2005, she executed a handwritten will while she was in an Arkansas hospital suffering from a terminal illness. The 2005 will names Bret, her male companion for the ten years preceding her death, as the sole beneficiary of her estate. She died two days later, and she had no children or spouse at the time of her death. Terrie had asked a visitor, Marge, to write out this will leaving everything to Bret. Marge did so, and then read the will back to Terrie. Terrie then signed the will in the presence of Marge and another witness. Both of these witnesses also signed the document at that time. Later, at the hearing mentioned below, both testified they understood the document to be Terrie's will.

The court conducted a hearing on the 2005 will after the stepchildren filed an objection to probate of the will. The former stepdaughter testified she saw Terrie late in the afternoon of February 1, 2005, and did not think Terrie was of sound mind. She had compared Terrie's signature on the will to that of Terrie's signature contained on a check written the same day and said the signatures looked "copied."

The former stepson testified he saw Terrie that same morning and that she was aware of her surroundings, her impending death, her family, her estate, and the existence and location of the 1990 will. Terrie also told the stepson the 1990 will would split everything equally between him and the stepdaughter, but that she wanted Bret to be able to live at her residence the rest of his life. The stepson further testified that Terrie became very groggy early that afternoon after receiving pain

medication.

Several other witnesses who visited Terrie during the afternoon of February 1, 2005, found her cognizant, alert, and conversational. Bret testified that he did not know about the will until a couple of weeks after Terrie's death.

- A) Generally, what major factual elements must the stepchildren prove to challenge the validity of the 2005 will? What is their burden of proof?
- B) Specifically, what would the stepchildren need to show about Terrie's competency to execute the 2005 will?
- C) What are the elements required to properly execute a will, other than a holographic or nuncupative will? Must there be strict compliance?

ARKANSAS ESSAY
ANSWER
WILLS, ESTATES, TRUSTS
February, 2005

A. Generally, in order for a will to be valid, there must be testamentary capacity, testamentary intent and the requisite formalities. The stepchildren would have to prove that one of these elements is not met. The facts seem to indicate a few possible defenses to the validity of the will. First, there is some evidence that Terrie did not have the mental capacity to execute the will. The stepdaughter testified that she did not think that Terrie was of sound mind. This would negate the element of testamentary capacity. Secondly, the facts indicate that there may have been some undue influence in the creation of the new will. Undue influence is an undue exertion of influence such that the testator signs a document that he or she would not have executed absent the influence. Because Terrie told the stepson that she wanted to split everything equally between the stepson and the stepdaughter and then signed a will leaving everything to Bret in the afternoon, there may be some undue influence that procured the will. Third, there is some evidence of fraud in the signature which would negate the requisite formalities. Stepdaughter testified that the signature was not that of Terrie.

The burden of proof to have the will declared invalid is a preponderance of the evidence. Seeing that the testimony goes both ways, I doubt the stepchildren will meet the burden. Stepdaughter testified that Terrie was not of sound mind but Stepson and others testified that Terrie seemed cognizant. Additionally, even though Terrie told the son one thing, she is able to change her will at any time because a will does not become a valid contract until death. Lastly, just claiming the signature on a check and will look the same is probably not going to meet a preponderance of the evidence that the will was forged.

B. Specifically, the stepchildren would need to show that Terrie did not understand the nature and extent of her property, did not understand the nature objects of her bounty or did not understand the nature of her disposition. The Stepson testified that Terrie was “aware of her surroundings, her impending death, her family, her estate, and the existence and location of the 1990 will.” The only thing she may not have understood was the nature of her disposition. If the stepchildren can show that Terrie did not understand that she was giving everything to Bret, it may be declared that Terrie was not competent to execute the will.

C. To properly execute a will, the will must be signed by the testator in the presence of two witnesses and the witnesses must then sign the will in the testator’s presence. The witnesses must understand that the document is the will of the person signing. There must be strict compliance with these formalities. From the facts it appears that these formalities were met. The witnesses testified that the testator signed the will in their presence and the witnesses understood the document to be the will of Terrie.

