

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

FEBRUARY 2016
VOLUME 23, NO. 6

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CRIMINAL

Stow v. State, 2016 Ark. App. 84 [**sex offender; termination of obligation to register**] Where the evidence established that appellant had the ability to “hide” his actions, that he suffered from addictive sexual behaviors, and that there was a “true” finding against him for sexual abuse, the circuit court did not err in concluding that appellant failed to establish that he was no longer a safety risk. Accordingly, the trial court did not err when it denied appellant’s petition to terminate his obligation to register as a sex offender. (Putman, J.; CV-15-576; 2-10-16; Harrison, B.)

Trujillo v. State, 2016 Ark. 49 [**bail**] The Arkansas Constitution permits a court to order a cash-only bail. Such an order should comply with the provisions of Rule 9.2 of the Ark. R. Crim. Pro. and be subject to the constitutional protections of article 8, section 2 of the Arkansas Constitution. (Green R.; CR-15-638; 2-11-16; Baker, K.)

Casey v. State, 2016 Ark. App. 98 [**motion to suppress**] Because law enforcement was responding to a 911 call that provided specific, particularized, and articulable reasons to indicate that appellant might have been involved in criminal activity, the officer lawfully stopped appellant’s vehicle and detained appellant. (Green R.; CR-15-676; 2-17-16; Abramson, R.)

Dickey v. State, 2016 Ark. 66 [**hearsay**] The trial court did not abuse its discretion when pursuant to Rule 803(3) of the Ark. R. Evid., it permitted witnesses to testify about statements made to them by the deceased victim about her fear of appellant and his prior physical abuse of her. [**Confrontation Clause**] The statements made by the deceased victim to her friends regarding her fears of appellant and his physical abuse of her were nontestimonial. Nontestimonial hearsay is not subject to the Confrontation Clause. (Weaver, T.; CR-14-794; 2-18-16; Wynne, R.)

Powell v. State, 2016 Ark. App. 116 [**Confrontation Clause**] The statements made by the victim to the 911 operator were nontestimonial. Specifically, the information that the victim provided to the operator was given to aid law enforcement as they attempted to provide emergency assistance. Because the statements were not testimonial, the circuit court did not err in allowing the recording of the 911 call to be admitted into evidence over appellant's Confrontation-Clause objection. (Cox, J.; CR-15-705; 2-24-16; Gruber, R.)

Gould v. State, 2016 Ark. App. 124 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon an allegation of improper inter-juror communication. (Clawson, C.; CR-15-453; 2-24-16; Hixson, K.)

Campbell v. State, 2016 Ark. App. 119 [**Ark. R. Evid. 404 (b)**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b) of the Ark. R. Evid., it admitted evidence of inappropriate sexual conduct between appellant and two of his minor step-granddaughters. (Williams, C.; CR-14-570; 2-24-16; Whiteaker, P.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Medley v. State, 2016 Ark. App. 79 (fleeing) CR-15-64; 2-10-16; Abramson, R.

Kimble v. State, 2016 Ark. App. 99 (possession of a firearm by a felon) CR-15-612; 2-17-16; Kinard, M.

Price v. State, 2016 Ark. App. 102 (theft of leased, rented, or entrusted property) CR-14-364; 2-17-16; Glover, D.

Ronk v. State, 2016 Ark. App. 126 (kidnapping) CR-15-670; 2-24-16; Brown, W.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Phounsavath v. State, 2016 Ark. App. 65 (suspended sentence) CR-15-553; 2-3-16; Virden, B.

Lewis v. State, 2016 Ark. App. 101 (probation) CR-15-734; 2-17-16; Gruber, R.

Ryan v. State, 2016 Ark. App. 105 (probation) CR-15-484; 2-17-16; Vaught, L.

CIVIL

Bloodman v. Bank of America, 2016 Ark. App. 67 [**default judgment**] Service by warning order was proper and refusal to set default judgement aside is affirmed. (Arnold, G.; CV-15-343; 2-3-16; Gruber, R.)

