

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

MAY, 2012
VOLUME 19, NO. 9

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 (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On May 24th, the Supreme Court announced the following:

1. Amended Administrative Order No. 19, effective immediately;
2. Revised Income Withholding for Support Form, effective immediately; and
3. Adopted various rules changes recommended by the Civil Practice Committee, effective July 1, 2012.

On May 31st, The Supreme Court amended Administrative Order No. 21, effective immediately.

Copies of these per curiams were included in the weekly mail out.

CRIMINAL

White v. State, 2012 Ark. App. 302 [**sufficiency of the evidence; criminal mischief**] There was substantial evidence to support appellant's conviction. [**hearsay**] The trial court did not abuse its discretion when it admitted into evidence two receipts, which were not prepared by the witness, because the evidence was merely cumulative to other testimony. (Griffen, W.; CACR 11-809; 5-2-12; Pittman, J.)

Walden v. State, 2012 Ark. App. 307 [**sufficiency of the evidence; aggravated robbery**] There was substantial evidence to support appellant's conviction. [**motion to suppress**] Appellant's statement was voluntarily given. Thus, the trial court did not err in denying appellant's motion to suppress. [**jury instruction**] The trial court did not err in refusing to give a jury instruction which would have provided information about appellant's previous convictions and sentences. [**motion for new trial**] Because appellant's sentence was less than the maximum sentence that he could have received, he could not establish that he was prejudiced by the trial court's denial of his motion for a new trial, which was based upon a victim-impact statement that he argued inflamed the jury. (Fitzhugh, M.; CACR 11-240; 5-2-12; Wynne, R.)

Williams v. State, 2012 Ark. App. 310 [**sufficiency of the evidence; possession of cocaine with intent to deliver**] There was substantial evidence to support appellant's conviction. [**motion for mistrial**] The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon two interruptions in the trial that were caused by an illness suffered by defense counsel. [**lay opinion testimony**] The trial court did not abuse its discretion when it permitted a law enforcement official to render a lay opinion that the amount of money and the way it was found on appellant at the time of his arrest were consistent with drug sales. (Glover, D.; CACR 11-857; 5-2-12; Glover, D.)

Brown v. State, 2012 Ark. App. 314 [**waiver of right to counsel**] The trial court's conclusion that appellant waived his right to counsel was clearly against the preponderance of the evidence. (Clawson, C.; CACR 11-535; 5-2-12; Martin, D.)

Goldsberry v. State, 2012 Ark. App. 319 [**jury instructions**] Where a defendant relies on the defense of complete denial, there is no rational basis for giving instructions on lesser-included offenses, and a trial court is correct to refuse such instructions. [**admission of evidence**] The trial court did not abuse its discretion by admitting into evidence testimony about appellant's suicide attempt. (Sims, B.; CACR 10-680; 5-2-12; Brown, W.)

State v. Martin, 2012 Ark. 191 [**expungement**] The circuit court erred in ruling that Ark. Code Ann. § 5-10-105 provided authority for the sealing of appellant's record. (Johnson, J.; CR 11-1232; 5-3-12; Goodson, C.)

Earl v. State, 2012 Ark. 189 [**Rule 37**] Joint representation is not per se violative of the constitutional guarantees of effective assistance of counsel. Based upon the facts in appellant's case, the trial court did not have a duty to inquire into the propriety of trial counsel's joint representation of appellant and his girlfriend. (Edwards, R.; CR 11-7; 5-3-12; Danielson, P.)

Arter v. State, 2012 Ark. App. 327 [**jurisdiction; revocation**] If a court places a defendant on probation conditioned upon his making restitution, and the defendant has not satisfactorily made all of his payments when the probationary period has ended, the court may continue to assert jurisdiction over the defendant. (Cottrell, G.; CACR 11-959; 5-9-12; Gladwin, R.)

