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CRIMINAL

Springs v. State, 2012 Ark. 87 [**Rule 37**] Appellant did not demonstrate grounds for reversal of the circuit court's denial of his Rule 37.5 petition. (Fitzhugh, M.; CR 09-824; 3-1-12; Corbin, D.)

Kelley v. Norris, 2012 Ark. 86 [**sentencing**] A trial court has no authority to direct that a sentence run consecutively to a nonexisting sentence that might thereafter be imposed in a different case. (Dennis, J.; 10-127; 3-1-12; Hannah, J.)

Samontry and Phouangmany v. State, 2012 Ark. 105 [**disqualification of counsel**] Rule 2(a)(8) of the Arkansas Rules of Appellate Procedure— Civil may be used as authority in a criminal case for pursuing an interlocutory appeal from an order disqualifying counsel. In criminal cases, disqualification on the basis of the attorney's receipt of privileged information from a codefendant formerly represented by that attorney should only be considered upon a clear showing that the present and former clients' interests are adverse. (Huckabee, S.; CR 11-985; 3-8-12; Brown, R.)

State v. Tyson, 2012 Ark. 107 [**nighttime search**] Rule 13.2(c)(iii) of the Arkansas Rules of Criminal Procedure does not expressly limit the safety concern to the safety of police officers. Although the affidavit in support of the request for a nighttime search warrant in appellant's case was insufficient, the *Leon* good-faith exception applied and the trial court erred in suppressing the evidence obtained during the search. (Griffen, W.; CR 11-713; 3-8-12; Danielson, P.)

Paschal v. State, 2012 Ark. 127 [**sufficiency of the evidence; witness bribery**] There was substantial evidence to support appellant's witness-bribery conviction. [**admission of evidence**] The trial court abused its discretion when it excluded evidence regarding the potential bias of a witness. [**constitutionality of statute**] Arkansas Code Annotated § 5-14-125 (a)(6) was unconstitutional as applied in appellant's case. Specifically, the Supreme Court concluded that the statute criminalized consensual sexual conduct between adults and, therefore, was an infringement of appellant's fundamental right to privacy. (Storey, W.; CR 11-673; 3-29-12; Hannah, J.)

CIVIL

City of Clinton v. Southern Paramedic Services, Inc., 2012 Ark. App. 101 [**moot**] Since ordinance had been repealed, case was moot, and circuit court's order was an advisory opinion. (Wood, R.; SC 11-870; 3-1-12; Brown, R.)

Sparkman Learning Center, Inc. v. Ark. Dept. Human Services, 2012 Ark. App. 194 [**due process**] In terminating contract, a violation of due process was not shown in hearing before administrative agency. (Fox, T.; CA 11-792; 3-7-12; Pittman, J.)

Pace v. Davis, 2012 Ark. App. 193 [**negligent entrustment**] Summary judgment was proper in suit alleging negligent entrustment of a firearm. Plaintiff failed to establish that defendant was incompetent, inexperience, or reckless. (Erwin, H.; CA 11-720; 3-7-12; Vaught, L.)

Bulsara v. Watkins, 2012 Ark. 108 [**Evidence Rule 503/ex parte communications**] Counsel's representation of defendant physician and also non-party physician does not insulate attorney from prohibition in this rule. Fact that counsel had discussions with plaintiff/patient's non-party physician results in his disqualification from representation of defendant doctor in malpractice action. (Humphrey, M.; SC 11-230; 3-8-12; Danielson, P.)

Acker Constr. v. Tran, 2012 Ark. App. 214 [**discovery**] Rule 26 (b)(5) addresses situations where a party inadvertently discloses information without intending to waive a claim of privilege. It does not apply here because disclosure was not inadvertent. [**lost profits**] Tacit agreement rule does not apply when the lost profits are the natural, proximate result of the breach. (Sullivan, T.; CA 11-610; 3-14-12; Hoofman, C.)

Bennett v. State, 2012 Ark. 119 [**ADTPA**] ADTPA has no application to the practice of law by attorneys. (Piazza, C.; SC 11-931; 3-15-12; Danielson, P.)

Grand Valley Ridge LLC v. Metropolitan Bank, 2012 Ark. 121 [**standing**] A guarantor had no standing to assert an individual breach of contract action against the lender arising out of the loan documents when the guarantor individually was not a party to the loan documents. [**sanctions**] Since claims were clearly barred by statute of limitations when they were brought, Rule 11 sanctions were in order. (Smith, K.; SC 11-483; 3-15-12; Goodson, C.)

Dohle v. Duffield, 2012 Ark. App. 217 [**prescriptive easement**] Use of spring house was adverse; however, use of “gap” was not continuous and uninterrupted for seven-year statutory period. (Schantz, D.; CA 11-967; 3-28-12; Vaught, L.)

Flowers v. Amerisour Drug Corp., 2012 Ark. App. 224 [**default judgment**] Personal jurisdiction is permissible ground for attacking a foreign default judgment and must be raised in the proceeding to register the foreign judgment. (Dennis, J.; CA 11-179; 3-28-12; Brown, W.)

