RECENT DEVELOPMENTS

Abortion—U.S. District Court for Eastern District of Arkansas Finds Arkansas Ban on Abortions After Detection of a Heartbeat but Prior to Viability Unconstitutional but Severable from the Act's Heartbeat Testing and Disclosure Requirements

Edwards v. Beck,

No. 4:13CV00224 SWW, 2014 WL 1245267 (E.D. Ark. Mar. 14, 2014).

The United States District Court for the Eastern District of Arkansas permanently enjoined enforcement of portions of the Arkansas Human Heartbeat Protection Act (AHHPA), Act 301, 2013 Ark. Acts 1226 (codified at ARK. CODE ANN. §§ 20-16-1301 to -1307 (Supp. 2013)), which would have prohibited abortions from being performed after twelve weeks of gestation once a heartbeat had been detected. *See* ARK. CODE ANN. § 20-16-1304(a). However, the district court severed unconstitutional parts of the Act from the Act's heartbeat testing and disclosure requirements, which remain in effect. *See* ARK. CODE ANN. § 20-16-1303(b)(1), (d)(1)–(2).

Dr. Louis Jerry Edwards and Dr. Tom Tvedten brought suit in federal court challenging the constitutionality of the AHHPA. The AHHPA required physicians to test for a fetal heartbeat before performing an abortion. ARK. CODE ANN. § 20-16-1303(b)(1). If a physician detected a heartbeat, she would have to disclose that information to the mother, along with the fetus's gestational age and the statistical probability of bringing the fetus to term. ARK. CODE ANN. § 20-16-1303(d)(1). The mother would have to sign a form acknowledging such disclosures had been made. ARK. CODE ANN. § 20-16-1303(e).

If a doctor found the gestation period was more than twelve weeks and detected a heartbeat, the AHHPA would prohibit the doctor from performing an abortion, ARK.

CODE ANN. § 20-16-1304(a), except in the case of rape, incest, or in response to a medical emergency. ARK. CODE ANN. § 20-16-1305 (Supp. 2013).

Citing *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-46, 870 (1992), as controlling precedent, the district court maintained that any prohibition on abortions prior to viability is unconstitutional. Because the plaintiffs presented undisputed evidence that a fetus cannot attain viability at twelve weeks, the district court permanently enjoined the State from enforcing the Act's twelve-week prohibition.

After deeming the twelve-week prohibition unconstitutional, the court evaluated whether it could sever the testing requirements from the disclosure requirements. Recognizing severability as a question of state law, the district court cited the Arkansas Supreme Court decision *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349, 357 (1994), which directs courts considering severability to evaluate: "(1) whether a single purpose is meant to be accomplished by the act; and (2) whether the sections of the act are interrelated and dependent upon each other." Although the absence of a severability clause in the statute is a factor to consider, it is not dispositive of the General Assembly's intent that the Act be treated as a whole.

Supporting an injunction of the entire Act, the plaintiffs contended that the testing and disclosure requirements were only enacted to determine whether the law prohibited an abortion. They argued that since the prohibition was invalidated, the remaining provisions served no purpose. Additionally, the plaintiffs maintained that the testing requirement would unnecessarily force every woman to undergo a vaginal ultrasound before having an abortion. Finally, the plaintiffs argued the heartbeat testing and disclosure requirements duplicated the ultrasound testing and disclosure provisions in sections 20-16-602, -901 to -908 of the Arkansas Code.

In severing the heartbeat testing and disclosure provisions, the district court found that the disclosure requirements were sufficiently tied to the Arkansas General Assembly's expressed purpose of "'protecting the life of the unborn'" and served a purpose independent from the

twelve-week prohibition (quoting *Casey*, 505 U.S. at 883). Furthermore, the district court found that nothing in the remaining portion of the Act mandated vaginal ultrasounds and that the heartbeat testing and disclosure requirements were distinct from other testing and disclosure provisions in Arkansas statutes.

Therefore, the district court lifted the Act's injunction on the heartbeat testing and disclosure portions, allowing them to go into effect and severing them from the permanently enjoined provision prohibiting abortions when a heartbeat is detected after twelve weeks of gestation.