Howerton v. State, 2012 Ark. App. 331 [**admission of evidence**] The trial court did not abuse its discretion when it admitted transcripts from on-line chats into evidence in the sentencing phase of appellant's trial because the evidence was relevant and was more probative than prejudicial. The trial court did not abuse its discretion when it admitted into evidence a presentencing report that contained personal opinions from a probation officer. (Clinger, D.; CACR 11-646; 5-9-12; Wynne, R.)

Williams v. State, 2012 Ark. App. 337 [**motion to suppress**] The trial court did not err in denying appellant's motion to suppress because the evidence that he sought to suppress was discovered by law enforcement after appellant abandoned it and was not the "fruit" of a search or seizure. (Culpepper, D.; CACR 11-1028; 5-9-12; Hoofman, C.)

Scott v. State, 2012 Ark. 199 [**Rule 37**] The trial court did not err by denying appellant's Rule 37.1 petition. (Storey, W.; CR 11-689; 5-10-12; Corbin, D.)

Laswell v. State, 2012 Ark. 201 [**sufficiency of the evidence; capital murder; aggravated robbery**] There was substantial evidence to support appellant's convictions. [**admission of evidence**] The trial court did not abuse its discretion when it admitted certain testimony regarding appellant's character because the evidence was independently relevant to illustrate that appellant had the intent, motive, and state of mind to commit murder, and because its probative value was not outweighed by the danger of unfair prejudice. Because appellant did not assert an insanity defense, expert testimony regarding appellant's ability to conform his conduct to the requirements of the law would have been irrelevant and could have confused a jury. Thus, the trial court properly excluded such testimony. (Green, R.; CR 11-940; 5-10-12; Danielson, P.)

State v. Harrison, 2012 Ark. 198 [**Rule 37**] Appellant's trial counsel was ineffective for failing to discover the criminal record of an eyewitness and for failing to use the knowledge of that criminal record to investigate and develop a theory of defense implicating the eyewitness as the individual who committed the crime for which appellant was charged. Accordingly, the trial court properly granted appellant's petition for postconviction relief. (Humphrey, M.; CR 10-638; 5-10-12; Corbin, D.)

Barrow v. State, 2012 Ark. 197 [**Rule 37**] The circuit court had jurisdiction to consider appellant's petition for postconviction relief. (Reynolds, D.; CR 11-621; 5-10-12; Hannah, J.)

Johnson v. State, 2012 Ark. 212 [**jurisdiction; parole**] The circuit court did not have jurisdiction to determine whether the Arkansas Department of Correction should apply certain statutory provisions when calculating appellant's parole eligibility date. (Dennis, J.; CR 11-736; 5-17-12; Brown, R.)

Nickelson v. State, 2012 Ark. App. 363 [**sufficiency of the evidence; aggravated robbery**] There was substantial evidence to support appellant's conviction. [**jury instructions**] Generally, an instruction for the lesser-included offense of robbery is required when a defendant is charged

with aggravated robbery. However, when the evidence is so conclusive as to show that only aggravated robbery could have taken place, it is not error for the trial court to refuse to give the lesser-included instruction on robbery. (Pope, S.; CACR 11-1079; 5-23-12; Hoofman, C.)

Tornavacca v. State, 2012 Ark. 224 [**drug court; due process**] Appellant's due-process claim, which stemmed from his removal from a drug-court program, was properly raised in a Rule 37 proceeding. (Williams, C.; CR 11-702; 5-24-12; Goodson, C.)

Chunestudy v. State, 2012 Ark. 222 [**404(b); pedophile exception**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b), it allowed the State to introduce evidence of other sexual activity with the victim that occurred prior and subsequent to the offense dates for which he was charged. [**discovery**] It was not an abuse of discretion for the circuit court to allow a witness, who was added to the witness list three days before trial, to testify. (Philhours, R.; CR 11-1161; 5-24-12; Danielson, P.)

White v. State, 2012 Ark. 221 [**illegal sentence; terms of incarceration**] The trial court lacked the authority to order appellant to complete a sex-offender treatment program while incarcerated. (Clinger, D.; CR 11-872; 5-24-12; Gunter, J.)

