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Recent Developments

RECENT DEVELOPMENTS

DOMESTIC RELATIONS: Effect of Agreement of Parties Relieving Adoptive Father of Support of Children

In *Bingham v. Bingham, 52 Okla. B.J. 1102 (1981)*, the court of appeals upheld the modification of a divorce decree, initiating child support for two minor adopted children. In the original divorce decree, the district court incorporated a private agreement between the parents and gave custody to the mother while the father "*is excused from the payment of child support . . . and . . . is without visitation rights to said minor children.*"[1] When the mother requested modification of the decree ten months later, the court found a "change of conditions" sufficient to order the father to begin paying support.

In finding the private "contract" voidable as against public policy, and its incorporation in the decree unenforceable, the appellate court noted that the district court's acceptance of it had the practical effect of (1) terminating the parental rights of the father, without strict conformance to statutory requirements of notice and hearing, and absent the presentation of evidence resulting in a finding by the court that termination was in the best interests of the children;[2] and (2) directly violating the statutory duty of the court to provide the minor children with the financial and parental support to which they are entitled, a duty that cannot be set aside by agreement of the parties.

The court emphasized that the state's overwhelming interest in protecting and providing for children is reflected in the strict statutory requirements regulating the creation of parental responsibility through adoption,[3] and such a decree relegates adoption to a second-class parental relationship.

While recognizing the statutory standard of proof of change of circumstances for modification of the amount of child support in a divorce decree, the court held, in this limited circumstance, that where no support is provided in the divorce decree this constitutes error on the part of the trial court,[4] and no change of circumstance need be shown to invoke the father's statutory obligation to support his children, whether natural or adopted.[5]

DOMESTIC RELATIONS: Retroactive Modification of Divorce Decree

In *McNeal v. Robinson*,[1] a father appealed a contempt citation and judgment for arrearages. He had failed to pay child support for the time the

[1] Bingham v. Bingham, 52 OKLA. B.J. 1102, 1102 (1981) (emphasis by the court).
[2] 10 OKLA. STAT. § 1130 (Supp. 1980).
[3] 10 OKLA. STAT. §§ 60.1 -60.23 (Supp. 1980).
[4] 12 OKLA. STAT. § 1277 (Supp. 1980).
[5] 10 OKLA. STAT. § 4 (Supp. 1980).
[1] 52 OKLA B.J. 1023 (May 2, 1981).

children were in his care. The Oklahoma Supreme Court recognized that a divorce decree may not be modified without the court's consent,[2] reversed the trial court on the issue of arrearages, and affirmed the contempt citation.

Retroactive modification allows the parties to a divorce decree to modify the decree without court approval. The court in *McNeal*, while maintaining that Oklahoma does not permit all such modifications,[3] found that it needed a more flexible rule. Parents obligated to pay child support will not, as a matter of law, automatically receive credit for expenditures not in compliance with the divorce decree. Credit may be allowed, however, when the parent who is obligated to pay keeps the children in his care, with the consent of the custodial parent.

Should the custodial parent continue to incur expenses of child maintenance for continuing custody of the children, then the obligor-parent would be liable to the custodial parent for such expenses, but not to exceed the amount of child support set out in the original divorce decree. The court will decide on a case-by-case basis whether credit will be allowed.

EMPLOYMENT DISCRIMINATION: Gender Requirements for Labor and Delivery Room Nurses

In *Backus v. Baptist Medical Center*,[1] a federal district court held that a hospital did not violate Title VII of the Civil Rights Act of 1964[2] by requiring labor and delivery nurses to be female and refusing to hire a male nurse for a duty position in the obstetrical and gynecology ward. The Court ruled that the gender requirement was a bona fide occupational qualification[3] justified by the unreasonable intrusion into the privacy of patients that would be caused by allowing unselected male nurses continued intimate contact with female patients.