Trusts/Creditors—Arkansas Supreme Court Departs from Uniform Trust Code, Holds Non-Spendthrift Trusts for Mandatory Lifetime Distributions Cannot Be Attached by the Beneficiary's Creditors, and Equitable Liens on Future Trust Distributions Are Not Available to Creditors Unless the Funds Are Permanently Unreachable Through Any Other Legal Process

J.B. Hunt, LLC v. Thornton,

2014 Ark. 62, ___ S.W.3d ___.

The Arkansas Supreme Court held that creditors may not reach a beneficiary's interests in future distributions from a trust because the interest is too uncertain. Furthermore, the court held creditors may not use section 16-66-418 of the Arkansas Code to claim an equitable lien on a judgment-debtor's future trust distributions unless the distribution funds are forever unreachable through any legal process. Thus, the unavailability of future trust distributions does not trigger section 16-66-418 because they may become available for garnishment once they are distributed.

J.B. Hunt, LLC, sought to enforce a $12.7 million judgment against Robert and Frieda Thornton. Although the Thorntons were insolvent, they were receiving quarterly lifetime distributions from five charitable-remainder trusts. At the time of J.B. Hunt's attempted enforcement, four other creditors were also attempting to enforce judgments against the Thorntons' trust distributions. As described by the circuit court, this set up a quarterly "'race to serve'" where each creditor established priority through writs of garnishment as the trust distributed funds to the Thorntons. In an attempt to bypass the "'race to serve,'" J.B. Hunt filed an action in circuit court to attach an equitable lien on the trusts' assets through attachment before they were distributed to the Thorntons—establishing a priority ahead of the other four creditors.

Under section 28-73-501 of the Arkansas Code—Arkansas's statutory equivalent to section 501 of the Uniform Trust Code (UTC)—a creditor may reach a debtor-beneficiary's interest in a non-spendthrift trust through

garnishment or attachment "of present or future distributions to or for the benefit of the beneficiary" (quoting ARK. CODE ANN. § 28-73-501 (Repl. 2012)). The UTC commentary to section 501 notes that attachment or garnishment may not be available where the debtor-beneficiary's interest is "'too indefinite or contingent'" (emphasis omitted) (quoting UNIF. TRUST CODE § 501 cmt. (2010)).

However, in defining an "indefinite" interest sufficient to prevent garnishment or attachment, the Arkansas Supreme Court veered away from the UTC. Under the UTC, the section 501 commentary on "indefinite" interests cites to the Restatement (Third) of Trusts and the Restatement (Second) of Trusts, both of which state that trust interests contingent only on the beneficiary-debtor's survival are not "too indefinite or contingent" for attachment by a creditor.[1]

In contrast to the UTC and Restatements, the Arkansas Supreme Court relied primarily on *Thompson v. Bank of America*, 356 Ark. 576, 157 S.W.3d 174 (2004), to hold that any future interest contingent on the beneficiary-debtor's survival is too indefinite attachment under Arkansas law. In *Thompson*, the Arkansas Supreme Court held lifetime annuity payments under a contract were too uncertain for attachment. 356 Ark. at 586, 157 S.W.3d at 180.

Attempting to avoid Arkansas's restriction on attachment, J.B. Hunt relied on additional language from UTC section 501's commentary, which allows creditors to claim present or future trust distributions if otherwise allowed by state law. J.B. Hunt asserted that section 16-66-418's equitable lien was just such a state-law alternative that allowed for attachment where creditors could not otherwise reach contingent distributions.

In affirming the circuit court's dismissal of J.B. Hunt's attempt to create an equitable lien, the Arkansas Supreme Court held that a section 16-66-418 equitable lien was only available for assets "which cannot be reached by regular process of law" (quoting *Miller v. Md. Cas. Co.*, 207 Ark. 312,

1. See RESTATEMENT (THIRD) OF TRUSTS § 56 cmt. e, illus. 1-2 (2003); RESTATEMENT (SECOND) OF TRUSTS § 162 cmt. a (1959).

315, 180 S.W.2d 581, 583 (1944)). Although the court held that creditors could not claim future distributions, it emphasized that such funds are not permanently unreachable because creditors could garnish the assets once they are distributed.

