Cite as 2009 Ark. 128

SUPREME COURT OF ARKANSAS

IN RE ARKANSAS RULES OF CIVIL PROCEDURE; RULES OF THE SUPREME COURT AND COURT OF APPEALS; AND RULES OF APPELLATE PROCEDURE—CIVIL

Opinion Delivered March 5, 2009

PER CURIAM

The Arkansas Supreme Court Committee on Civil Practice has submitted its annual proposals and recommendations for changes in rules of procedure affecting civil practice. We have reviewed the committee's work, and we now publish the suggested amendments for comment from the bench and bar. The Notes explain the changes, and the proposed changes are set out in "line-in, line-out" fashion (new material is underlined; deleted material is lined through).

We have declined to publish at this time the committee's proposal regarding the addition of a new provision to Ark. R. Civ. P. 4 setting out a "substantial compliance" standard for service of process in situations where no default has occurred. We are referring this issue back to the committee and requesting further explanation of the perceived need for the proposed change.

We express our gratitude to the Chair of the committee, Judge Henry Wilkinson, its Reporter, Judge D.P. Marshall Jr., and all the committee members for their faithful and helpful work with respect to the rules.

Comments on the suggested rules changes should be made in writing before May 15, 2009 to: Leslie W. Steen, Clerk, Supreme Court of Arkansas, Attn.: Civil Procedure Rules, Justice Building, 625 Marshall Street, Little Rock, Arkansas 72201.

A. ARKANSAS RULES OF CIVIL PROCEDURE

Rule 40. Trial Settings and Continuances.

(a) *Settings.* (1) Cases shall be set for trial at the request of any party after the issues have been joined. The court may assign a trial date, on its own motion, even though neither party has requested a setting. Precedence shall be given to actions entitled thereto by any statute of this State. (2) The court shall mail, e-mail, or fax notice of all trial settings to all counsel and pro se parties, and require written confirmation from each of them that the notice was received. The court shall file a copy of the notice and confirmations with the circuit clerk.

Addition to Reporter's Notes, 2009 Amendment. This amendment splits subdivision (a) into two parts and adds a new section (2). The new provision will help ensure that all parties get notice of scheduled trials and other court proceedings at which they should appear. This new procedure will make uniform the current practice, which varies from circuit court to circuit court. A parallel amendment to Rule 78 establishes the same procedure for notice of hearings.

Rule 78. Motion Day and Hearings on Motions.

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(c) Hearing, Notice, and Waiver. The court, upon notice to all parties, may hold a hearing on a motion only after the time for reply has expired; however, the court may hear a proper ex parte motion at any time. When notice is required, the court shall mail, e-mail, or fax notice of a hearing to all counsel and pro se parties and require written confirmation from each of them that the notice was received. The court shall file a copy of the notice and confirmations with the circuit clerk. Unless a hearing is requested by counsel or is ordered by the court, a hearing will be deemed waived and the court may act upon the matter without

further notice after the time for reply has expired.

Addition to Reporter's Notes, 2009 Amendment. Subdivision (c) has been amended to establish a notice procedure for hearings on motions. The change obligates the circuit court to give notice, get confirmation that all the parties received the notice, and create a record about notice. The change will help ensure that all of the parties have notice of scheduled hearings. This new procedure will make uniform the current practice, which varies from circuit court to circuit court. A parallel amendment to Rule 40 establishes the same procedure for notice of trial settings.

B. ARKANSAS RULES OF THE SUPREME COURT AND COURT OF APPEALS

Rule 4-8. Procedure for no-merit briefs, pro se points, and responses in involuntary-commitment cases.

(a) After studying the record and researching the law, if appellant's counsel in an involuntary-commitment case determines that the appellant has no meritorious basis for appeal, then counsel may file a no-merit brief and move to withdraw. Counsel's no-merit brief must include the following information:

(1) The argument section of the brief shall list all adverse rulings to the appellant made by the circuit court on all objections, motions, and requests made by the party at the hearing from which the appeal arose and explain why each adverse ruling is not a meritorious ground for reversal.

(2) The abstract and addendum shall contain all rulings adverse to the appellant made by the circuit court at the hearing from which the order of appeal arose.

