appellate highlights

by Donn Kessler and Patrick C. Coppen

SUPREME COURT
CIVIL MATTERS

The failure of a person released under bond to appear as ordered without a reasonable explanation does not require a court to forfeit the bond. Rather, the court has discretion whether to order forfeiture and should consider factors such as whether the failure to appear is the result of the commission of a crime, willfulness, the efforts of the bonding company to apprehend the defendant after the failure to appear, costs to the State and the public interest. *State of Arizona v. Old West Bonding Co.*, 1 CA-CV 01-0436, -0499, -0510 and -0512 (consolidated), 9/26/02 … **State adoption subsidies paid as part of an agreement to adopt children with special needs belong to the children and not the adopting parents. Therefore, such payments are not to be considered as credits against child support obligations when the adoptive parents divorce.** *Hamblen v. Hamblen*, 1 CA-CV 01-0569, 9/26/02* … Although the statute of limitations period for legal malpractice is two years under ARS § 12-542, **the limitations period pertaining to legal malpractice in a criminal matter is tolled until the subject criminal proceeding has been dismissed with prejudice or a final resolution of the case has been made.** It is only after the subject litigation involving the client has terminated that a client's rights are fixed and full damages are ascertainable and not speculative or contingent. Tolling the limitations period for legal malpractice actions in criminal cases gives a defendant the peace of mind to allow the legal process to work fully and finally in hopes that his position will ultimately be vindicated and the defendant client will not be forced to disrupt his relationship with his attorney. *Glaze v. Larsen*, 2 CA-CV 2001-0196, 9/24/02 … **Neither a previous interim order in a proceeding to discipline a contractor nor an order against the contractor in another complaint where the basis for discipline was not an issue preclude license revocation under res judicata or collateral estoppel because the interim order was not final and the prior final order did not litigate the same issue.** *Better Homes Const.Co., Inc. v. Goldwater*, 1 CA-CV 01-0594, 9/19/02 … **A court has jurisdiction to resolve a complaint alleging that a church board was liable for negligent hiring and retention of a pastor and infliction of emotional distress, fraud and racketeering where it knew or should have known the pastor had an alleged history of misconduct and was now being accused of seduction and fraud. The court could resolve those claims by application of neutral provisions of civil law without violating the First Amendment or the ecclesiastical abstention doctrine.** The court could examine church structure to define the parties' duties in pure secular terms and did not need to resolve internal organizational disputes or conduct relating to religious duties. *Rashedi v. General Board of Church of the Nazarene,* CV-01-0550, 9/19/02 … **A school district and principal have no duty to motorists to protect them from school children driving off the school grounds during a lunch break even if the children were allowed to leave the school grounds in violation of school policy.** The institution of the modified closed-campus policy also did not amount to an assumption of a duty under RESTATEMENT (SECOND) OF TORTS § 324. *Collette v. Tolleson Unif. School Dist. No. 214*, 1 CA-CV 01-0490, 9/19/02 … **A suspension of a defendant motorist's driver's license under ARS § 28-1321 based on a refusal to submit to required breath, blood or urine testing is not invalidated by the unconstitutionality of the original stop or detention of the defendant. Because license suspension hearings under ARS § 28-1321(K) are civil in nature, the exclusionary rule should not be applied and a defendant has no constitutional right to consult with an attorney** about taking required tests to determine possible alcohol or drug impairment. *Tornabene v. Bonine & Arizona Dept. of Transp.*, 2 CA-CV 2001-0124, 9/19/02 … **Allegations of negligence or fault made in an original complaint against a defendant with whom a plaintiff settles before trial may be used as admissions by a party opponent under ARIZ.R.EVID. 801(d)(2)(D), to undercut a plaintiff's trial strategy to minimize the negligence of the non-party.** Such use is not violative of ARIZ.R.EVID. 408, precluding the use of settlement information. *Henry v. Healthpartners/TMC* 2CA-CV 2000-0136, 9/19/02 … **A marriage performed in Mexico that was invalid under Mexico law was still valid in Arizona where, under ARS §§ 25-111(B)(2) and 25-112, the marriage was performed by an unauthorized person but the husband had stipulated that the wife believed in good faith that the officiant was authorized to perform the ceremony.** The fact the husband later discovered the wife had stated she was unsure the marriage was lawful did not entitle the husband to reconsideration of the issue where he did not show he could not have obtained such evidence earlier. *Donlann v. Macgurn*, 1 CA-CV-01-0095, 9/12/02 … **Neither the State of Arizona nor two child case workers were entitled to qualified immunity or protective service immunity under ARS § 8-805 for the sexual assault of a child placed by the State in a shelter where: (1) the State was not being sued solely on the basis of respondeat superior, but also for failing to properly license emergency shelters; (2) the alleged misconduct (failure to have a case and safety plan prior to initial placement, failure to assess the needs of the child and failure to make required visitation) did not fall under child protective services, but under the child welfare and placement statutes; and (3) there were sufficient facts the state violated clearly established constitutional rights of children under state-regulated foster care to be free from unnecessary and unreasonable harm and the state failed to exercise professional judgment.** *Weatherford v. State of Arizona*, 1 CA-CV 01-0496, 9/10/02 … Under the intertwining doctrine, a court may deny arbitration of arbitrable claims that are so related to non-arbitrable claims where both are the subject of the same litigation, severance is impractical or impossible and arbitration would render a special statutory right to bring a particular action totally meaningless. Under Arizona law, the intertwining doctrine does not apply to multiple contracts, some with arbitration clauses and some without. **ARS § 12-1501 (providing for enforcement of valid and irrevocable arbitration agreements) does not confer discretion on a trial court to ignore valid arbitration agreements merely because litigation involves related arbitrable and non-arbitrable claims. Rather than allowing a court to ignore such agreements, § 12-1502(D)**