NISHA, LLC v. Tribult Constr., LLC, 2012 Ark. 130 [**arbitration**] The court rather than the arbitrator should determine whether representation of a corporation by a non-lawyer during arbitration proceedings constitutes the unauthorized practice of law. Furthermore, a non-lawyer’s representation of a corporation in such proceedings does constitute the unauthorized practice of law. (Tabor, S.; SC 11-927; 3-29-12; Brown, R.)

Richard v. Union Pacific RR, 2012 Ark. 129 [**dismissal**] Dismissal in federal court under the facts of the case was not at the sole instance of the plaintiff and did not invoke the two-dismissal rule under R. 41. Although the initial dismissal motion bore only the plaintiff’s request, it was with the urging and agreement of the defendant; therefore, application of the two-dismissal rule in this case would be harsh and contrary to the purpose of the rule. (Wyatt, R.; SC 11-650; 3-29-12; Brown, R.)

Carnegie Public Library v. Carroll County, 2012 Ark. 128 [**jurisdiction**] Dispute over library tax involved a county ad valorem tax and how the county is distributing the tax proceeds, and the dispute should have been raised in the county court. The circuit court lacked subject matter jurisdiction. (Arnold, G., S.; SC 11-784; 3-29-12; Corbin, D.)

Middleton v. Lockhart, 2012 Ark. 131 [**judgment enforcement**] The 1999 decree constituted a judgment and was subject to being revived in its own right irrespective of an earlier 1992 judgment. The time to enforce the judgment or to revive it began to run upon its entry – not its rendition in open court. (Womack, S.; SC 11-790; 3-29-12; Gunter, J.)

DOMESTIC RELATIONS

Brown v. Brown, 2012 Ark. 89 [**visitation–modification**] The trial court denied the appellant mother’s motion to modify the father’s visitation of the parties’ twenty-six-month-old child. Appellant based her request upon an alleged material change in circumstances—that she wanted to continue to nurse her child—and the child wanted to continue to nurse-- beyond the 18 months the parties had contemplated when the decree was filed. In affirming the circuit court, the Supreme Court said that the appellant had agreed to the time frame when she voluntarily entered into the visitation agreement as a part of the divorce decree. Now she has changed her mind. The court said that she should not be permitted to allege a material change in circumstances that she herself has created. Once the circuit court found no change in circumstances warranting modification of visitation, there was no need to address the issue of best interest of the child. (Schantz, D.; No. SC 11-1129; 3-1-12; Brown, R.)

State of Arkansas, OCSE v. Perry, 2012 Ark. 106 [**statutory interpretation; paternity testing**] Appellee's paternity was established by default judgment in 1995 when the child was 7 years old and child support was ordered. The appellee apparently failed to comply with the order because he had accumulated a significant arrearage by the time the motion for a judgment was filed by OCSE in 2009. The Supreme Court assumed jurisdiction because the case involves the interpretation of Ark. Code Ann. § 9-10-115(e)(1)(a), which provides, in part, that when a man has been adjudicated the father or has acknowledged paternity without scientific testing, he is entitled to one paternity test "at any time during the period of time that he is required to pay child support upon the filing of a motion...." The issue is whether "the period of time that [he] is required to pay child support" is during the child's minority, when the child support obligation is in effect, or whether it includes additional time, after the child's majority, so long as an arrearage exists. Ark. Code Ann. § 9-14-237 sets out the time frame in which a noncustodial parent is required to pay child support, providing, in pertinent part, that the duty to pay child support automatically terminates when the child reaches 18 years of age. The court held that the appellee is not entitled to a paternity test. The court said the noncustodial parent's child support obligation ended when the child turned eighteen. Likewise, the court said, the period in which he could seek a paternity test ended when the child turned eighteen. (Jamison, L.; No. SC 11-948; 3-8-12; Gunter, J.)

Madison, et al. v. Osburn, 2012 Ark. App. 212 [**domestic relations—paternity; visitation; retroactive child support; grandparent visitation; probate--guardianship**] Paternity and guardianship actions were consolidated. On the issue of paternity, the Court of Appeals affirmed the trial court's finding that appellant Griffin was the legal father because he signed and acknowledged paternity at the child's birth, that acknowledgment was not rescinded within sixty days as required in the paternity statutes, and the appellee mother failed to prove that it was procured by fraud, duress, or material mistake of fact to extend that time beyond the sixty days. The court said that the DNA testing requirements of section 9-10-108(a)(1) did not apply because it had no bearing on whether the acknowledgment of paternity was based on fraud or material mistake of fact. On the issue of the father's visitation, the court affirmed the trial court's denial of visitation, because it was within the court's statutory discretion to grant or deny it. However, the court erred in making visitation contingent upon the payment of back child support. In addition, the court affirmed the order for back child support, but reversed and remanded the court's setting the amount of prospective and retroactive child support without reference to the child-support guidelines. Upon remand, the court should consider the amount of the appellant's income, refer to the guidelines, and recite whether or not the award is a deviation, in conformity with Administrative Order No. 10. On the issue of guardianship, the court found no error in the denial of the appellant grandparents' petition for guardianship because the record did not support a finding that the mother is an unfit parent. The court affirmed the order for grandparent visitation, finding that it was made in compliance with the statute, and that there was no evidence that the grandparents would not cooperate with the mother. (Martin, D.; No. CA 11-223; 3-14-12; Abramson, R.)