Because attachment of the Thorntons' trust interests were not subject to attachment through either section 501 of the UTC or section 16-66-418 of the Arkansas Code, J.B. Hunt could not establish priority superior to any other debtors. To enforce its judgment, J.B. Hunt would instead have to join the rest of the creditors in the quarterly "'race to serve.'"

Wills and Estates—Arkansas Supreme Court Holds Presumed-Legitimate Children Seeking to Inherit from Out-of-Wedlock Fathers Must Meet the Same Statutory Requirements as Illegitimate Children to Make a Claim Against an Estate, and Paternity Must Be Established Within 180 Days of the Decedent's Death

Bell v. McDonald,

2014 Ark. 75, ___ S.W.3d ___.

The Arkansas Supreme Court held that subsection 28-9-209(d) of the Arkansas Code, which imposes requirements on an illegitimate child for inheriting from a putative father's estate, also applies to a presumed-legitimate child who makes a claim against a putative, out-of-wedlock father's estate. Furthermore, the court reaffirmed that an action to establish paternity must be completed, not merely filed, within 180 days of the alleged father's death. Finally, the court held that a presumed-legitimate child has no standing to challenge the constitutionality of the 180-day restriction because section 9-10-104 of the Arkansas Code does not authorize children who are presumed legitimate to file paternity actions on their own behalf.

To claim inheritance from the estate of a putative father under subsection 28-9-209(d), an illegitimate child must make a claim against the estate and establish paternity through one of six enumerated methods within 180 days of the man's death. Of the six methods, only subsection 28-9-209(d)(1)—a court action for paternity—may occur once the putative father is dead.

When Carmella Bell was born, her mother was married to Paul McDonald. Therefore, subsection 28-9-209(a)(2) presumes Bell to be a legitimate child of her mother and Paul McDonald. On November 20, 2011, Paul's brother, Carl McDonald, died. In his will, Carl McDonald stated that he had no living children or descendants and devised all of his property to his sister, Rachael Phillips. On February 27, 2012, and again on March 1, 2012, Bell filed pro se notices of her intent to contest Carl McDonald's will, claiming that she was his sole child and heir. On May 21, 2012, Bell's mother

alleged that she had filed a paternity action to declare Carl McDonald as Bell's biological father. However, no circuit court had taken the paternity action before the 180-day deadline.

Dismissing Bell's petition to contest the will, the circuit court found that Bell failed to timely satisfy subsection 28-9-209(d)'s requirements because the paternity action had not been completed within the statutory 180-day period. On appeal, Bell argued that subsection 28-9-209(d) only required her mother to file, not necessarily complete, an action to establish paternity within the 180-day period. Further, Bell argued that a more restrictive interpretation of the 180-day period would violate her constitutional rights of equal protection and due process.

Affirming the circuit court's dismissal of Bell's petition, the Arkansas Supreme Court held that even though Bell was a presumed-legitimate child under the Arkansas statute, she still qualified as an "illegitimate" child for the purposes of her petition against the will of her putative, out-of-wedlock father. Therefore, she had to satisfy the conditions of subsection 28-9-209(d) within the 180-day window.

Furthermore, the supreme court held that subsection 28-9-209(d) requires a petitioner to complete—not simply file—an action to establish paternity within the statutory 180-day window. Because the paternity action filed by Bell's mother was not completed within 180 days of Carl McDonald's death, Bell was not eligible to make a claim against his will. This holding solidified the same interpretation found in *Burns v. Estate of Cole*, 364 Ark. 280, 219 S.W.3d 134 (2005), as controlling precedent for Arkansas.

As to Bell's constitutional arguments, the Arkansas Supreme Court rejected Bell's equal-protection challenge to the 180-day window because she had no right to file a paternity action under section 9-10-104 of the Arkansas Code, which precludes a presumed-legitimate child from challenging her parentage. Because section 9-10-104 required Bell's mother—not Bell herself—to file the paternity action against Carl McDonald, Bell could not challenge the constitutionality of subsection 28-9-209(d).