provides for staying court proceedings or litigation involving both types of claims pending the results of arbitration. *Hallmark Industries, L.L.C. v. 1st Systech Int l, Inc.*, 2CA-CV 2001-0186, 9/5/02 … Disagreeing with a contrary decision by Division Two, Division One held **the minority tolling statute for the statute of limitations, ARS § 12-502, applies to a wrongful death action brought by the personal representative of the deceased's estate acting on behalf of the minor children.** *Porter v. Triad of Arizona,* 1 CA-CV 01-0216, 9/3/02 … **An unperfected medical lien is valid against a patient who has actual notice of the lien's existence and amount.** *Blankenbaker v. Jonovich*, 1 CA-CV 01-0379, 9/3/02.

COURT OF APPEALS CRIMINAL MATTERS

A defendant's **previous conviction for possession of drug paraphernalia, a Proposition 200 offense, constitutes a historical prior felony conviction for purposes of sentence enhancement** under ARS § 13-604. *State v. Thues*, 1 CA-CR-01-1015, 9/24/02 … A defendant's **failure to register as a sex offender is a continuing crime** that achieves finality only when the offender satisfies the registration requirements. Therefore, a trial court **sentencing a defendant as a class-four felony for such an offense did not violate the *ex post facto* clause of the U.S. Constitution where the defendant initially failed to register when a violation was a class-six felony but continued to violate the statute after the legislature amended it to make the offense a class-four felony.** *State v. Helmer*, 1 CA-CR-01-0583-PR, 9/24/02 … For the purposes of jury instructions in a criminal case, **premeditation, as statutorily defined by ARS § 13-1101(1), is a period of time sufficient to permit reflective thought process regardless of the instantaneous nature of such thoughts or whether reflection actually occurs. If a jury is so instructed on the issue of premeditation, the jury must also be instructed that in order for premeditation to be actually found, the act resulting in death of the victim may not be impulsive or the effect of a sudden quarrel or heat of passion. A criminal defendant may waive his right to be present to respond with his attorney to jury questions by expressly giving his attorney authority to appear on his behalf. A trial court errs if it sentences a defendant to an additional two years of imprisonment pursuant to ARS § 13-604(R) based on findings made by the trial court itself (rather than the jury)** regarding his release status at the time of his convicted offense. **An individual participating in diversion or a deferred prosecution program under ARIZ.R.CRIM.P. 38.1 is on release for the purposes of sentence enhancement under ARS § 13-604(R).** Although the State may be required to adhere to a plea agreement in which a prior felony conviction was not to be used for sentence enhancement purposes, the fact that a second felony was committed while on release for the first offense may be considered for enhancement purposes. *State v. Booker*, 2 CA-CR 2000-0517, 9/12/02.