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TORTS

On March 2, 2002, Victoria Victim was driving her sister Barbi Victim home from Doc Sawbones' office. Vicki's daughter Pansi was in the back seat. All three were visibly upset. Barbi had just learned that her broken hip was not healing properly, and that she would probably need hip replacement surgery. She and Vicki were bashing the man who had run over her in the Wal-Mart parking lot six months earlier and broken her hip. Vicki was actually crying. Little Pansi could care less about Aunt Barbi's broken hip. She was peeved because mom refused to stop at McDonald's and get her a happy meal like she had promised, and she was making that fact known by bouncing around the back seat, pulling mom's hair, twisting Aunt Barbi's ear, and letting out a series of ear-piercing shrieks.

As the Victims pulled into the intersection of Detroit and Vine on the north side of town, a van owned by the local dry cleaning establishment, Fine Clean Clothes, Inc. (often called by its moniker "FCC") hurtled into the intersection. The light was just going from yellow to red for the van.

The van t-boned Vicki's car, which skidded sideways into the kneecaps of Peter Pedestrian and came to rest on its side just before hitting the front window of a Krispy Kreme Donut Shoppe. Dude, FCC's delivery driver, lurched out of the van, liquor on his breath and the sudden realization that he was in a world of trouble on his mind. "Oh m'gosh...I'm sooooo shorry...ish anybody hurt...what am I gonna tell Mr. Fine...I'm not even shupposed to be in this part of town today...I'll lose my job thish time for sure...I've got a wife and sheven kiddies...oh, what am I gonna do..." And

on and on and on. Turns out, Dude's deliveries were all on the south side that day, but a powerful thirst had gotten the better of him, and he had dropped over to his favorite pub on the north side for a liquid lunch. It was while he was headed back to the south side to resume his route that the collision occurred.

Vicki was badly shaken up by the wreck, but she didn't have any real physical damage other than a few abrasions and contusions. Pansi, mercifully – given the volume at which she could scream – was knocked out cold. She came to in the ambulance with Aunt Barbi, who was wailing about how bad her hip hurt. Peter was also taken to the hospital with two crushed kneecaps. Dude was taken to the North Side Station House and booked on a DWI charge. Both vehicles were towed to the local automobile graveyard, where adjusters for their respective insurers promptly declared each “a total loss.”

Of course there will be lawsuits. Identify the potential plaintiffs and discuss what claims each plaintiff should make (be sure to include possible theories of recovery, target defendants, and types of damages). Discuss any other important things suggested by the fact pattern that you must consider if you are consulted by one of the potential plaintiffs. Discuss what defenses should be raised by the target defendants to each of the plaintiffs' claims.

ARKANSAS ESSAY
ANSWER
TORTS
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Vicky

Vicky will have a basic claim of negligence against Dude. Negligence contains the following elements: 1.) Duty, 2.) Standard of care, 3.) Breach, 4.) Causation (both cause-in-fact and proximate causation), and 5.) Damages. Dude had owed a duty to other drivers on the road to drive as a reasonably prudent person would under the circumstances and he breached that duty when he drove drunk and caused an accident. Dude would be responsible for the resulting personal injury (cuts and bruises) as well as the property damage. (Total loss to the car.) Also, he is liable for future medical treatment and lost income.

Vicky will have a potential claim for negligence against FCC based on various theories such as respondeat superior, negligent hiring, negligent entrustment, and/or negligent supervision. FCC will be vicariously liable under the doctrine of respondeat superior for the acts of Dude (employee) committed during or in the course of employment. The same negligence by Dude noted above will apply here and will be imputed to FCC. FCC will likely allege that Dude's acts were outside the scope of his employment to escape liability, but since he was drinking while on the job and would have been in an accident regardless of where he was actually supposed to be making deliveries, that defense will not be successful. This allegation would not have any effect on the negligence based claims of negligent hiring, supervision, or entrustment. Under each of these theories, FCC will be liable for Vicky's personal injuries and property damage.

Vicky may also have a claim against the bar owner. In Arkansas, a bar owner is strictly liable if he knowingly serves alcohol to an intoxicated adult. The facts here are not clear on this point, but I would advise of the potential claim.

Pansi

Vicky, as Pansi's parent, would bring a claim on behalf of the minor child under the same claims as Vicky noted above. (Basic negligence against Dude, negligence-based claims of respondeat superior, entrustment, hiring, and supervision against FCC) Also, a potential claim against the bar owner if the facts support it.