Price v. Griffin, 2012 Ark. App. 205 [**summary judgment; res judicata**] The appellant appealed from an order granting summary judgment of his motion to enforce a provision in the parties' supplemental divorce decree involving his pension/retirement plan. The Court of Appeals held

that the trial court did not err in finding that the appellant's cause of action was barred by res judicata. The court said that his motion did not differ in any material degree from an earlier cause of action, from which he failed to appeal. (Garrett, R.; No. CA 11-966; 3-14-12; Hart, J.)

Wadley v. Wadley, 2012 Ark. App. 208 [**alimony; marital property**] The appellant husband appealed the award of permanent alimony of \$2,000 a month to the appellee wife, the amount determined to be the marital value of the veterinary clinic, and the amount awarded to appellee for her interest in it. The appellee cross-appealed, alleging that the trial court erred in failing to award her half of the amount gained during the marriage in a certificate of deposit acquired by the appellant during the marriage. The Court of Appeals affirmed the award of alimony and the amount awarded for appellee's share in the appellant's veterinary business. The court reversed and remanded on the trial court's failure to award her any of the marital equity in the CD held in appellant's name. The court said it was a marital asset, not divided equally, without an explanation of the reasons why the division was inequitable. The court said that, on remand to consider the CD, the trial court also could reconsider its award of alimony so that a fair and equitable disposition of the matter would be effected. (Hannah, C.; No. CA 11-1047; 3-14-12; Robbins, J.)

PROBATE

In the Matter of the Adoption of Baby Boy B., A Minor, 2012 Ark. 92 [**adoption—consent; statutory construction**] The Supreme Court said the legislative intent in amending section 9-9-206(a)(2) in the Adoption Code “was to extend protection to the father who establishes...a significant custodial, personal, or financial relationship” to his biological child. The inquiry that flows from that, and the issue in this case, is what degree of compliance with that requirement by a father makes necessary his consent to an adoption of his minor child. The father in this case contended, and the court found, that the mother of the child had thwarted this putative father's efforts from the time he found out about the pregnancy. Even though the circuit court found his consent unnecessary under the statute, the court also found that the putative father had done all he could do to protect his rights under the circumstances. The Supreme Court held that his efforts to establish a significant custodial, personal, or financial relationship, in light of the child's mother's thwarting his efforts, were sufficient to require his consent under section 9-9-206(a)(2) before the child could be adopted, and the trial court's finding that his consent was not necessary was clearly erroneous. The adoption was vacated and the case was remanded. (Maggio, M.; No. SC 11-374; 3-1-12; Baker, K.)

JUVENILE

Adams v. Arkansas Dept. of Human Services, 2012 Ark. App. 211 [**D-N Adjudication**] Appeal dismissed because appellant voluntarily relinquished her parental rights. (Hendricks, A.; CA11-1193; 3-14-2012; Glover, D.)

Blanchard v. Arkansas Dept. of Human Services, 2012 Ark. App. 215 [TPR] Appellant argued there was insufficient evidence to support the trial court's best interest finding. The trial court found that all appellant's children (three girls) were extremely adoptable after testimony from DHS and the children and after observing the children in court. The appellate court noted the deference given to the trial court to judge credibility and, stated that in matters involving the welfare of young children, we give great weight to the judge's personal observations. The appellate court stated that it was obvious that three girls close in age would face potential harm if placed back in the custody of the appellant who had been found to have sexually abused one of the girls. There was also evidence from another sibling during the termination hearing that she had been sexually abused and did not want to live with appellant. Although the trial court did not consider this testimony, in a de novo review, it is further evidence that supported the trial court's finding that TPR was in the children's best interest. (Zimmerman, S.; CA11-1159; 3-13-2012; Brown, W.)

Cole v. Arkansas Dept. of Human Services, 2012 Ark. App. 2 [TPR] Appellant argued that there was insufficient evidence to support the trial court's finding that she had not made significant progress to improve the conditions that caused removal and there was no evidence to support the court's best interest finding. Yet, the focus of appellant's argument was that she needed more time and that there was no need to rush to termination since her child was being cared for by a relative. The appellate court found sufficient evidence and noted appellant's inability to recognize or accept the facts surrounding the severe physical abuse that caused her child to be removed. Such failure presents a substantial risk of serious harm to her child and demonstrates that she has shown no progress that she can protect and care for her child. (Zimmerman, S.; CA11-1178; 3-14-2012; Vaught, L.)

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

Carmez v. Arkansas Dept. of Human Services, 2012 Ark. App. 198 (Cooper, T.; CA 11-1040; 3-7-2012; Gruber, R.)

Cheney v. Arkansas Dept. of Human Services, 2012 Ark. App. 209 (Wilson, R.; CA11-1080; 3-14-2012; Wynne, R.)