COURT OF APPEALS MENTAL HEALTH MATTERS

A petition for court-ordered mental health treatment under ARS § 36-533(B) need not be accompanied by a prior application for mental health evaluation because the statute only requires the petition be accompanied by a prior affidavit for evaluation, if one exists. *In re Maricopa County Superior Court No. MH 2001-001139*, 1 CA-MH-01-0010, 9/26/02 … **The Sexually Violent Persons Act, ARS §§ 36-3701 through -3717, is constitutional under the federal due process clause. Consistent with *Kansas v. Crane*, 122 S. Ct. 867 (2002), the statute implicitly requires the State to prove and a jury to find that the person to be committed has a serious difficulty in controlling his behavior. However, the jury must be specifically instructed that it must determine whether the person has such a serious difficulty.** *In re Wilbur W.*, 1 CA-MH-01-0008-SP, 9/11/02.

COURT OF APPEALS JUVENILE MATTERS

Neither statutes nor the juvenile commitment guidelines require a juvenile court to make findings of fact showing it considered alternatives to commitment to the Department of Juvenile Corrections. Even if the record does not reflect such a consideration, the Court of Appeals will presume the court made all necessary findings to support its decision. *In re Nikey R.*, 1 CA-CV-01-0192, 9/12/02.

* indicates a dissent

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The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continually. Readers may visit the sites for the Supreme Court (www.supreme.state.az.us/opin), the Court of Appeals, Div. 1 (www.cofad1.state.az.us) and Div. 2 (www.apltwo.ct.state.az.us).

lawyer regulation

SANCTIONED ATTORNEYS

SCOTT ASHTON-BLAIR

Bar No. 010142; File No. 99-1018

By Supreme Court Judgment and Order dated Dec. 19, 2001, Scott Ashton-Blair, P.O. Box 8400, Scottsdale, AZ 85252, was suspended for 60 days for conduct in violation of his duties and obligations as a lawyer. Mr. Ashton-Blair also was ordered to pay restitution to a client in an amount to include the unpaid interest on a borrowed sum of $20,000 at 10 percent per annum less his $1,000 fee. Mr. Ashton-Blair was ordered to reimburse the Client Protection Fund for any claims paid out not to exceed the maximum permissible payment of $100,000. Mr. Ashton-Blair also was ordered to pay costs and expenses incurred by the State Bar together with interest at the legal rate in this matter.

The misconduct in this matter arose when Mr. Ashton-Blair entered into a business transaction with a client by receiving a loan from the client. Initially, Mr. Ashton-Blair did not pay back the loan and the client contacted the State Bar. After inquiry from the State Bar, Mr. Ashton-Blair paid the loan but not the accrued interest. It was uncontested that Mr. Ashton-Blair complied with Rule 42, ARIZ.R.S.CT., ER 1.8(a)(1), which requires the transaction and terms to be fair and reasonable to the client and fully disclosed and transmitted in writing to the client in a manner that could be reasonably understood by the client. However, Mr. Ashton-Blair's conduct was found by clear and convincing evidence to have violated Rule 42, ARIZ.R.S.CT., ER 1.8(a)(2) and (3), which require that the client be given a reasonable opportunity to seek the advice of independent counsel in the transaction and require that the client consents in writing. Contrary to Mr. Ashton-Blair's interpretation of ER 1.8(a)(3), the Disciplinary Commission determined that the requirement of 1.8(a)(3) that "the client consents in writing" means the client must consent in writing to the conflict, not just to the terms of the business transaction.

There were four aggravating factors found pursuant to the ABA *Standards for Imposing Lawyer Sanctions,* Section 9.22: (b) dishonest or selfish motive, (g) refusal to acknowledge the wrongful nature of the conduct, (h) vulnerability of the client and (j) indifference to making restitution. There were two mitigating factors found pursuant