(b) Appellee is not required to, but may, respond to a no-merit brief. Appellee may file a concurrence letter supporting the no-merit brief. Any appellee's response shall be filed within thirty (30) days of the filing of the no-merit brief.

(c) The Clerk of the Supreme Court shall mail the appellant, at the appellant's last known address, a copy of the no-merit brief and the motion to withdraw. The Clerk shall notify the appellant in writing that the appellant may raise any points that the

appellant chooses and that these points may be typewritten or hand-printed. The Clerk shall also notify the appellant that the points must be received by the Supreme Court Clerk by mail or other method of delivery within thirty (30) days from the date that the Clerk mailed the appellant the notification.

(d) The Clerk shall mail a copy of appellant's points to the appellee and appellant's counsel within three (3) business days after receiving them.

(e) Appellee is not required to respond to appellant's points. Appellee may do so, however, by filing a response within thirty (30) days of the date the points were received by the Clerk of the Supreme Court.

Explanatory Note. In appeals in criminal, termination-of-parental-rights, and adult long-term protective-custody cases, appointed counsel may discharge their professional obligations by filing a no-merit brief and moving to withdraw. The Clerk must serve the brief and motion on the appellant, who then has the opportunity to file pro se points, which the appellee may in turn respond to. Ark. Sup. Ct. R. 4–3(j) and 6–9(I); see generally Anders v. California, 386 U.S. 738 (1967); Linker-Flores v. Ark. Dep't of Human Servs., 359 Ark. 131, 194 S.W.3d 739 (2004); Adams v. Ark. Dep't of Health and Human Servs., 375 Ark. 402, 291 S.W.3d 172 (2009). This procedure balances the appellant's right to counsel on appeal and due process with the lawyer's obligation as an officer of the court not to pursue frivolous arguments. Involuntary-commitment cases raise similar constitutional and procedural concerns. But no Anders procedure currently exists in our rules for those kinds of cases. While the deprivation of liberty is neither as extended as a prison sentence nor as final as losing parental rights, involuntary commitment is nonetheless a "massive curtailment of liberty," and thus constitutionally significant. Humphrey v. Cady, 405 U.S. 504, 509 (1972). The supreme court recently noted this issue, Dickinson v. State, 372 Ark. 62, 67, 270 S.W.3d 863, 866 (2008), but did not decide whether an Anders procedure is needed in involuntary-commitment cases. Dickinson, 372 Ark. at 70–71, 270 S.W.3d at 869 (Imber and Brown, JJ., dissenting). The new rule creates this procedure for these cases.

Rule 6-7. Taxation of Costs.

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(b) Reversal. The appellant may recover (1) brief costs not to exceed $3.00 per page with

total costs of the brief not to exceed $500.00, (2) the filing fee of ~~$100.00~~ $150.00, (3) the circuit clerk's costs of preparing the record, and (4) the court reporter's cost of preparing the transcript.

Explanatory Note. The fee for filing an appeal increased to $150.00 on 31 July 2007. The Rule is amended to reflect this increase.

C. ARKANSAS RULES OF APPELLATE PROCEDURE—CIVIL

Rule 6. Record on Appeal.

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(b) *Transcript of proceedings.* On or before filing the notice of appeal, the appellant shall order from the reporter a transcript of such parts of the proceedings as he has designated in the notice of appeal and make any financial arrangements required by the court reporter pursuant to Ark. Code Ann. § 16-13-510(c). If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary thereto, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. If the appellant has designated less than the entire record or proceedings, the appellee, if he deems a transcript of other parts of the proceedings to be necessary, shall, within ten (10) days after the ~~filing~~ receipt of the notice of appeal, file and serve upon the appellant (and upon the court reporter if additional testimony is designated) a designation of the additional parts to be included. The appellant shall then direct the reporter to include in the transcript all testimony designated by appellee.

Explanatory Note. This minor amendment harmonizes part of this Rule with part of Rule of Appellate Procedure—Civil 4(a). Under the latter rule, a party has at least ten days after receiving a notice of appeal to file a notice of cross appeal. The deadline for taking that step should be the same as the deadline for designating additional record materials under Rule of Appellate Procedure—Civil 6(b). The change makes Rule 6 track Rule 4: the ten-day window for filing either a cross appeal or a designation of additional record materials opens when a party receives a notice of appeal and closes ten days later.