The plaintiff graduated from nursing school in 1978 and immediately sought employment as a fulltime registered nurse in the obstetrical and gynecology department. The hospital denied him employment, explaining that it did not employ male nurses in that ward because of "the concerns of [its] female patients for privacy and personal dignity which makes it impossible for a male employee to perform the duties of the position effectively."[4]

The district court first held that the hospital had standing to raise the constitutional right of privacy, finding that patient dissatisfaction resulting in

[2] Craig v. Collins, 285 P.2d 859 (Okla. 1955).

[3] 52 OKLA. B.J. 1023 (May 2, 1981).

[1] 510 F. Supp. 1191 (E.D. Ark. 1981).

[2] 42 U.S.C. §§ 2000e-2000e-17 (1964).

[3] 42 §§ 2000e-2(a)(1) permits sexual differentiation in certain activities if sex is a bona fide occupational qualification "reasonably necessary to the normal operation of that particular business or enterprise."

[4] 510 F. Supp. 1191, 1192 (E.D. Ark. 1981).

economic loss to the hospital gave it a personal stake in the matter[5] and that the doctor-patient, hospital-patient relationship permitted the hospital to raise the issue on behalf of its patients.[6]

Reaching the constitutional issue, the court recognized that medical care of the human body involved important privacy rights protected by the Constitution.[7] It found that an exclusion of males in this particular job was justified by the right of the hospital to protect female patients from unwanted invasion of privacy by an "unselected" male nurse.[8] The court focused on the "deep seated feeling of personal privacy involving one's own genital area,"[9] and the widely held belief that "[h]aving one's body inspected by members of the opposite sex may invade that individual's most fundamental privacy right, the right of privacy of one's own body."[10] Thus, the court stated, "[i]n this area of the law, the courts focus not on the employee's competence, but rather on the obvious bodily intrusion which will result."[11] It rejected any analogy between a male nurse and a male obstetrician/gynecologist by finding significant the fact that the doctor is selected while the nurse is not. The court drew further support from the multitude of cases dealing with an inmate's constitutional right to privacy. These cases hold that a correctional employer may exclude a member of one sex from a job where there will be continued contact with prisoners while they are engaged in sensitive acts.[12]

JUDGMENTS: Effect of a Modification of the Original Judgment on the Dormant Judgment Statute

In *Chandler-Frates & Reitz v. Kostich, 52 Okla. B.J. 1614 (July 4, 1981)*, the Oklahoma Supreme Court held that where a modification of an original judgment is a mere clerical correction, the modification does not affect the running of the dormancy statute.[1]

The issue arose out of a monetary judgment received by Chandler-Frates against Kostich. The judgment was awarded to Chandler-Frates on

[5] Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977).

[6] Eisenstadt v. Baird, 405 U.S. 438 (1971); Griswold v. Connecticut, 381 U.S. 479 (1964).

[7] York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964).

[8] 510 F. Supp. 1191, 1195 (E.D. Ark. 1981).

[9] A. LARSON, EMPLOYMENT DISCRIMINATION—SEX § 14.30 (3d ed. 1980).

[10] City of Philadelphia v. Pennsylvania Human Relations Comm'n, 300 A.2d 97 (Pa. 1973).

[11] 510 F. Supp. 1191, 1195 (E.D. Ark. 1981).

[12] *See* Forts v. Ward, 434 F. Supp. 946 (S.D.N.Y. 1977).

[1] The dormancy statute is 12 OKLA. STAT. § 735 (1971). The statute provides that a judgment is effective for five years, and unless the judgment is executed upon during the five years, the law will treat the judgment as being satisfied. *See* Ashur v. McCreey, 150 Okla. 111, 300 P. 767 (1931).

January 5, 1972, for a set amount with 10 percent prejudgment interest from August 1, 1968. In August, 1976, the trial court, upon the request of the appellant, Kostich, modified the order by setting the prejudgment interest at 6 percent, the rate specified by statute.[2]

The appellee, Chandler-Frates, on February 16, 1977, sought to execute upon the judgment. The appellant filed a motion to quash and plea to jurisdiction, asserting that the five-year limitation of the dormancy statute precluded execution. The appellee responded that because the original judgment had been modified the relevant date for computing the dormancy statute was the date of the modification instead of the date of the original judgment. The trial court denied appellant's motion.