Rowe v. Hobbs, 2012 Ark. 244 [**Act 1782 of 2001**] Neither Ark. Code Ann. § 29-30-162 nor Ark. Code Ann. § 29-30-163, which effectively eliminated the sunset provisions of the "seventy-percent rule," were unconstitutionally repealed by Act 1782 of 2001. (Fox, T.; 11-256; 5-31-12; Gunter, J.)

Mitchell v. State, 2012 Ark. 242 [**Rule 37**] Conclusory statements that counsel was ineffective will not sustain a Rule 37 petition. (Henry, D.; CR 11-1204; 5-31-12; Hannah, J.)

Charland v. State, 2012 Ark. 246 [**Rule 37**] The circuit court did not err in denying appellant's postconviction petition without holding an evidentiary hearing. (Crow, K.; CR 11-1051; 5-31-12; Baker, K.)

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

Green v. State, 2012 Ark. App. 315 (aggravated assault; first-degree terroristic threatening) CACR 11-1111; 5-2-12; Martin, D.

Hancock v. State, 2012 Ark. App. 338 (felon in possession of a firearm) CACR 11-964; 5-9-12; Brown, W.

Davis v. State, 2012 Ark. App. 362 (committing a terroristic act) CACR 11-1242; 5-23-12; Martin, D.

Smith v. State, 2012 Ark. App. 359 (first-degree murder) CACR 11-1292; 5-23-12; Glover, D. 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:

Dees v. State, 2012 Ark. App. 345 (suspended sentence) CACR 11-815; 5-16-12; Gruber, R.

Morgan v. State, 2012 Ark. App. 357 (probation) CACR 11-1211; 5-23-12; Wynne, R.

Reyes v. State, 2012 Ark. App. 358 (suspended sentence) CACR 11-568; 5-23-12; Gruber, R.

Leflore v. State, 2012 Ark. App. 355 (probation) CACR 11-685; 5-23-12; Pittman, J.

Mister v. State, 2012 Ark. App. 375 (suspended sentence) CACR 11-860; 5-30-12; Hoofman, C.

CIVIL

Fulton v. Beacon Ins. Co., 2012 Ark. App. 320 [**insurance**] Policy was not ambiguous; owner failed to take steps required by policy to prevent pipes from freezing; therefore, he was not entitled to recover under the policy. (Laser, D.; CA 11-559; 5-2-12; Brown, W.)

Feagin v. Jackson, 2012 Ark. App. 306 [**unjust enrichment**] In suit arising out of a failed romantic relationship, lot owned by couple jointly was order sold and proceeds divided equally. Woman sought under an unjust enrichment theory to recover 100% of the proceeds because she paid for lot and man never built house on it. However, under facts of case, trial court's ruling to divide in half was not unfair. (Hughes, T.; CA 11-1135; 5-2-12; Robbins, J.)

Watkins v. Ark. Elder Outreach, Inc., 2012 Ark. App. 301 [**charitable immunity**] Summary judgment on charitable immunity defense was not proper as factual questions remained on whether entity is in fact a nonprofit, charitable organization. [**negligence**] Claim against nursing home administrator was properly dismissed because there was no proof that he proximately cause the injury. [**Prof. Conduct Rule 4.2**] Attorney should not be allowed to have ex parte communications with current and former employees of the corporate defendant. (Hill, V.; CA 11-767; 5-2-12; Vaught, L.)

Tripcony v. Ark. School for Deaf, 2012 Ark. 188 [**employee termination**] Circuit court lacked subject-matter jurisdiction to conduct a judicial review of the termination of a state employee. Discharge of an employee is not an adjudication but an administrative decision. Public policy exception applicable to wrongful termination cases was not implicated in this situation. (Piazza, C.; SC 11-899; 5-3-12; Brown, R.)