Peter Pedestrian

Peter would have a negligence claim against Dude individually and potential claims of negligence against FCC under the theories of respondeat superior, negligent entrustment, negligent hiring, and/or negligent supervision as noted above for Vicky and Pansi. FCC would attempt to assert a defense that these acts occurred outside the scope of employment, but that would fail as described above. Peter will be able to recover for his personal injury (because he was within the foreseeable zone of danger) to his knees plus any future treatment costs, and lost wages.

Peter would also have a potential claim against the bar owner based in strict liability as noted above.

Krispy Kreme

No claims for property damage because the truck never came in contact with the store. The store may have some type of trespass claim which would require the truck to be removed and the cost of the removal would have to be covered by Dude or FCC. (Otherwise, I am assuming there was no damage to the property of Krispy Creme under the facts.)

FCC

Assuming that Dude's acts are outside the scope of employment, FCC would have a negligence claim against Dude for the property damage of the truck ("total loss"). (Assuming the acts are outside the scope of employment only for this question.) Dude breached his duty to FCC (under a contractual/employment relationship) when he did not act as a reasonably prudent person or employee by drinking, driving, and causing an accident.

Note, that if the acts are within the scope of employment, Dude will likely seek indemnification for his defense against all the other parties. The duty to indemnify Dude is likely covered under the employment contract,

Barbi

Barbi will have a claim against the "man" who hit her in the Wal-Mart parking lot. This claim will be based on negligence and therefore requires the elements of duty, standard of conduct, breach, causation, and damages to be shown. The "man" failed to meet the reasonable person standard when he hit another person in the parking lot whom he owed a duty to because she was within the foreseeable zone of danger. The "man" would be liable for Barbi's personal injury and all future treatment of her hip. The "man" may claim a defense of negligent treatment, but this is no defense because to be a defense (only as to the amount of damages), the treatment must be grossly negligent.

Barbi will have the same claims against Dude individually and/or FCC based on negligence noted above and against the bar owner in strict liability as noted above.

In relation to the accident in the Wal-Mart parking lot, Barbi may have a premises liability action against Wal-Mart if the design of the parking lot had anything to do with the accident. (Need more facts but I would advise Barbi of potential claim.)

Barbi may have a claim of negligence against Doctor Sawbones if his treatment failed the appropriate standard. This claim would have the same elements as basic negligence except for the standard of care. In a professional malpractice suite, standard of care is determined on a local standard in Arkansas. (The facts state that the injury is not healing properly, but need more facts to determine the viability of the claim.)

Also, Barbi may have a claim of negligence against the doctor if his treatment caused a “medical injury” as defined by the Arkansas Medical Malpractice Act. (More facts would be needed to determine the viability of this claim as well.)

Other Items to Discuss

I would need to inform each of the parties that the statute of limitations for all negligence based actions is 3 years, but the Medical Malpractice Act specifically states there is a statute of limitations for a “medical injury” of 2 years.

Another point I would generally discuss is how Arkansas applies fault in a negligence action. (Could apply to claims by Pansi and Vicky because the negligence of not restraining the child could be a factor.) Arkansas, by the Civil Justice Reform Act of 2003, changed liability from joint and several (except in cases of acts in concert) to several only.

Arkansas also follows the 50% rule in comparative fault, but the facts clearly support the plaintiffs on each of their claims.

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PROPERTY

Joe Blow owned a small farm called “Blackacre” located in Jackson County, Arkansas. Joe was elderly and in ill health, and in 2001 executed his Last Will and Testament, in which he left Blackacre to his son Bobby. The execution of the will met all legal requirements. In 2002, while Joe was still alive, Bobby, perhaps anticipating his father’s death, executed and delivered a warranty deed to Blackacre to Manuel Casals. Manuel was a migrant worker, a native and citizen of Mexico, who had earned substantial money working in Jackson County. The warranty deed from Bobby Blow to Manuel Casals was recorded in Jackson County in 2002.

In 2003 Manuel had saved enough money to allow him to bring his wife and children from Mexico to live with him on Blackacre. After his family arrived, Manuel executed and recorded a warranty deed from himself to his wife, Maria, and himself, as husband and wife, for the life of the survivor of them, with remainder in their children, Pablo and Rosetta, “and their bodily heirs, forever.” Pablo and Rosetta were 6 and 9 years old respectively, at the time Manuel executed the deed.