The supreme court indicated that the determinative issue as to what is the relevant date in computing the dormancy statute was whether the modification of the judgment was a vacation of a void judgment and entry of a new judgment *or* merely a correction of the original journal entry. If the modification is a new judgment, the dormancy statute runs from the date of the new judgment, but if the modification is only a correction of the journal entry, the original judgment is still valid and the dormancy statute runs from the date of the original judgment.

The court found that the modification was only a correction of the journal entry because although the trial court had jurisdiction to award prejudgment interest, it lacked authority to award more than the statutory rate of 6 percent specified by statute. Because the rate of interest is a matter of law, the trial court did not have to set out the interest rate in the order. Therefore, the original judgment was still valid and the date of that original judgment would be used in computing the running of the dormancy statute.

MALICIOUS PROSECUTION: Effect of Prior Settlement By Less Than All Defendants

In a case of first impression, the Oklahoma Supreme Court held that a settlement by fewer than all the defendants in a suit does not preclude the other non-settling defendants from bringing an action for malicious prosecution. In *Young v. First State Bank, 52 Okla. B.J. 1089 (May 5, 1981)*, the plaintiff in the malicious prosecution suit, Young, alleged that the defendant Bank had previously filed a suit unjustifiably naming him as one of three defendants in a suit to recover on three notes and to foreclose a real estate mortgage. The defendant Bank alleged that the suit was barred because it had dismissed the suit with prejudice against all three defendants as a result of settlement with the other two defendants. The Bank also argued that the dismissal was tantamount to an admission by the defendants that probable

[2] 23 OKLA. STAT. § 266 (1971).

cause had existed to bring the original suit in that the defendants procured the settlement by the payment of money.

The court agreed that where there was one single defendant, or where all defendants took part in the settlement process, the settlement would bar a suit for malicious prosecution.[1] However, in this case, because plaintiff Young had not taken part in or consented to the settlement, it cannot be said that he made an admission as to probable cause. The mere fact that one defendant admits that he owes money to the plaintiff by making a settlement in no way establishes that the other defendants were not wrongfully sued.

PARENT AND CHILD: Appointed Counsel Not Required for Termination of Parental Rights

In *Lassiter v. Department of Social Services*,[1] the United States Supreme Court held, in a 5-4 decision, that the due process clause does not require the appointment of counsel for an indigent parent in every hearing for termination of parental rights.

In *Lassiter*, the petitioner's minor child was adjudicated neglected because of inadequate medical care, and custody was given to the Department of Social Services in 1975. The following year, Lassiter was convicted of second degree murder and sentenced to twenty-five to forty years in prison. In 1978 the Department of Social Services petitioned the court to terminate the mother's parental rights because she had had no contact with the child in almost three years and had made no progress toward correcting the conditions that led to the child's removal from her custody. No counsel was appointed for Lassiter, an indigent, at the termination hearing in which the court found that termination of parental rights was in the best interest of the child. The appellate court upheld this decision.

The Supreme Court granted certiorari to consider the petitioner's fourteenth amendment claim. The Court emphasized that due process requires the appointment of counsel for an indigent only when the litigant may lose his physical liberty if the litigation is lost, whether the proceedings are civil or criminal[2] and even where a prison term may be brief.[3] As a litigant's interest in personal liberty diminishes, so does his right to appointed counsel.[4]

The Court balanced the private parental right to and desire for "the companionship, care, custody and management of his or her children,"[5] the

[1] Jaffe v. Stone, 18 Cal. 2d 146, 114 P.2d 335 (1941).

[1] 49 U.S.L.W. (U.S. June 2, 1981).

[2] Vitek v. Jones, 445 U.S. 480 (1978) (involuntary transfer to a mental hospital); *In re* Gault, 387 U.S. 1 (1967) (juvenile hearing result might be commitment to an institution); Gideon v. Wainwright, 372 U.S. 335 (1963).

