

APPELLATE UPDATE

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (<http://courts.state.ar.us/opinions/opinions.html>).

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ANNOUNCEMENTS

On October 2nd, the Supreme Court published for comment the proposed new Code of Judicial Conduct. The comment period ends December 31, 2008. A copy of the *per curiam* order was included in the mailout.

On October 9th, the Supreme Court adopted amendments to various rules affecting civil practice. The rules are effective January 1, 2009. A copy of the *per curiam* order was included in the mailout.

On October 23rd, the Supreme Court adopted amendments to various rules to implement Administrative Order Number 19. The rules are effective January 1, 2009. A copy of the *per curiam* order was included in the mailout.

On October 30th, the Supreme Court published for comment proposed changes to the Rules of the Board of Certified Court Reporter Examiners. The comment period ends January 1, 2009. A copy of the *per curiam* order was included in the mailout.

CRIMINAL

Hayes v. State: [**sufficiency of the evidence; sexual abuse in the first degree**] There was substantial evidence to support appellant's conviction for sexual abuse in the first degree. (Hanshaw, L.; CR 08-300; 10-2-08; Gunter).

Wedgeworth v. State: [**motion to suppress; 5th Amendment Right to Counsel**] Appellant was arrested and transported to the police department for an interview. Law enforcement officials read appellant his *Miranda* rights. Thereafter, appellant indicated that he wanted his lawyer present but explained that he could not identify his attorney's name. The law enforcement

official left appellant alone to “think and maybe remember who his attorney was.” Approximately five to ten minutes later, the law enforcement official returned to the interview room and asked appellant whether he remembered his attorney’s name. Appellant did not recall the name. After relaying this information to law enforcement officials, appellant was asked “what he wanted to do.” Appellant then gave a confession. Appellant filed a motion seeking to suppress his confession and argued that it was obtained in violation of his Fifth Amendment Right to Counsel. The trial court denied appellant’s motion. On appeal, the Supreme Court concluded that appellant had invoked his right to an attorney and that law enforcement officials wrongfully continued the interrogation before appellant initiated contact with them and without his attorney present. (Anthony, C.; CR 07-1042; 10-2-08; Gunter).

Bond v. State: [**rape-shield statute**] The trial court did not err in excluding evidence of the victim’s prior sexual conduct because it was only slightly relevant and it was more prejudicial than probative. [**jury instructions**] The trial court, who gave model jury instructions that contained an accurate statement of the law, did not err in refusing to give appellant’s proffered jury instructions. (Scott, J.; CR 08-224; 10-2-08; Hannah).

Brown v. State: [**sufficiency of the evidence; second-degree sexual assault**] There was substantial evidence to support appellant’s conviction of second-degree sexual assault. [**continuance**] Appellant requested a continuance because a witness, who he wanted to testify, would not be able to attend the trial at the previously scheduled time. The trial court denied appellant’s request. On appeal, the Supreme Court affirmed the circuit court and explained that the evidence, which appellant sought to introduce through his absent witness, was admitted through the testimony of other witnesses. Thus, appellant was not able to establish that he suffered prejudice by the trial court’s refusal to continue the trial to allow the attendance of his witness. (Humphrey, M.; CR 07-1178; 10-2-08; Corbin).

Young v. State: [**sufficiency of the evidence; rape; residential burglary**] There was substantial evidence to support appellant’s convictions of rape and residential burglary. (Chandler, L.; CR 08-189; 10-2-08; Corbin).

Rounsaville v. State: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant’s rape conviction. [**Rule 33.3 of the Arkansas Rules of Criminal Procedure**] Rule 33.3 of the Arkansas Rules of Criminal Procedure provides that “the trial court shall designate a date certain, if a hearing is requested or found to be necessary, to take evidence, hear, and determine all of the matters presented.” Appellant presented the circuit court with a fourteen-page motion for new trial in which he asserted eight examples of his attorney’s inadequate representation. He requested a hearing on his motion. The trial court denied his request. On appeal, the Supreme Court concluded that pursuant to the Rules of Criminal Procedure and case law, appellant was entitled to a hearing on his motion at which the allegations in his motion could be developed. (Humphrey, M.; CR 08-205; 10-2-08; Brown).