Cass v. Ark. DHS, 2012 Ark. App. 323 [**admin. app.**] Court affirmed agency's decision that individual was not physically disabled and is not entitled to Medicaid benefits. (Scott, J. ; CA 11-1283; 5-9-12; Vaught, L.)

Stevens v. Stair, 2012 Ark. App. 333 [**boundary line**] Court did not err in interpreting legal descriptions in deeds. The acreage in the deeds must yield to the property descriptions in the deeds, which include the fence as the dividing line. (Weaver, T. ; CA 11-1041; 5-9-12; Gruber, R.)

Centerpoint Entergy Co. v. Green, 2012 Ark. App. 326 [**eminent domain**] Court did not consider lost building opportunity, that is, value of potential subdivision lots when no subdivision was in existence at the time of the taking, or where it could not be determined with any degree of certainty that a subdivision would be platted in the near future. Issue raised on appeal about appraiser being an expert was without merit as no objection was made at trial over qualifications. (Wright, J. ; CA 11-1197; 5-9-12; Pittman, J.)

The Entertainer, Inc. v. Duffy, 2012 Ark. 202 [**new trial**] Party was not entitled to a new trial based on contention that its lawyer had abandoned it because client failed to present evidence that it kept in contact with attorney or attempted to keep abreast of the proceedings. [**affirmative defense**] Defendant did not raise defense of charitable and statutory immunity in its pleadings. It is not jurisdictional. [**punitive damages**] Punitive damages assessed by the court as opposed to the jury were supported by the evidence and not clearly erroneous. (Philhours, R.; SC 11-766; 5-10-12; Baker, K.)

D & D Parks Constr. v. Martin, 2012 Ark. App. 343 [**pleading/evidence**] Defendant moved to dismiss complaint pursuant to Rule 10 (d) because plaintiff did not attach copy of contract to complaint. Under facts of case, motion was properly denied because of delay, waiver and no showing of prejudice. In bench trial of case alleging defective construction, court's finding of liability and assessment of damages were supported by evidence. (Putman, J. ; CA 11-1150; 5-16-12; Gladwin, R.)

Metro Empire Land Assoc. v. Arlands, LLC, 2012 Ark. App. 350 [**summary judgment**] There is no requirement that a statement of undisputed facts accompany a summary judgment motion. [**notice/tax sale**] Due process does not require the Commissioner of State Lands to investigate every signature on return receipts to insure that signature is in fact the property owner. Since there was evidence that the certified mail was received, there was nothing to trigger requiring evidence of actual notice. (Williams, L. ; CA 11-319; 5-16-12; Hoofman, C.)

Robinson v. Villines, 2012 Ark. 211 [**final order/Rule 54 certification**] Order is not final because order being appealed contemplates further action. Rule 54 (b) certificate did not include specific findings of any danger of hardship or injustice that could be alleviated by an immediate appeal and does not detail facts that establish such a hardship or injustice is likely, and it does not satisfy the requirements of Rule 54. (Fox, T.; SC 11-1057; 5-17-12; Corbin, D.)

Boyajian v. State, 2012 Ark. 210 [**ADTPA**] Deceptive Practices Act is inapplicable to an attorney collecting debts in the course of the practice of law. (Fox, T.; SC 11-1013; 5-17-12; Hannah, J.)

Holliman, et al. v. Johnson, et al., 2012 Ark. App. 354 [**Ark.R.Civ.P, Rule 12(b)**] In their initial responsive pleading, the defendants pled that appellants' complaint should be dismissed "pursuant to Rule 12(b) of the Arkansas Rules of Civil Procedure." They then relied upon 12(b)(5) & (6), insufficient process and insufficient service of process, without specifically pleading them. Their pleading did not preserve the right to assert them later. Under Rule 12(h)(1), they waived these defenses. General pleading for dismissal of complaint pursuant to Rule 12 (b), without further specificity, fails to preserve specific Rule 12 (b) defenses. Rules of procedure require specificity in pleading. (Weaver, T.; No. CA 11-1205; 5-23-12; Vaught, L.)