[3] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[4] Gagnon v. Scarpelli, 411 U.S. 778 (1973) (in probation revocation hearing, the decision whether counsel should be appointed is made on case-by-case basis).

[5] Stanley v. Illinois, 405 U.S. 645 (1972).

state's interest in the welfare of the child, as well as in saving judicial time and money, and the risk that the termination procedures used will lead to erroneously depriving an uncounseled parent of his child. Holding that the trial court should make the decision whether due process requires the appointment of counsel for an indigent parent on a case-by-case basis, the Court recognized, with approval, that higher standards than those minimally tolerable under the Constitution have been adopted in many states.

Turning to the facts of this case, the Court held that the trial court did not err in failing to appoint counsel for Lassiter because (1) there were no allegations of neglect or abuse in the petition on which criminal charges could be based; (2) while the Department of Social Services was represented by counsel, there was no expert testimony; (3) there were no troublesome points of law; (4) the weight of the evidence was sufficiently great that lack of counsel could not have made a determinative difference; (5) the absence of counsel did not render the proceedings fundamentally unfair; and (6) Lassiter had expressly declined to appear at the 1975 hearing on the neglect petition.

PROCEDURE: Rendering of the Judgment

In *McCullough v. Safeway Stores, Inc., 52 Okla. B.J. 847 (April 11, 1981)*, the Oklahoma Supreme Court addressed the issue of when a judgment is in fact rendered. *McCullough* involved the plaintiff's appeal from a motion for summary judgment in favor of the defendant. The defendant's motion was filed November 13, 1978, and was granted on February 20, 1979. The trial court ruled solely on the briefs, outside the presence of the parties, and the only record of the ruling was a minute entry and a corresponding entry on the appearance docket. There was no record that any timely notice had been sent to the parties involved in the case. Counsel for both sides were without notice of the ruling until they received the trial judge's letter of April 13, 1979. The plaintiff brought his appeal to the supreme court on May 10, 1979, but it was dismissed because the appeal had not been filed within thirty days after the decision of the trial court.[1] The April 7, 1981, ruling was after rehearing of the motion of dismissal.

The Oklahoma Supreme Court held that when a judge rules on a matter, it cannot be effected by a minute entry nor by an entry on the appearance docket, when those are made out of the presence of the parties. Until a timely notice of the decision has been mailed to the parties who are appearing in the action, no ruling or judgment can be said to have been rendered. The court said that because the plaintiff did not know of the ruling until he received the April 13, 1979, letter, the appeal filed with the court on May 10, 1979, "was brought within thirty days of April 13th."

[1] 12 OKLA. STAT. § 990 (1971): "An appeal to the Supreme Court may be commenced from an appealable disposition . . . within thirty (30) days from the date of the final order on judgment sought to be reviewed."

Justice Simms, concurring in part and dissenting in part, agreed with the result of rehearing but disagreed with the court's reasoning. Justice Simms argued that the mere entry of the judgment was nothing more than a "ministerial act" and not a "rendition of judgment." He stated that the ministerial act of entry of the decision does not begin the time for the commencement of an appeal but is calculated from the day it is rendered, *i.e.*, when the terms of the decision are pronounced by the judge.[2]

Judgment on a matter, when the parties to the action are in absentia and it is made on a day not set aside for pronouncement of the decision, cannot be considered rendered until the parties to the action are notified of the decision. This decision represents a departure from prior Oklahoma cases, which have held a judgment to be final between the parties when it is rendered, regardless of whether it is entered.[3]

[2] 12 OKLA. STAT. app. 2, Rule 1.11(b) (1971): The statute provides: "If judgment on jury verdict is reserved or if the case is tried to the court, judgment is deemed rendered when its terms are completely pronounced by the judge and clearly resolve all the issues in controversy."

[3] Adamson v. Brady, 182 P.2d 748 (Okla. 1947).