Turner v. State: [**sufficiency of the evidence; aggravated robbery**] Where the only evidence that linked appellant to the crime was a fingerprint and the State’s evidence did not exclude every other reasonable conclusion but that of appellant’s guilt, the Court of Appeals concluded that there was not substantial evidence to support appellant’s aggravated-robbery conviction.

(Dennis, J.; CACR 08-256; 10-8-08; Hart).

Reeves v. State: [**statute of limitations**] The circuit court erred in denying appellant's motion to dismiss the charges against him because the applicable statute of limitations barred the State from prosecuting appellant for criminal non-payment of child support. (Arnold, G.; CR 07-1127; 10-9-08; Wills).

Elkins v. State: [**sufficiency of the evidence; aggravated robbery; rape**] Because appellant failed to make a specific motion for a directed verdict at trial, as is required by Rule 33.1 of the Arkansas Rules of Criminal Procedure, the Supreme Court was precluded from reviewing appellant's challenge to the sufficiency of the evidence on appeal. (Johnson, K.; CR 08-375; 10-9-08; Brown).

Burchette v. Sex Offender Screening and Risk Assessment Committee: [**due process**] Appellant's procedural due-process rights were not violated when he was denied a second face-to-face interview before the Sex Offender Assessment Committee. (Gray, A.; 07-408; 10-23-08; Brown).

Jones v. State: [**jurors**] The trial court did not err when it refused to dismiss a juror, who expressed concerns about "retribution" from a spectator at the trial, but admitted that she had not received any threats, expressed no fear of the spectator, and insisted on multiple occasions that she could remain fair and impartial. [**State's appeal**] The Supreme Court was precluded from considering the State's cross-appeal because the issue to be appealed was not properly preserved. (Langston, J.; CR 08-429; 10-23-08; Imber).

Blair v. State: [**sufficiency of the evidence; DWI**] There was substantial evidence to support appellant's driving-while-intoxicated conviction. (Phillips, G.; CACR 08-476; 10-29-08; Griffen).

Hinojosa v. State: [**motion to suppress**] Appellant, who was driving a vehicle with an out-of-state license plate, was stopped by law enforcement officials for violating Ark. Code Ann. § 27-14-716, which is captioned "display of license plates generally." The Court of Appeals determined that Ark. Code Ann. § 27-14-704, rather than Ark. Code Ann. § 27-14-716, controls the display of license plates that are registered in foreign states. The license plate on appellant's vehicle complied with the requirements of Ark. Code Ann. § 27-14-704. Thus, law enforcement officials stopped appellant's vehicle without probable cause. Accordingly, any evidence that was seized during the invalid stop should have been suppressed. (Kennedy, J.; CACR 08-234; 10-29-08; Hart).

Seamster v. State: [**revocation of suspended imposition of sentence**] The trial court erred when it concluded that appellant failed to comply with the terms and conditions of his suspended imposition of sentence. Specifically, the trial court erroneously revoked appellant's suspended sentence based upon a violation of a condition that was articulated in a document that was appended to the judgment and commitment order but was not included in the document that outlined the conditions of his suspended sentence. (Fitzhugh, M.; CACR 07-815; 10-29-08; Hart).

Sales v. State: [**sufficiency of the evidence; capital murder; aggravated robbery**] There was substantial evidence to support appellant's convictions for capital murder and aggravated robbery. [**mistrial**] Potential jurors were present when law enforcement officials showed crime-scene photographs to the victim's family. Based upon these facts, appellant requested a mistrial. The trial court denied his request and the Supreme Court, holding that appellant failed to show how he was prejudiced by the foregoing facts, affirmed the trial court. (Gibson, R.; CR 07-1308; 10-30-08; Hannah).

Bush v. State: [**sufficiency of the evidence; capital murder**] There was substantial evidence to support appellant's capital-murder conviction. (Langston, J.; CR 08-430; 10-30-08; Gunter).

Dodson v. Norris: [**belated appeal**] A motion for belated appeal is not part of the ordinary appellate review process. (Wilson, W.; 07-1179; 10-30-08; Corbin).