Joe Blow died in 2004. Immediately after his death, his will was admitted to Probate. Bobby was Joe’s sole heir at law - Joe’s wife had died in 1995.

You are asked to examine title to Blackacre after Joe’s death. When you do so, you discover the will and the deeds mentioned above. Assume that Joe Blow had good and merchantable title to Blackacre and was the sole owner of the farm after his wife’s death in 1995.

Who owns Blackacre? Describe the interest(s) owned. Explain.

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ANSWER
PROPERTY
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Generally title must be conveyed by the individual who possesses it, if the transferor does not possess title then title is not passed. An exception to this rule is when the transferor acquires title after the transfer then that title passes to the transferee and relates back to the original transfer.

Here Bobby's interest in the title was not realized at the time of the transfer because when property is devised in a will the beneficiary of such interest doesn't arise until the death of the testator. So, Manuel didn't have title when he recorded his interest, he may have had notice of such by performing a title search. A title search would have shown that Bobby did not have the right to transfer Blackacre, absent a durable power of attorney that would have allowed Bobby to transfer such property.

Arkansas is a race notice state when dealing with deeds. Meaning the first person to record without notice has ownership. In this case cause Bobby acquired title later, although Manuel had notice, the interest will transfer to Manuel and Maria.

Manuel owned Blackacre in fee simple until he redeeded the property to himself and Maria, because they were married they own the property as tenants by the entirety. Much like joint tenants with rights of survivorship, Manuel and Maria own Blackacre and if one dies the other retains full ownership as a survivor. The redeed was legal, in Arkansas a straw conveyance is no longer required, one may transfer his interest to himself and another without having to transfer to a 3rd person and then have them transfer back to the original owner.

Those also having an interest are their children. The transfer from Manuel to Manuel and Maria contained interesting language. The conveyance seems to have created a life estate in the survivor of Manuel and Maria with a vested remainder in the form of a fee tail to Pablo and Rosetta.

In Arkansas the language "and their bodily heirs forever," or "and the heirs of their body," will create a fee tail meaning Pablo and Rosetta would own, as tenants in common, a life estate and their decedents would have a vested remainder in fee simple. Because the interest passed on does not contain an interest to Manuel and Maria, this is subject to the Rule Against Perpetuities. This rule states that an interest must vest or fail within 21 years of a life in being in order to be valid.

The lives in being are Pablo and Rosetta and the other interests will vest upon their death so this would satisfy the Rule Against Perpetuities.

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1 Page
CRIMINAL LAW AND PROCEDURE

On the afternoon of February 23, 2005, Al and Jeremy plot to rob the Pacific Bank. Al gets his semi-automatic weapon, and tells Jeremy that he hopes he doesn't have to use it. The pair thereupon enter the Pacific Bank and attempt to rob it. Upon seeing the lone security guard pull his weapon, Al panics and accidentally shoots the guard. At that point, the men grab a sack of money that contains a tracking device, and exit the bank. They are caught six blocks later.

The security guard is rushed to the hospital, but, unfortunately, he dies later that evening as a result of the gunshot.

Once Al and Jeremy are taken to jail, they are interviewed separately by Detective Sharp. Jeremy says nothing. When Al is interviewed, the detective offers him a cup of cocoa, tells him that he already knows what happened, and that he simply wants to hear it from Al. Al breaks down and gives the detective an incriminating statement.

1. If Al has an accomplished lawyer such as yourself, would he most likely be convicted of capital murder, first degree murder, second degree murder, or manslaughter? Explain.
2. Can Jeremy be charged with the death of the security guard? If your answer is no, explain why he cannot be so charged. If your answer is yes, name two affirmative defenses that Jeremy may have.
3. Defense counsel seeks to suppress Al's statement. Does he have a basis?

ARKANSAS ESSAY
ANSWER
CRIMINAL LAW AND PROCEDURE
February, 2005

1. Murder Charge for Al

Al will be convicted of manslaughter. The issue here is mental state of Al. In AR, a person is convicted of manslaughter when they recklessly commit an act that causes death. The persons mental state is not knowingly (they know that the crime they commit will cause death) but recklessly (subjective intent that action could cause death of another).