Kennedy v. Ausbrooks, 2016 Ark. App. 62 [**new trial**] In light of expert witness' lack of knowledge of the facts, his speculative view of the required standard of care, and his behavior at trial, the circuit court did not abuse its discretion in granting appellee's motion for a new trial. The record indicates that the circuit court was aware of appellee's concerns, stopped the proceedings, excused the jury, and addressed the issues with the expert on two occasions. Further, the circuit court conducted a full hearing on appellee's motion for a new trial during which both parties' arguments were duly considered. (Phillips, G.; CV-15-489; 2-3-16; Gladwin, R.)

Washington County v. Board of Trustees of Univ. Ark., 2016 Ark. 34 [**taxation**] The University of Arkansas is an instrumentality of the State of Arkansas, and its property is immune from ad valorem taxation. (Martin, D.; CV-15-357; 2-4-16; Baker, K.)

Ahmad v. Beck, 2016 Ark. 30 [**admin. appeal/declaratory judgment**] Dr. Ahmad was not permitted to file a separate declaratory judgment action to raise claims that he could have raised in the administrative hearing that was on appeal and still pending. (Griffen, W.; CV-15-33; 2-4-16; Brill, H.)

Watson Chapel School Dist. v. Vilches, 2016 Ark. App. 87 [**teachers**] Ark. Code Ann. § 6-17-1209 provides that a schoolteacher who is absent from her duties "as a result of personal injury caused by either an assault or a criminal act committed against the teacher in the course of his or her employment" shall be granted a leave of absence from school with full pay. The injury does not need to be physical for the statute to apply and includes PTSD. (Wyatt, R.; CV-15-602; 2-10-16; Gruber, R.)

Liberty Bank v. Byrd, 2016 Ark. App. 86 [**constructive trust**] The trust instrument provided that upon Hollye's death, the jointly held assets were to be disposed of according to Vernon's estate plan, not Hollye's plan. The circuit court correctly found that Vernon's actions were contrary to Hollye's testamentary intent and plan and its imposition of the constructive trust is affirmed. Upon Vernon's death, Hollye, as the surviving joint tenant, became entitled to all of the jointly held assets that Vernon had transferred to the trust. (Pearson, W.; CV-15-168; 2-10-16; Gruber, R.)

Wheatley v. Dixie Mall, LLC, 2016 Ark. App. 94 [**landlord**] The trial court did not err by issuing the writ of possession. The tenant violated the permitted-use clause of the lease. Moreover, the notice requirements of the lease were complied with. (Schrantz, D.; CV-15-609; 2-10-16; Hoofman, C.)

Woodward v. State Police Commission, 2016 Ark. App. 97 [**admin. appeal**] Substantial evidence supported the Commission's disciplinary actions that appellant violated the ASP policy concerning search and seizures. Commission did not act arbitrarily. (Welch, M.; CV-15-348; 2-10-16; Brown, W.)

Williamson v. Baptist Health, 2016 Ark. App. 78 [**loss of life damages**] Williamson contends that the jury omitted loss-of-life damages from its award. Specifically, she argues that, based on the overwhelming evidence about the value Cynthia Frazier placed on her life, the jury could not have accounted for this component of loss-of-life damages when making its award to her estate. To support her argument, she contends that the whiteboard used by the jurors indicated that they considered only Frazier's income and expenses when awarding damages to the estate. A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent. The markings on the deliberation-room whiteboard are not admissible. Without those markings, there is no evidence to support Williamson's argument that the jury did not consider loss-of-life damages. The judgment reflects the jury's decision as it was shown in its interrogatories. Any argument regarding a potential misunderstanding or irregularity in the jury's verdict was waived upon the jury's discharge. (Palmer, C.; CV-15-45; 2-10-16; Gladwin, R.)

Haile v. Johnston, 2016 Ark. 52 [**eligibility to hold office**] Upon sealing and expunging of criminal conviction pursuant to Ark. Code Ann. § 16-90-1401 *et seq.*, it is deemed that conviction never occurred and all privileges and rights are restored; therefore, person is entitled to run for and hold office. (Weaver, T.; CV-16-18; 2-11-16; Baker, K.)