Lake Village Healthcare Center, LLC v. Hatchett, 2012 Ark. 223 [**sanctions/discovery violations**] Trial judge's striking of answer because of discovery violations concerning emails was not an abuse of discretion under facts of this case. (Gibson, B.; SC 11-458; 5-24-12; Baker, K.)

US Fuel International, Inc. v. Murphy Oil, Inc. 2012 Ark. App. 367 [**guaranty**] There was no novation to the guaranty obligation. A response to a summary judgment filed by one party does not inure to the benefit of another party who did not timely file a response. (Elmore, B. ; CA 11-1288; 5-30-12; Hart, J.)

Agracat, Inc. v. AFS-NWA, LLC 2012 Ark. App. 372 [**fiduciary duty/instructions**] Objection to jury instruction was not specific enough to preserve the issue under Rule 51. The objection must tell the court what is wrong with the instruction. (Glover, D. ; CA 11-714; 5-30-12; Lindsay, M.)

Beck v. Inter City Transportation, Inc. 2012 Ark. App. 370 [**corporate charter**] Ark. Code Ann. 26-54-112 provide that upon reinstatement of a lapsed corporate charter, the reinstatement is retroactive to the time of forfeiture. A party with a claim against the corporation cannot claim that its rights are violated by the reinstatement. [**fees**] Ark. Code Ann. 16-22-308 makes an award of attorney's fees applicable to a rescission case. (Pierce, M. ; CA 11-846; 5-30-12; Gruber, R.)

Fatpipe, Inc. v. State of Ark. 2012 Ark. 248 [**Admin. Procedure Act**] Trial Court did not have subject matter jurisdiction over claim by company over failure to be awarded contract with state. Basis of agency's action was administrative – not adjudicative – consequently, there is no right to judicial review. (Pierce, M.; SC 11-1213; 5-31-12; Goodson, C.)

Ground Zero Constr., Inc. v. Walnut Creek, LLC 2012 Ark. 243 [**materialmen's lien**] Notice did not comply with statutory 75-day lien notice because it did not contain a general description of the labor, service, or materials furnished. The notice stated "in connection with labor and materials provided," which was not sufficient under the statute. (Scott, J.; SC 12-15; 5-31-12; Brown, R.)

Scottsdale Ins. Co. v. Morrow Land Valley Co., 2012 Ark. 247 [**choice of law**] Under choice of law analysis, Arkansas, not Tennessee, had the most significant relationship to the issues in the case involving the interpretation of an insurance contract. Contract was found to be ambiguous, and insurer was held to have a duty to defend. Under the pollution exclusion, it was possible that the injury may fall within the policy's coverage. (Gunn, M.; SC 11-905; 5-31-12; Baker, K.)

DOMESTIC RELATIONS

Hudson v. Hudson, 2012 Ark. App. 308 [**change in custody**] The Court of Appeals affirmed the circuit court's finding that no significant change in circumstances affecting the child's best interest or jeopardizing her well being had occurred to justify a change in custody from the mother to the father. (Webb, G.; No. CA 11-1045; 5-2-12; Gruber, R.)

McCormick v. McCormick, 2012 Ark. App. 318 [**divorce–property division**] The appellant claimed that the circuit court erred in dividing both marital and nonmarital property unequally. The Court of Appeals outlined the disputed property, both real and personal, as well as all issues the appellant raised. The court noted that the tracing of money or property into different forms is a tool, a means to an end, but not an end in itself. The fact that one spouse made contributions to property does not require that those contributions be recognized in the division of that property at divorce. In addition, the circuit court found that the appellant had unclean hands, a finding of fact that supported the unequal division. While not a statutory factor for the court to consider in dividing marital property unequally, unclean hands may provide a reason for the unequal division. The decision was affirmed. (Harkey, A.; No. CA 11-1049; 5-2-12; Hoofman, C.)