CIVIL

Nixon v. Chapman: [**motion in limine**] Court granted motion in limine regarding the fact that the defendant received a traffic ticket in the underlying accident that was the subject of the pending negligence action. Only when a defendant enters a plea of guilty in open court is it proper to admit evidence relating to either a traffic citation conviction or even the mere issuance of a citation. Here the defendant did not appear in open court but she negotiated a plea with the prosecutor. The settlement was presented to the district judge who approved it. It was proper to grant the motion in limine. (Carson, G.; CA08-70; 10-1-08; Gladwin)

Terry v. White: [**contempt**] The court's order, the subsequent violation of which gave rise to a finding of contempt, was definite in its terms and clear as to what duties it imposed. (Lindsay, M.; SC 07-1143; 10-2-08; Imber)

Hot Spring County Medical Center v. Arkansas Radiology Affiliates: [**arbitration**] Agreement requiring arbitration was enforceable. There was no lack of mutuality of obligation. (Switzer, D.; CA 08-16; 10-8-08; Robbins)

Bob Cole Bail Bonds v. Brewer: (**bail bondsman list**) Statute requires that list maintained by circuit clerk, showing registered bondsmen, show names in the order in which they register with the clerk. Registration of an individual bondsman is not the same as a registration for a company. (Fitzhugh, M.; SC 07-1264; 10-9-08; Gunter)

Save Energy Reap Taxes v. Shaw: [**ballot initiative**] Section 3-8-204(f)(6) governs local option petitions; it requires strict compliance. The petitions were properly invalidated for non-compliance. Substantial evidence supports finding of instances of common authorship of numerous signatures. (Smith, P.; SC 08-1184; 10-16-08; Brown)

Battles v. Morehead: [**discovery/constructive fraud**] Plaintiff's failure to update discovery related to his medical treatment constituted constructive fraud. (Phillips, G.; CA 07-1176; 10-22-08; Marshall)

Poff v. Brown: **[equitable claim/defense]** Plaintiff seeking specific performance contended that the defendant had to plead unconscionability as an affirmative defense. However, the equitable claim for specific performance gives rise to equitable defenses, such as the clean hands doctrine. (Harkey, J.; SC 08-305; 10-23-08; Hannah)

Jones v. McGraw: **[remand/scope of damages hearing]** Case was remanded for a damages hearing; however, defendant was allowed to explore proximate causation. This was error because proximate causation is an issue on liability – not remedy. The sole issue on remand was the amount of damages. (Scott, J.; SC 08-372; 10-23-08; Danielson)

Wal-Mart v. D.A.N. Joint Venture: **[garnishment]** A properly registered foreign judgment may be enforced by a writ of garnishment. The amount of the garnishment judgment for a defaulting garnishee is the amount of non-exempt wages at the time of service of the writ, plus attorney's fees and expenses. (Duncan, X.; SC 08-434; 10-23-08; Wills)

Elder v. Mark Ford: **[sanctions/pro se]** Court properly imposed Rule 11 sanctions on a *pro se* litigant who filed a frivolous action because the action was barred by *res judicata*. (Tabor, S.; CA 08-384; 10-29-08; Pittman)

Defir v. Reed: **[deed]** Ark. Code Ann. Section 28-9-209 requires purported heir to commence an action or assert a claim against estate within 180 days of the death. By failing to do so, she cannot assert an interest in property by intestate succession. (Glover, D.; CA 07-1322; 10-29-08; Hart)

Wilson v. Lincare, Inc.: **[death/substitution of parties]** Party to federal suit died while case was pending. Rather than substituting the administratrix as the plaintiff, the action was dismissed. Later it was refiled in the name of the deceased plaintiff in state court. The real party in interest in the federal case was the administratrix but no substitution was made before the federal case was nonsuited. The claim abated and was never revived. (Guthrie, D.; CA 07-812; 10-29-08; Heffley)

Haupt v. Kumar: **[informed consent]** Directed verdict was not in order because a jury question had been presented on the issue of informed consent. (Sims, B.; CA 08-229; 10-29-08; Pittman)