Foster v. Watson, 2016 Ark. App. 104 [**boundaries**] There is no indication there was ever mutual recognition of the fence as the boundary line, which is necessary to establish a boundary by acquiescence. Adverse possession was not proven because Foster failed to prove his use of the

land unequivocally indicated that he was claiming ownership of the disputed property. (Weaver, T.; CV-15-654; 2-17-16; Glover, D.)

Shriners Hospitals v. First United Methodist Church of Ozark, 2016 Ark. App. 103 [**conveyance**] The trial court erred in concluding the parol-evidence rule prohibited Shriners from introducing evidence outside the deed itself that would show the conveyance constituted a gift rather than a sale. (Sutterfield, D.; CV-15-600; 2-17-16; Glover, D.)

Courtyard Gardens Health v. Arnold, 2016 Ark. 62 [**arbitration**] The arbitration agreement provided that NAF was to be the arbitrator. Although NAF is no longer available to perform this function, the agreement to arbitrate is enforceable and is not rendered unenforceable based on the defense of impossibility of performance. The NAF term was merely an ancillary logistical concern, and section 5 of the FAA applies and provides a procedure for the appointment of a substitute arbitrator. (McCallum, R.; CV-14-1105; 2-18-16; Baker, K.)

Whitecotton v. Owen, 2016 Ark. App. 120 [**boundaries**] The evidence supported the court's finding of the fence line being the boundary line by acquiescence. (Sullivan, T.; CV-15-610; 2-24-16; Whiteaker, P.)

Sloop v. Kiker, 2016 Ark. App. 125 [**Statute of Frauds**] The parties' real-estate contract satisfied the Statute of Frauds. Sloop contends that the contract was deficient because it did not name the Kiker trusts as sellers of the property and did not contain a sufficient description of the property. However, the warranty deed that the parties executed on the same day as the real-estate contract named the Kiker trusts as grantors and provided a formal, legal description of the property. Generally, instruments executed at the same time by the same parties, for the same purpose, and in the course of the same transaction, are, in the eyes of the law, one instrument and will be read and construed together. Moreover, if a contract furnishes a means by which realty can be identified—a key to the property's location—the Statute of Frauds is satisfied. Here, the contract's designation of the premises by street address met this requirement. (Womack, S.; CV-15-206; 2-24-16; Hoofman, C.)

Morgan v. Big Creek Farms, 2016 Ark. App. 121 [**default judgment**] Big Creek conducted a diligent inquiry into the whereabouts of the Morgans sufficient to satisfy the constructive-service provision of Rule 4(f). The affidavits of the process servers and investigators establish that a diligent inquiry was conducted, and the affidavit for warning order reflected those efforts. Service was properly effectuated by warning order. (Weaver, T.; CV-15-659; 2-24-16; Whiteaker, P.)

Palestine-Wheatley School District v. Hopkins and Teacher Retirement System (ATRS), 2016 Ark. App. 112 [**school**] ATRS found that the school district was responsible for paying the employer contribution to ATRS on settlement proceeds received by appellee Fingers. ATRS's findings were

not arbitrary, capricious, or characterized by an abuse of discretion. (1) There was no ruling in federal court regarding the employer contribution to ATRS; (2) ATRS was not part of the settlement and did not review or approve the settlement or Release; (3) Fingers received \$180,882.34 after attorney's fees were paid; (4) ATRS interpreted Ark. Code Ann. § 24-4-401(c)(4) to require a 14 percent employer contribution to be paid to ATRS on all salary; (5) ATRS interpreted Ark. Code Ann. § 24-7-202(27)(B)(iii) to allow ATRS to treat as salary any remuneration paid to a member for the settlement of litigation with an ATRS employer; and (6) ATRS determined that the District was liable to it for contributions equal to 14 percent of \$180,882.34, plus interest. (Proctor, R.; CV-15-631; 2-24-16; Gladwin, R.)