Writing in dissent, Justice Hart, joined by Justice Baker, contended the majority erred by applying subsection 28-9-209—a statute explicitly reserved for "illegitimate" children. Justice Hart argued that because Bell was born while her mother was married, Arkansas law presumes that she is legitimate. Therefore, she was not an "illegitimate" child, and subsection 28-9-209(d), by its plain language, should not apply.

Regarding Bell's constitutional arguments, the dissent noted that the majority failed to address the core constitutional question raised by Bell—whether the Arkansas statute depriving presumed-legitimate children from challenging their parentage and, therefore, depriving them of their opportunity to establish rights as an heir, violates the child's equal-protection and due-process rights. According to the dissent, the majority's holding that Bell was unable to challenge the constitutionality of the statutes used to determine her individual rights as a child "offends both logic and justice."

Evidence/Medicaid—Arkansas Supreme Court Holds FDA Warning Letters Regarding Drug Labeling Are Inadmissible Hearsay and All Government Reports Are Per Se Unfairly Prejudicial for Purpose of Fact-Finding Under Arkansas Rules of Evidence; and MFCCA's Provision on False and Misleading Statements Only Applies to Statements Made During Certification Proceedings

Ortho–McNeil–Janssen Pharmaceuticals, Inc. v. State,

2014 Ark. 124, ___ S.W.3d ___.

The Arkansas Supreme Court held that government-agency reports are per se highly prejudicial under Rule 403 of the Arkansas Rules of Evidence, and therefore, courts must exclude them when they are introduced for the purpose of fact-finding. Furthermore, the court held that Food and Drug Administration (FDA) "Warning Letters" constitute special investigations of specific complaints and, therefore, are inadmissible hearsay that do not qualify for the public-records exception under Rule 803(8)(iv) of the Arkansas Rules of Evidence.

Finally, the Arkansas Supreme Court interpreted subsection 20-77-902(8)(B) of the Arkansas Code—the false-statement section of the Arkansas Medicaid False Claims Act (MFFCA)—as only covering statements made by medical-care facilities in applying for official certification or re-certification.

The Arkansas Attorney General sought civil penalties against Ortho–McNeil–Janssen Pharmaceuticals (Janssen) for violating the MFFCA and the Arkansas Deceptive Trade Practices Act (ADTPA) through statements about possible side effects of the anti-psychotic drug Risperdal.

At trial, the Attorney General introduced a "Warning Letter" sent by the FDA to Janssen stating that Janssen had made "false or misleading" statements regarding Risperdal's side effects in promotional materials sent to healthcare providers. Janssen filed a motion in limine to exclude the Warning Letter under Rules 403 and 801. The trial court denied Janssen's motion and admitted the letter. Further,

the Attorney General argued the MFFCA applied to any statements regarding products or services provided to the Arkansas Medicaid program. Therefore, the State argued that since Janssen sold Risperdal to Arkansas Medicaid, its false representation of Risperdal's side effects triggered penalties under the statute. The circuit court agreed with the Attorney General's interpretation, and a jury found against Janssen on both the ADTPA and MFFCA claims. The court imposed civil penalties of $11.4 million and $1.194 billion on Janssen for violating the ADTPA and MFFCA, respectively.

On appeal, Janssen argued that the FDA issued the Warning Letter as part of a special investigation into a particular case, complaint, or incident—namely the company's promotion of Risperdal. Furthermore, Janssen argued the letter was more prejudicial than probative and, therefore, was inadmissible. Finally, Janssen argued that the circuit court wrongfully interpreted the MFFCA and that the false-statement section only applied to statements made by healthcare facilities seeking certification.