City of Little Rock v. Carpenter: **[foia/ attorney's fees]** Fees were not awardable because requestor did not substantially prevail in his FOIA action concerning the material which was not provided to him. (Proctor, W.; SC 08-171; 10-30-08; Danielson)

Benton County Stone v. Benton County Planning Board; **[planning board appeal]** Ordinance was not void for vagueness. (Finch, J.; SC 08-291; 10-30-08; Wills)

Mays v. Cole, County Clerk: **[petition/signatures]** In order for signatures to be considered on a petition, the person must be a registered voter, and it is not permissible to sign before one registers. (Thomas, J.; SC08-1231; 10-31-08; Imber)

DOMESTIC RELATIONS

Brock v. Eubanks: [**visitation; contempt**] This is a substituted opinion on a petition for rehearing. In the original order, the Court of Appeals affirmed the trial court's finding the appellant custodial mother in contempt for failure to comply with the court's visitation schedule, and affirming a permanent restraining order that enjoined her from interfering with the appellee father's visitation with the minor child. On rehearing, the Court affirmed the trial court's finding of contempt and reversed "the portion of the restraining order that impermissibly delegates the court's contempt power to law-enforcement officers." The Court agreed "that the circuit court attempted to make the executive branch the judge and jailer by delegating to law-enforcement officers the authority to 'determine' if she was in contempt of any order of the court and to 'arrest and incarcerate' her upon a determination or reasonable suspicion of violation of the court's orders." The Court said that the permanent restraining order authorized law-enforcement officers to arrest and incarcerate the appellant for actions far beyond the statutory offense of interference with visitation. In addition, she was not provided a means of purging herself of contempt if officers decided to incarcerate her. The order delegated the circuit court's judicial power to enforce its orders by finding a party in contempt and assigning punishment for the contempt, an inherent power of the court. Under the order, the officers did not have to bring the appellant before the court after arresting her, or even to inform the court that she had been arrested. Instead, the law-enforcement officers were assigned the judicial function of deciding whether conduct violated the court's order and whether such conduct was willful and contemptuous. Law-enforcement officers are executive branch employees, not judicial officers with authority to make decisions traditionally and constitutionally assigned to the courts. (Maggio, M.; No. CA 07-560; 10-1-08; Bird)(substituted opinion)

Sharp v. Keeler: [**custody; evidence; contempt**] The circuit court did not err in determining that no material change in circumstances had occurred since the original custody order was filed. The circuit court did not abuse its broad discretion in limiting the testimony of the expert witness who had performed a psychological evaluation of the appellant. Finally, the trial court did err in jailing the appellant for contempt. The contempt was committed outside the presence of the court. The appellant was not afforded the statutory notice required by Ark. Code. Ann. § 16-10-108(c). She was entitled to notice of specific accusations and a reasonable time to defend herself before the court decided the issue of contempt. (Zimmerman, S.; No. CA 07-1027; 10-1-08; Marshall)

Hicks v. Cook: [**child custody**] The circuit court's decision awarding custody to the appellee biological father was affirmed. The appellant mother contended that the court had impermissibly based its decision on its perceptions of her religious preferences and her mental health. The Court of Appeals said that the trial court did not use religion as a basis for its decision but that the court simply pointed out the appellant's lack of credibility on the issue of her interest in Wicca. The Court of Appeals found, also, that the court's consideration of her mental health and her medications was also issues of credibility. (Vittitow, R.; No. CA 07-1321; 10-1-08; Gladwin)

West v. West: [**marital property division—unequal distribution; default judgment—fraud**] The trial court set aside an unequal division of property in a divorce case, which by default judgment awarded all of the marital property to the appellant husband. The appellee had contended below

that the division of property should be set aside based upon fraud. She stated that she did not participate in the proceedings because she relied upon the appellant's assertions that a compromise had been reached on the property issues. In affirming the circuit court, the Court of Appeals said that default judgments are not favored in the law and should be avoided when possible. The Court affirmed the trial court's finding that fraud justified setting aside the judgment in accordance with Rule 55(c)(3) of the Arkansas Rules of Civil Procedure. The Court pointed out that a distinction no longer exists between intrinsic and extrinsic fraud in setting aside a default decree. The Court found no error in the trial court's determination that the appellant's actions were sufficient to justify setting aside the decree regarding the division of property. (Kilgore, C.; No. CA 07-832; 10-8-08; Baker)