McCafferty v. Oxford American Project, Inc., 2016 Ark. 75 [**illegal exaction**] The issue is whether McCafferty can maintain an illegal exaction lawsuit to challenge an allegedly improper expenditure from UCA's "cash fund." The circuit court properly granted summary judgment against McCafferty because the undisputed facts show that the cash funds at issue were not generated or arising from taxation. A claim for illegal exaction specifically requires that the funds at issue be generated or arise from taxation. (Welch, M.; CV-15-264; 2-25-16; Goodson, C.)

DOMESTIC RELATIONS

Pelts v. Pelts, 2016 Ark. App. 75 [**divorce--property division--retirement benefits**] The circuit court did not err in awarding the appellee wife one-half of her marital portion of the appellant husband's military retirement effective when he retires and begins drawing benefits. Under the circumstances of this case, the Court of Appeals held that such a division did not run afoul of the state's marital-property law and was not clearly erroneous. The Court also did not find error in the circuit court's requiring the appellant to elect a survivor benefit plan in its marital-property division. In Arkansas, military retirement benefits are marital property. However, the Court remanded the issue to the circuit court to clarify that the parties would bear a proportional payment for the benefit plan, rather than the appellant husband's paying the premium in its entirety, which is what he understood it said. (Feland, W., No. CV-15-305; 2-3-16; Hoofman, C.)

Troutman v. Troutman, 2016 Ark. App. 70 [**child support**] The Court of Appeals found no merit in the appellant's argument that the circuit court erred in finding that the appellee payor demonstrated a material change in circumstances. His gross income, based upon his 2012 and 2013 income-tax returns, clearly changed by more than 20% or \$100 per month, which constituted a material change in circumstances sufficient to support a modification under Arkansas Code Annotated section 9-14-107(a)(1). The Court also found no error in the circuit court's calculation of appellee's income for purposes of child support. The decision was affirmed. (Lindsay, M.; No. CV-15-379; 2-3-16; Whiteaker, P.)

Graves v. Graves, 2016 Ark. App. 68 [**divorce--division of marital property**] The appellant husband appealed from what he contended was an unequal division of marital property because the circuit court did not consider that, after the parties separated but before their divorce, he used \$110,000 in one account to pay the parties' income-tax liability while the appellee wife used \$100,000 from a separate account to purchase personal items such as automobiles and furniture. In affirming, the Court of Appeals said that the appellant failed to obtain a specific ruling below, so the Court did not consider the point on appeal. Although he may have argued initially for an equal division of the tax liability he incurred before the divorce, neither the 2014 decree nor the supplemental decree included a specific ruling on this issue. Although his motion for reconsideration may have requested further findings, he did not amend his notice of appeal after that motion was deemed denied. Because the circuit court did not rule on a division of income-tax liability and he did not appeal the denial of his motion for reconsideration, the appellate court had nothing to review. (Jamison, L.; No. CV-15-392; 2-3-16; Gruber, R.)

Villanueva v. Valdivia, 2016 Ark. App. 107 [**divorce; custody; due process**] The appellant's primary issue on appeal from the parties' decree of divorce was that entry of the final decree violated her due-process rights because the notice she received indicated that it was a temporary hearing. The court set out the notice of hearing which provided for a "one (1) hour temporary hearing for, but not limited to the Plaintiff's Complaint for Divorce and Motion for Ex-Parte Emergency Temporary Custody." The Court of Appeals said that under the circumstances of the case, there was no due-process violation. She failed to file a timely answer within thirty days or otherwise to make any appearance in the case. She was given notice "on the face of the summons, and she was afforded the opportunity to be heard. Instead, she chose not to file an answer or make an appearance, and after a hearing the divorce decree was entered." The decision was affirmed. (Williams, C.; No. CV-15-748; 2-17-16; Hixson, K.)