In this case, Al accidentally shot the security guard while attempting to rob a bank, therefore his mental state was not to knowingly shoot the security guard. Al's mental state would be deemed reckless because he panicked, drew the gun and in state of panic, shoots the guard.

One might argue first degree murder because the death occurred while committing a felony (attempted robbery) but Al did not have the mental state of knowingly shooting the guard during the attempted robbery. Capital murder is out because it also requires knowing mental state and commencement of a dangerous felon (burglary, arson, robbery, rape, kidnapping) and so is second degree which also requires knowingly mental state.

In conclusion, Al will be convicted of manslaughter.

2. Accomplice Liability for Jeremy

Jeremy will also be charged with the death of the security guard. The issue here is Jeremy's liability as an accomplice to the attempted robbery. In AR, an accomplice is one who knowingly aids, abets, help, commences - basically one who takes part and helps commit a crime. Arkansas does not adhere to the common law division of principle and accessory, everyone involved is held liable as the principle. Also, an accomplice may be charged with all crimes that stem from the crime committed. Affirmative defenses to accomplice liability are effective withdraw (one notifies all parties) and mistake of fact (no knowledge of weapon).

In this case Jeremy is an accomplice because he aided in the attempted robbery. This attaches accomplice liability to Jeremy making him liable for all subsequent crimes stemming from crime, including the security guards death. He could plead he knew nothing about the gun or "yea, but Al pulled the trigger," but these would probably fail because Jeremy remained an accomplice when he and Al grab the bag and exit the bank.

In conclusion, Jeremy will be charged with the death because he was an accomplice.

3. Admittance of Al's Statement

Al's statement will be suppressed because he was not given his proper 5th Amendment Miranda warnings. Once in police custody before interrogation, the person must be given their Miranda warnings. The Miranda warnings are you have the right to remain silent, anything you say may be held against you, you have the right to an attorney, if you cannot afford one, the court will appoint one to you. If the 5th Amendment Miranda warnings are not properly asserted, statements made during interrogation may be suppressed.

In this case, Al was in police custody because he had been taken to jail. The interview was deemed interrogation but instead of issuing proper 5th Amendment Miranda warnings the detective tries to make buddies to get Al to talk. No Miranda warnings were given before Al gave a statement.

In conclusion, Al's statement should be suppressed because it violated his 5th Amendment right to counsel under Miranda.

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2 Pages
EQUITY AND DOMESTIC RELATIONS

John is the unmarried thirty-five year old vice president of Your Town's largest employer. He has acquired, as a result of his earnings, a \$300,000.00 home, with a mortgage against it of \$100,000.00. He has acquired options on 100 shares of his employer's stock at \$25.00 per share. The market price for the stock is currently \$24.00 per share. His employer has a retirement plan. John's fully vested interest in that retirement plan is \$100,000.00. John's contribution to the retirement plan, and that of his employer, are \$5,000.00 each per year for a total of \$10,000.00 annually.

John is considering marriage to Mary, a local accountant. Mary has a very successful business practice. She operates as a professional association. She is the sole shareholder. The professional association has just agreed to purchase the assets of an older accountant in the community who is retiring. This sale will be effective January 1, 2006. On that date Mary will commence making payments of \$5,000.00 per month for twelve months after which the practice will be hers. Mary has a three-year-old daughter, Sally, by a previous relationship with a married man. Mary knows the identity of the father but has never told the natural father of his relationship to Sally. Thus, the natural father has never contributed to Sally's support or had any contact with her. Mary wants John to adopt Sally right after they are married.

John has discussed all of this with the general counsel of his employer who has suggested that he come and discuss a prenuptial agreement with you. The marriage is scheduled for September 30, 2005.

Explain a prenuptial agreement to John and what must be done to have a valid prenuptial agreement. Explain to John what will happen to his property upon divorce without a prenuptial agreement. Explain to John what would happen to Mary's property upon divorce without a prenuptial agreement. What will be the effect upon a divorce if John adopts Sally as opposed to what will happen upon a divorce if he does not adopt Sally? Are there hurdles that must be overcome before he can adopt Sally?