McKenzie v. Pierce, 2012 Ark. 190 [**final order; writ of certiorari**] The appellant's wife and her former husband, the appellee, were parties to a change of custody action involving their minor child. Among the allegations were that the marriage of appellant and his wife was unstable, that appellant was depressed, and that appellant lacked stability. Based upon those contentions, the appellee subpoenaed appellant's health-care providers for his medical records. Appellant filed a motion to quash based upon him not being a party to the action. He said that issuing them would result in a violation of his state and federal rights. The Supreme Court found that because the circuit court's denial of a motion to quash and a motion for Rule 11 sanctions was not a final order, it had no jurisdiction to hear the case as an appeal, but that it could hear it as a petition for extraordinary relief under the original jurisdiction of the court. Another problem: the appellant had no right to appeal because he was not a party to the custody case. The court found that the appellant's medical records could not be subpoenaed as he was not a party to the case. Because a direct appeal would not lie, the writ of certiorari was granted. The case was remanded for consideration of whether Rule 11 sanctions are appropriate. (Story, B.; No. SC 11-933; 5-3-12; Baker, K.)

Goslee v. Goslee, 2012 Ark. App. 332 [**military-disability payments**] When the parties divorced, they entered into a child-custody and property-settlement agreement, under which the appellee husband agreed to pay the appellant one-half of his monthly pension for as long as he draws it. At the time of the divorce, the appellee was receiving a monthly military-disability payment, which he had been receiving since he left the military. He paid the appellant one-half of this payment, in addition to child support, for nine months, after which he paid only child support. She filed a motion for contempt. After a hearing the trial court found that the appellant was not entitled to one-half his medical disability because it was not a “pension.” The court also found that the Uniformed Services Former Spouses’ Protection Act (FSPA) does not empower the states to treat such disability payments as divisible property. The trial court’s decision was based upon two grounds, and the appellant addressed only one, in which case the court will affirm without addressing the merits of either. The decision was affirmed. (Cook, V.; No CA 11-1139; 5-9-12; Wynne, R.)

Baldwin v. Baldwin, 2012 Ark. App. 334 [**alimony**] In the divorce decree, the trial court ordered the appellant husband to continue to provide the appellee wife with her current health insurance for three years after the divorce decree and to pay one-half of her medical expenses for the same period of time. Her testimony at the hearing was that she could not obtain medical insurance on her own until she was in remission from her previous bout with cancer for five years. Both parties agreed that the order to pay health insurance and non-covered medical expenses was a form of alimony. The Court of Appeals used that standard in its review, and found that the trial court considered the proper factors and did not abuse its discretion. (Huckabee, S.; No. CA 11-1280; 5-9-12; Glover, D.)

Clowers v. Stickel, 2012 Ark. App. 346 [**divorce decree—res judicata; travel expenses; attorney fees**] The Court of Appeals affirmed the circuit court’s denial of the appellant’s motion to modify the divorce decree based upon res judicata. The court reversed and remanded the award of attorney’s fees to the appellee for the trial court to consider based upon the factors set out in *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). The court reversed the trial court’s award of travel expenses to the appellee, noting that it found no statutory authority for the award. (Storey, W.; No. CA 11-1306; 5-16-12; Glover, D.)

Wilson v. Powers, 2012 Ark. App. 351 [**change of custody; modification of child support; visitation**] The Court of Appeals affirmed the circuit court’s denial of a change of custody, which the trial court based on its finding that the appellant had failed to demonstrate a material change in circumstances. The court could not address the trial court’s decision on the amount of child support and its effective date because the appellant did not amend his notice of appeal to include a denied posttrial motion on the subject. Finally, the court affirmed the trial court’s decision that all airline tickets for the children’s visitation must be purchased as round-trip tickets to airports within a one hundred-mile radius of the parties’ residences. The court found the trial court’s reasoning thoughtful and based upon the best interests of the children, so the court did not err in setting visitation requirements. (Williams, C.; No. CA 11-883; 5-16-12; Hoofman, C.)