Rownak v. Rownak: **[contempt]** The circuit court found the appellant father in contempt for failure to follow the parents' express agreement that the parties' children be raised in the Protestant faith unless both parties consent to promoting some other belief system. The appellant thereafter promoted the Church of the Latter-Day Saints (LDS) without the mother's consent. The circuit court found him in contempt for "promoting another religious belief system/faith" to his sons and enjoined his conduct. The appellant did not appeal from the order but filed a motion for clarification of the term "contemptuous conduct" or, in the alternative, a motion under Ark. R. Civ. P. 60(a) for modification of the order to prevent a miscarriage of justice, that being the portion of the order enjoining him from promoting his religious faith to his children. The court denied both motions. On appeal, the Court of Appeals affirmed, finding that the injunction upon which the appellant appealed was based upon a valid contract between the parties and did not violate appellant's constitutional rights. The Court said that the circuit court correctly found that parents can agree by contract about their children's religious upbringing and that such a provision is neither criminal nor void as against public policy. With respect to the appellant's request for clarification of the contempt order, the appellant contended that the order was vague about what would be considered contemptuous and that the court's refusal to clarify what would be considered contemptuous in the future was an abuse of discretion. The Court said that the testimony was clear that, without appellee's consent and over her objections, appellant and his wife promoted the LDS faith. The Court noted that the contract provision was included in the divorce decree at appellant's instigation, and that the circuit court did not abuse its discretion by refusing to clarify specific acts that the parties' contract sought to prevent. (Scott, J.; No. CA 08-193; 10-8-08; Bird)

PROBATE

Paula Sue Combs, as Executrix of the Estate of James R. Stewart v. Paula Jane Stewart: **[decedents' estates]** The trial court did not err in finding the estate responsible for the remaining debt owed to Farm Credit Services. The estate is now the sole owner of the farm and chicken houses and will receive the major benefit of the loan, so it should pay the remaining part of the debt. Further, the trial court did not err in allowing the widow to retain money from the sale of chickens and cattle, since, upon her husband's death, she became the sole owner of that personal property. The estate did not have a claim to the chickens or the cattle, so it therefore had no right to money received in exchange for that property. (Guthrie, D.; No. SC 08-276; 10-9-08; Danielson)

JUVENILE

Tuck v. Arkansas Dept. of Human Servs., [TPR] Reversed and remanded as to the appellant, putative father. Although, DHS recognized appellant as the father early in the case and even named him in the case plan, he was not named as a party as required by A.C.A. 9-27-311 or served a copy of the dependency-neglect petition as required by A.C.A. 9-27-312 or the Arkansas Rules of Civil Procedure. Appellant was not provided notice to hearings or offered any services.

Appellant was named as a defendant twenty-two months later when DHS filed a TPR petition alleging that he failed to establish paternity, provide support or maintain contact, and failed to comply with the case plan and court orders to which he was never a party.

The Court held that the basic due process guarantees were not provided and it was not harmless error. DHS has a duty to parents in dependency-neglect cases and that duty is not triggered by requests by parent. (Medlock, M.; 08-582; 10-8-2008; Griffin)

EIGHTH CIRCUIT

Lane v. Celadon Trucking : [conflicts of law] District court did not err in applying conflict-of-law principles in determining that Indiana law should govern defendant's subrogation claims; however, the district court erred in applying the Indiana lien reduction statute. (E.D. Ark.; # 07-3319; 10-9-08)

U.S. SUPREME COURT

Kennedy v. Louisiana: [capital punishment] Louisiana charged petitioner with the aggravated rape of his then-8-year-old stepdaughter. He was convicted and sentenced to death under a state statute authorizing capital punishment for the rape of a child under 12. The State Supreme Court affirmed, reasoning that children are a class in need of special protection, the state court held child rape to be unique in terms of the harm it inflicts upon the victim and society and concluded that, short of first-degree murder, there is no crime more deserving of death.

Held: The Eighth Amendment bars Louisiana from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the victim's death.

(No. 07-343; modified October 1, 2008)