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ANSWER
EQUITY AND DOMESTIC RELATIONS
February, 2005

Prenuptial Agreement in Arkansas

Arkansas allows for the creation of a prenuptial contract to be executed before marriage among parties (men and women) who intend to marry. This agreement could be modified during marriage, in Arkansas.

For this agreement to be valid it must be in writing and signed by the parties. To say "I do" is enough consideration to support the agreement.

Arkansas courts scrutinize this type of agreement very carefully. The agreement must show a fair distribution (see below), and it must be shown that it was based on full disclosure of the parties financial conditions. The agreement, to be valid must be entered by the parties without undue influence.

A prenuptial agreement can govern many areas of a marriage. While still married and, most importantly to John in this case, also governs what happens after the parties divorce.

Some of the areas that might be included in a prenuptial agreement are:

- rights of the parties to own and control property "separate" from the other spouse during marriage,
- it might eliminate or limit spouse's support upon divorce (alimony),
- it can include all types of dispositions regarding property owned by the parties (who gets increase in value, who is responsible for specific debts, etc).

It cannot include dispositions regarding children but can include any other dispositions not contrary to law or public policy.

Division of Property in Arkansas

Without a prenuptial agreement, in Arkansas, property acquired after marriage by one of the spouses is "presumed" to be owned by both spouses 50/50.

Separate property, which is property owned before marriage by one of the spouses, continues to be separate, unless commingled (exchanged during marriage without being able to trace its origin).

Even during marriage, some property, acquired during marriage may be regarded as separate. This is the case when separate property is exchanged (with tracing) for other property; property received by gift of inheritance and income and proceeds (tracing) of separate property.

John's Property and Division Without a Prenuptial Agreement

Home:

\$300,000.00 with debt will be considered separate and he will keep it upon divorce. The increase in value of that property will also be presumed to be separate. Mary may argue that she contributed to the "increase" and then she would have an interest on the increase upon marriage.

Option on the Shares:

In my opinion since what John has is an option on the shares, he still doesn't own them. If he acquires, exercises the option and acquires the stock during marriage then the stock would be considered "marriage property" and Mary would have a right to 50% of the value at the time of the divorce.

Retirement Plans:

In Arkansas one spouse has an interest on the other spouse's retirement and pension plans. Even if the value cannot be determined (Quadro) at the time of the divorce.

Since at the time of the marriage John would have (has) a "fully vested interest of approximately \$100,000.00." We could argue that that part would continue to be separate but the future contribution of John and his employer (when no prenuptial agreement) would be considered "marriage property."

We must remember everything acquired or received after marriage is "presumed" marriage property in Arkansas.

Division of Mary's Property Upon Divorce Without Prenuptial Agreement.

Business Practice

her business would continue to be separate; the income from the business would be considered "marriage property" while married

pending transactions upon divorce would also be considered "marriage property"

In Mary's case I see a very big issue regarding her purchasing of the assets of the other accountant because it is proposed to take effect after marriage and thus would be considered community property.

This might be also of concern to John because he might be "liable" for the payments agreed on this agreement. It would only be fair that if he benefits from the co-ownership - (as a spouse) that he would be also responsible.

As an attorney, I would highly recommend John that he enters into a prenuptial agreement with Mary. Hopefully, he won't need it but it will certainly protect his investments and his property.

In order to enter into this agreement John must disclose all the properties he owns and any other financial obligations so Mary enters into the agreement under “full disclosure.”

I would recommend John proposes this entering into the agreement with ample time before the marriage so as to not be considered “undue influence.” I would also make sure the distribution made and all other dispositions in the prenuptial agreement be fair to both parties.

Adoption of Little Sally

In Arkansas there are different types of adoption. Through the state, through agencies, and private as is the case in front of us.

If John adopts little Sally he has rights and obligations of a biological parent.

The adoption would terminate all rights and obligations of the biological parent.

Rights include the right to participate in Sally’s life during and after marriage. (Visitation rights - maybe if appropriate even custody.) Obligations Include Child Support!!!

For adoption in Arkansas we require consent of the biological parents and in the written consent there must be included the opportunity to change their mind for 10 days.

John and Mary would need (in my opinion) to get the consent of the biological father of Sally because Mary knows his identity. He as a father has a right to “raise” and be part of Sally’s life.

Biological parent may negate the consent required but in Arkansas that “consent can not be unreasonable.”