Fischer v. Smith, 2012 Ark. App. 342 [**relocation**] In this relocation decision, the Court of Appeals held that the trial court erred by shifting the burden of proof to the custodial parent to prove some advantage in her relocation with her minor child, and it reversed and remanded for further proceedings. (Powell, R.; No. CA 11-982; 5-16-12; Hart, J.)

Vander Heyden v. Vander Heyden, 2012 Ark. App. 356 [**change of custody; relocation**] The Court of Appeals held that the trial court did not err in finding that the appellant failed to show a material change of circumstances in appellee's ability to manage her finances since the entry of the decree of separate maintenance, or a material change in circumstances related to one of their children's education. The appellant also failed to meet his burden to prove that the trial court erred in allowing the children to relocate with the appellee to Canada. The court noted the trial court's thorough consideration of each of the *Hollandsworth* factors in its 120-point, seventeen-page decree. The decision was affirmed. (Smith, V.; No CA 11-1234; 5-23-12; Gladwin, R.)

Metz v. Steele, 2012 Ark. App. 373 [**change of custody—material change in circumstances; relocation**] The trial court denied the appellant mother's request to relocate with the child to another state and granted the appellee father's request to change custody, finding a material change in circumstances and that it was in the best interest of the child. The Court of Appeals found that no material change in circumstances had occurred, and reversed without reaching the issue of best interest. On the relocation issue, the court found that the trial court erred by shifting the burden of proof to the custodial parent, and reversed on that issue, as well. The case was remanded for further proceedings consistent with the opinion. (McCain, M.; No. CA 11-942; 5-30-12; Abramson, R.)

PROBATE

Marcellus v. Mays, 2012 Ark. App. 304 [**guardianship**] The circuit court's denial of the paternal grandmother's petition for guardianship of her grandson was affirmed. While she presented "considerable evidence about...[the mother's]...shortcomings..." the evidence was largely controverted. The decision was not clearly against the preponderance of the evidence. (Sullivan, T.; No. CA 11-1201; 5-2-12; Hart, J.)

D.L.R. v. N.K. and C.K., 2012 Ark. App. 316 [**adoption**] The appellees' petition for the adoption of appellant's child was granted upon the circuit court's finding that D.L.R. was a parent not having custody and that he was unreasonably withholding his consent to the adoption. The appellant's argument on appeal concerned whether the circuit court erred in finding that he was a parent not having custody. The court quoted a substantial portion of the circuit court's "thorough and well-stated decision" and affirmed the granting of the adoption. (Boling, L.; No. CA 11-950; 5-2-12; Martin, D.)

Rodgers v. Rodgers, et al., 2012 Ark. 200 [**ademption**] In adopting “the intention theory” as the law in Arkansas, the Supreme Court held “that if property that is the subject of a specific devise is sold by an attorney in fact at a time when the testator is incompetent, and the testator does not regain testamentary capacity before his or her death, an ademption of the specific devise does not take place as to the unexpended, identifiable proceeds of the sale.” The court further held “that Ark. Code Ann. § 28-68-202 does not preclude such a holding, because while the estate is unquestionably bound by the sale of the timber deeds by the attorney in fact”...[the provision]...”is ‘silent on the issue of who is entitled to the proceeds of the sale where the principal has made a specific bequest in a will and where identifiable proceeds are found in the estate.’” (Singleton, H.; No. SC 11-1020; 5-10-12; Gunter, J.)