In response to the evidentiary issues, the Attorney General argued that the FDA issued the letter as part of an ongoing, routine investigation pursuant to the Agency's legal authority; therefore, the State maintained that the letter should fall under the public-records exception to hearsay. The Attorney General supported this argument with two primary cases: *Omni Holding & Development Corp. v. 3D.S.A., Inc.*, 356 Ark. 440, 156 S.W.3d 228 (2004), and *Archer–Daniels–Midland, Co. v. Beadles Enterprises, Inc.*, 367 Ark. 1, 238 S.W.3d 79 (2006). In *Omni Holding*, a party challenged the admission of a Federal Aviation Association (FAA) inspection report. In *Archer-Daniels-Midland*, a party challenged the admission of an FDA Warning Letter that informed hog farmers of possible contamination. In both cases, the Arkansas Supreme Court admitted the government communications under Rule 803(8)'s public-records exception to hearsay.

While noting that circuit courts have "broad discretion" in evidentiary matters and should not be reversed absent a "manifest abuse" of that discretion, the Arkansas Supreme Court nevertheless reversed the circuit court's denial of Janssen's motion in limine (citing *Advanced Envtl. Recycling*

Techs, Inc. v. Advanced Control Solutions, Inc., 372 Ark. 286, 275 S.W.3d 162 (2008); *Grummer v. Cummings*, 336 Ark. 447, 986 S.W.2d 91 (1999)). On the hearsay issue, the Arkansas Supreme Court held that *Omni Holding* and *Archer–Daniels–Midland* were not controlling precedent because neither case involved a direct challenge to admissibility based on Rule 803(8)(iv)'s "special investigations" exclusion. Even though both opinions mention this portion of the Rule, the *Janssen* court found such language to be dicta.

Instead, the *Janssen* court relied on the Arkansas Court of Appeals' decision in *McCorkle Farms, Inc. v. Thompson*, 79 Ark. App. 150, 84 S.W.3d 884 (2002), and a Montana Supreme Court opinion in *Crockett v. City of Billings*, 761 P.2d 813 (Mont. 1988), as applicable persuasive authority. In *McCorkle*, the Arkansas Court of Appeals excluded a report from the Arkansas Plant Board's Pesticide Committee that addressed complaints over crop destruction. In *Crockett*, the Montana Supreme Court interpreted its version of Rule 803(8) to exclude a report from the State employment commission after it investigated a discrimination complaint.

Finding the reports in *McCorkle* and *Crockett* to be most similar to the FDA Warning Letter, the *Janssen* court held that such letters fall into Rule 803(8)(iv) "special investigations" exclusion and, therefore, do not qualify for admission under the Arkansas public-records hearsay exception.

On the issue of the Warning Letter's prejudice, the Arkansas Supreme Court once again looked to Montana for persuasive authority. Citing the Montana Supreme Court's analysis in *Stevenson v. Felco Industries, Inc.*, 216 P.3d 763 (Mont. 2009), the *Janssen* court noted that reports issued by government agencies inherently carry a "'badge of trustworthiness'" and, therefore, create undue prejudice in the minds of the jury that "far outweigh[s]" any possible probative value.

Finding that the circuit court abused its discretion in denying Janssen's motion to exclude the FDA Warning Letter, the Arkansas Supreme Court reversed and remanded the ADTPA claim for further consideration.

Interpreting the MFFCA, the Arkansas Supreme Court held that subsection 20-77-902(8)(B)'s original construction indicated the General Assembly intended the false-statement provision to be read in context with the rest of the statute, which only concerns statements made by facilities applying for certification. Therefore, the circuit court erred in applying the statute to a pharmaceutical company like Janssen. The Arkansas Supreme Court reversed and dismissed the MFFCA judgment against Janssen.

Writing for the dissent, Justice Danielson, joined by Chief Justice Hannah and Justice Corbin, contended that the FDA Warning Letter fit squarely within Rule 803(8)'s public-records exception to hearsay and, therefore, that the circuit court did not abuse its discretion by denying Janssen's motion in limine.

The dissent noted that the record did not show the FDA letter was part of a particular complaint, case, or incident. Rather, the dissent maintained the letter was a result of the "agency's routine duties of reviewing and regulating the information on, and advertising of, drugs such as Risperdal," pursuant to the FDA's statutory authority. According to the dissent, since the FDA was conducting its routine oversight function and not responding to a specific complaint, the Warning Letter should not fall under the Rule 803(8)(iv) exclusion.

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