Davis v. Davis, 2016 Ark. 64] [**certified question from Court of Appeals**] The Supreme Court accepted certification of this case from the Court of Appeals because it presents an issue needing clarification or development of the law, and because it involves an issue upon which there is a perceived inconsistency in the decisions of Arkansas's appellate courts. The certified question is "whether a divorce decree is a final and appealable order when it contains language permitting the parties to agree on a division of marital property prior to sale or language permitting the parties to agree on the details of the sale. The Court of Appeals has taken the position that such language renders a divorce decree nonfinal for purposes of appeal." The Court reviewed prior case law and found that the divorce decree in this case "'addresse[s] every issue presented by the parties, reserving no issues' to be determined later." The Court held that the decree is a final, appealable order and remanded to the Court of Appeals for a decision on the merits. (Sutterfield, D.; No. CV-14-533; 2-18-16; Baker, K.)

PROBATE

Hale v. Coffman, 2016 Ark. 36 [**guardianship**] The appellee is the father of the appellant, who filed for temporary and permanent guardianship of her father. At the hearing on the permanent guardianship, the circuit court granted the father's directed-verdict motion to dismiss the guardianship petition. He argued successfully that the nursing home where he resides is an "institution," where he was confined for the treatment of mental or nervous diseases, which he contended meant that the appellant was required to present the testimony or the sworn written statement of a professional who was a member of the medical staff of the nursing home. The appellant daughter argued that because the nursing home was a long-term care facility, it was not an institution for the treatment of mental or nervous diseases. Therefore, she argued that the appellant did not have to present the testimony of a professional on the medical staff of the nursing home. On appeal, the daughter made the same argument, alleging that the circuit court erred in finding that the nursing home is an institution for the treatment of mental or nervous diseases, and that she was not required to present testimony by a professional on the medical staff of the nursing home. The appellee did not file a responsive brief on appeal. The Supreme Court reviewed the pertinent statutes, including definitions, and noted that the parties did not dispute that the nursing home was a long-term care facility. The Court held that, given the statutory definition of "long-term care facility, the nursing home in question was "not an 'institution for the treatment of mental or nervous diseases.'" It concluded that the circuit court erred in deciding that appellant was required to present testimony of a qualified professional who was a member of the medical staff of the nursing home where the appellee resided. It reversed and remanded for proceedings consistent with its opinion. (McCain, G.; No. CV-15-202; 2-4-16; Hart, J.)

Lagios v. Goldman, et al., 2016 Ark. 59 [**adoption**] The appellant biological father of a child appeals from a decree of adoption granted to the appellants. In affirming the adoption, the Supreme Court held: (1) that the failure of the appellees to include all statutory information in the adoption petition required by Ark. Code Ann. Section 9-9-210(a) did not deprive the circuit court of jurisdiction when all of the information was made a part of the record before the adoption decree was entered; (2) that the appellant failed to establish that section 9-9-211 sets forth a jurisdictional requirement subject to strict compliance (and the appellees substantially complied with the statute); (3) that the appellees' failure to strictly comply with section 9-9-212(f)(regarding notice of the adoption to the deceased mother's parents) did not deprive the circuit court of jurisdiction; (4) that the circuit court did not abuse its discretion in holding a subsequent hearing for the appellees to introduce the home study into evidence; and (5) that the circuit court's finding that granting the adoption is not against the preponderance of the evidence. (Chandler, L.; No. CV-15-491; 2-18-16; Danielson, P.)

Hill v. Powell, 2016 Ark. App. 123 [**adoption**] The circuit court based its denial of the adoption upon the petitioner's failure to obtain the required consent of the mother, and its finding that the

adoption was not in the best interest of the child. The appellant challenged only the consent issue on appeal. When the circuit court bases its decision on two independent grounds and the appellant challenges only one on appeal, the appellate court will affirm without addressing either. Consequently, the court could not address appellant's first argument because she did not challenge both independent grounds on which the court relied in denying her adoption petition. The decision was affirmed. (Parker, J.; No. CV-15-570; 2-24-16; Vaught, L.)

JUVENILE

Bell v. Ark. Dep't of Human Services, 2016 Ark. 72 [**Indigency/Appellate Counsel**] Appellant argued that the trial court abused its discretion in denying her motion for indigence for the purposes of appellate counsel by improperly relying on expected income and acted arbitrarily regarding the discrepancies between her affidavit of indigency and prior testimony at the TPR hearing. The burden of proof is on the petitioner and is based on the federal poverty guidelines. The trial court was affirmed for denying appellant's indigency motion where appellant had presented evidence at the TPR hearing that her income was above the federal poverty line. Further, the trial court found that appellant was not credible due to discrepancies in her testimony in court and her indigency affidavit concerning her income and expenses. (Hendricks, A.; CV-15-604 2-3-2016; Vaught, L.)