In the Matter of the Guardianship of S.H., et al. v. Herrington, et al., 2012 Ark. 245 [**guardianship–termination; discovery–Ark.R.Civ.P 35(a); evidence–hearsay**] The paternal grandparents had guardianship of their grandchild with the natural parents’ permission. The child’s mother filed a petition to terminate the guardianship, which the trial court denied. In this case of first impression, the Supreme Court adopted the majority view, holding that “parents who have not been found unfit do not relinquish their fundamental liberty interest in raising their children by consenting to a guardianship and, thus, they are entitled to the *Troxel* presumption in a proceeding to terminate that guardianship....[T]his conclusion best comports with the constitutional right of parents, the temporal nature of guardianships, and public policy.” Because no weight was given to the mother’s decision to terminate despite the presumption that she acts in her child’s best interest, the court held that the application of Ark. Code Ann. § 28-65-401 in this instance violated her constitutional rights. The court said that “a natural parent who has not been deemed unfit is entitled to the presumption that he or she is acting in the child’s best interest, even after consenting to a guardianship.” The court said that when a parent who has not been found unfit and who has consented to a guardianship attempts to terminate that guardianship, that parent must provide evidence that the guardianship is no longer necessary. Then the guardians have the burden of rebutting the presumption that the termination of the guardianship is in the child’s best interests. The court reversed and remanded. The court also found that the circuit court abused its discretion by not applying the correct legal standard in evaluating the motion for psychological evaluation under Rule 35. Finally, the appellate Court could not consider the hearsay objections because no timely objections were made at the hearing. (Henry, D.; No. SC 11-1107; 5-31-12; Gunter, J.)

EIGHTH CIRCUIT

Graham v. Hartford Life Insurance Co. [**insurance**] In an action to recover under an accidental death and dismemberment policy, Arkansas’s statute of limitations for contract actions applied, and the district court erred in applying the shorter limitations period contained in the policy. (E.D. Ark.; No. 11-2070; 5-11-12)

U.S. SUPREME COURT

Blueford v. Arkansas [**double jeopardy**] The State of Arkansas charged petitioner Alex Blueford with capital murder. Before the start of deliberations, the trial court instructed the jury to consider the offenses as follows: “If you have a reasonable doubt of the defendant’s guilt on the charge of capital murder, you will consider the charge of murder in the first degree. . . . If you have a reasonable doubt of the defendant’s guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter. . . . If you have a reasonable doubt of the defendant’s guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.” The court also presented the jury with a set of verdict forms, which allowed the jury either to convict Blueford of one of the charged offenses, or to acquit him of all of them. Acquitting on some but not others was not an option. After deliberating for a few hours, the jury reported that it could not reach a verdict. The court inquired about the jury’s progress on each offense. The foreperson disclosed that the jury was unanimous against guilt on the charges of capital murder and first-degree murder, was deadlocked on manslaughter, and had not voted on negligent homicide. The court told the jury to continue to deliberate. The jury did so but still could not reach a verdict, and the court declared a mistrial. When the State subsequently sought to retry Blueford, he moved to dismiss the capital and first-degree murder charges on double jeopardy grounds. The trial court denied the motion, and the Supreme Court of Arkansas affirmed.

Held: The Double Jeopardy Clause does not bar retrying Blueford on charges of capital murder and first-degree murder.

(a) The jury did not acquit Blueford of capital or first-degree murder. Blueford contends that the foreperson’s report that the jury was unanimous against guilt on the murder offenses represented a resolution of some or all of the elements of those offenses in his favor. But the report was not a final resolution of anything. When the foreperson told the court how the jury had voted on each offense, the jury’s deliberations had not yet concluded. The jurors in fact went back to the jury room to deliberate further, and nothing in the court’s instructions prohibited them from reconsidering their votes on capital and first-degree murder as deliberations continued. The foreperson’s report prior to the end of deliberations therefore lacked the finality necessary to amount to an acquittal on those offenses.

(b) The trial court’s declaration of a mistrial was not improper. A trial can be discontinued without barring a subsequent one for the same offense when “particular circumstances manifest a necessity” to declare a mistrial. This Court has never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse, let alone to consider giving the jury new options for a verdict. As permitted under Arkansas law, the jury’s options in this case were limited to two: either convict on one of the offenses, or acquit on all. The trial court did not abuse its discretion by refusing to add another option—that of acquitting on some offenses but not others. (May 24, 2012)