Manken v. Ark. Dep't of Human Services, 2016 Ark. 100 [**TPR – putative father**] Appellant argued that the trial court erred in treating him with two legal statuses, a non-parent who did not have parental rights attach, and a parent whose rights should be terminated. The trial court's alternative finding of termination was effective only if the trial court's finding that parental rights did not attach was reversed. The appellate court found that the trial court's order effectively found that appellant did not have parental rights and dismissed him from the case. Appellant did not challenge this finding. The appellate court distinguished this case from *Whitehead* where the appellant in that case was not dismissed from the TPR and argued that his rights had attached. The trial court's alternative finding was applicable only in the event of a condition that did not occur. However, the court modified the TPR order to clarify that no termination occurred so as not to prejudice appellant as to any future termination. (Smith, T.; CV-15-810; 2-17-2016; Kinard, M.)

Bell v. Ark. Dep't of Human Services, 2016 Ark. 113 [**TPR - service**] Appellant waived her objection to service by failing to preserve this issue for appeal and through her appearance and of her attorney at the termination hearing. [**subsequent factors**] Appellant argued that the trial court erred in considering evidence about issues that occurred while in her child was in her custody. Appellant does not challenge the sufficiency of the evidence supporting the trial court's findings, but that the court erred in considering certain evidence. Appellant admitted to mental health, family and criminal issues. The appellate court stated that there is no limitation that the subsequent factor cannot occur while a parent has custody only that it arose subsequent to the filing of the

original dependency-neglect case. The factors must demonstrate that the removal occurred prior to the termination and return is contrary to the child's health, safety and welfare. (Sullivan, T.; CV-15-904 2-24-2016; Gladwin, R.)

Crowley v. Ark. Dep't of Human Services, 2016 Ark. App. 66 [**TPR - best interest**] Appellant argued that TPR was unnecessary and not in his children's best interest because they remained in their mother's custody so permanency was not an issue. Also the no-contact order would sufficiently protect his children's best interest. The appellate court distinguished this case from *Caldwell*, because appellant had been found to have physically abused his children and there was testimony that they were afraid of him. Also *Caldwell* and *Lively* (no evidence on adoption) had evidence of a strong relationship with grandparents. The appellate court found this case more like *Hays* where the parent has subjected his children to violence and abuse. The termination meets the purpose of the termination statute and served to break the violence toward the children and their mother. The trial court was affirmed where it found that the issue of adoptability was of no legal relevance and there was a heightened risk of harm. (Zuerker, L.; CV-15-814; 2-3-2016; Harrison, B.)

Dodd v. Ark. Dep't of Human Services, 2016 Ark. App. 64 [**TPR - best interest/harm**] Appellant does not challenge that his child is adoptable, but that the court erred in finding that he subjected the child to a risk of harm. The trial court was affirmed in finding that appellant's blatant disregard and violation of court orders, his continued drug use and allowing the child's mother to visit her child contrary to the court's order was enough to show potential harm. [**subsequent factors**] Appellant's failure to comply with court orders and continued drug use were sufficient subsequent factors. (Williams Warren, J.; CV-15-747; 2-3-2016; Abramson, R.)

Cases in which the Court of Appeals affirmed No-Merit TPR and Motion to Withdraw Granted:

Jones v. Ark. Dep't of Human Services, 2016 Ark. App. 110 [**failure to remedy, subsequent factors and aggravated circumstances**] (Branton, W.; CV-15-565; 2-17-2016; Brown, W.)

Hunter v. Ark. Dep't of Human Services, 2016 Ark. App. 95 [**failure to remedy, failure to maintain contact and subsequent factors**] (Wisdom L.; CV-15-818; 2-10-2016; Hoofman, C.)