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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

Administrative Order Number 15.1 amended, effective immediately. The amendments are to sections 1, 2, and 3 and are summarized as follows: Section 1 (c) is amended to provide an individualized clinical component commensurate with each attorney's experience. Sections 2 and 3 are amended with respect to providing attorney contact information and clarifying attorney's communication responsibilities. (Per Curiam, March 17, 2016)

Arkansas Rule of Appellate Procedure—Crim. 19 adopted, effective immediately. This new rule requires that a party is first to look to his or her former attorney, rather than the appellate court, for a copy of a brief or an appellate record. (Per Curiam, March 31, 2016)

CRIMINAL

Dillard v. State, 2016 Ark. App. 147 [**Sex Offender Registration Act**] Arkansas Code Annotated § 12-12-922 (a) gives the Sex Offender Assessment Committee authority to conduct its own assessment and classify an offender as a “sexually dangerous person.” (Wright, J.; CV-15-753; 3-2-16; Hixson, K.)

Inskeep v. State, 2016 Ark. App. 135 [**sufficiency of the evidence; aggravated residential burglary**] There was insufficient evidence to establish that appellant attempted to inflict a serious physical injury on his victim, and the jury would have had to resort to speculation and conjecture to decide that such an attempt was made. Thus, the trial court erred when it denied appellant’s directed-verdict motion on the aggravated-residential-burglary charge. (Davis, B.; CR-15-738; 3-2-16; Harrison, B.)

Carrick v. State, 2016 Ark. App. 152 [**contempt**] The trial court erroneously entered an order which held appellant in criminal contempt for disobeying a court order that he hire an attorney; displaying disorderly, contemptuous, and insolent behavior; and disobeying and resisting the court’s “jury-trial process.” The court’s contempt order was erroneous because at the time that appellant was held in contempt there was no order with definite terms and expressed duties in place for appellant to violate. Even if an order with definite terms had been in place, its enforcement with contempt would still have been erroneous because the trial court was attempting to force appellant to hire an attorney by threat of contempt, which would have effectively denied him his right to self-representation. (Griffen, W.; CR-15-301; 3-9-16; Virden, B.)

Hinson v. State, 2016 Ark. App. 166 [**Ark. Code Ann. § 5-65-208**] Because a chemical test of the driver’s breath, saliva, or urine is mandatory under Ark. Code Ann. § 5-65-208, the statute does not require law enforcement to advise the driver of his right to refuse consent to the test. (Sims, B.; CR-15-627; 3-9-16; Hoofman, C.)

Turner v. State, 2016 Ark. 96 [**Rule 37**] The Supreme Court has affirmed the denial of a Rule 37.1 petition notwithstanding the circuit court’s failure to make sufficient findings under Rule 37.3(a) only in two circumstances: (1) when it can be determined from the record that the petition is wholly without merit, or (2) when the allegations in the petition are such that it is conclusive on the face of the petition that no relief is warranted. However, it is not incumbent on the appellate court to scour the record to affirm. Sufficient written findings by the circuit court are required to demonstrate that appellant was entitled to no relief. In appellant’s case, the circuit court’s findings were insufficient for appellate review and the case was remanded with instructions to make specific findings on a particular issue. (Talley, D.; CR-15-572; 3-10-16; Brill, H.)

Sandrelli v. State, 2016 Ark. 103 [**Rule 37**] The record and files failed to conclusively show that counsel's failure to call additional witnesses resulted in no prejudice to appellant. Thus, the trial court erred when it denied appellant's Rule 37 petition without a hearing on the issue. Accordingly, the case must be remanded to the circuit court for a hearing to determine whether counsel's failure to call witnesses was based on reasonable judgment and, if not, whether this failure prejudiced appellant. (Fitzhugh, M.; CR-15-530; 3-10-16; Wood, R.)

Van Winkle v. State, 2016 Ark. 98 [**Rule 37**] The circuit court did not clearly err in denying appellant's petition for postconviction relief, which was based upon the following allegations: (1) that his trial counsel was ineffective for failing to present his only viable defense; (2) that his trial counsel was ineffective for failing to move for a change of venue; (3) that his sentence for employing a firearm in the commission of an offense is void as both structural error and ineffective assistance of trial counsel; and (4) that the circuit court erred in denying his request for a hearing. (Ryan, J.; CR-15-324; 3-10-16; Danielson, P.)

Harris v. State, 2016 Ark. App. 173 [**cross-examination**] The trial court abused its discretion when it limited the scope of the cross-examination of a witness thereby preventing appellant from challenging the witness's credibility. (Kemp, J.; CR-15-640; 3-16-16; Vaught, L.)

Roberts v. State, 2016 Ark. 118 [**waiver; Rule 37.5**] The circuit court erred when it found that appellant had the capacity to choose between life and death and could make a knowing and intelligent waiver of his right to postconviction relief. (Wood, R.; CR-15-417; 3-17-16; Wood, R.)

State v. Coble, 2016 Ark. 114 [**Ark. Code Ann. § 5-14-110**] The circuit court correctly interpreted Ark. Code Ann. § 5-14-110 (a)(4)(C) as providing that a guardian commits the crime of sexual indecency with a child only if he or she causes or coerces a minor to expose his or her sex organs—not to the actor (who is the guardian) but instead to *another person*. (Wyatt, R.; CR-15-779; 3-17-16; Hart, J.)

Burr v. State, 2016 Ark. App. 182 [**Ark. Code Ann. § 5-65-205(a)(2)**] The provisions of Ark. Code Ann. § 5-65-205(a)(2), are not unconstitutional. (Green, R.; CR-15-673; 3-30-16; Gruber, R.)

Makkali v. State, 2016 Ark. 137 [**writ of habeas corpus; scientific-evidence-based claims**] Petitions filed pursuant to Ark. Code Ann. § 16-112-201 *et seq.* should be filed in the court in which the conviction was entered. (Dennis, J.; CV-15-856; 3-31-16; Hart, J.)

Sylvester v. State, 2016 Ark. 136 [**post-arrest silence**] When a comment on a defendant's post-arrest silence is not an attempt to impeach the defendant, it is not the type of comment prohibited by the United States Supreme Court in *Doyle v. Ohio*, 426 U.S. 610 (1976). (Fitzhugh, M.; CR-15-522; 3-31-16; Baker, K.)

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

Fennell v. State, 2016 Ark. App. 142 (harassment) CR-15-87; 3-2-16; Gruber, R.

Wilson v. State, 2016 Ark. App. 164 (failure to comply with registration requirements under the Sex Offender Registration Act) CR-15-849; 3-9-16; Hixson, K.

Flemister v. State, 2016 Ark. App. 180 (theft of property) CR-15-695; 3-30-16; Viriden, B.

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:

Valencia v. State, 2016 Ark. App. 176 (suspended sentence) CR-15-562; 3-16-16; Hoofman, C.

CIVIL

Billings v. U.S. Bank National, 2016 Ark. App. 134 [**default judgment**] Service by warning order was improper; default judgment was void for lack of service. (Cottrell, G.; CV-15-680; 3-2-16; Viriden, B.)

Graham v. Tomlinson, 2016 Ark. App. 139 [**title**] Record title holder was clear; quiet title action affirmed. (Murphy, M.; CV-15-742; 3-2-16; Harrison, B.)

Valois Dynasty, LLC v. City National Bank, 2016 Ark. App. 140 [**intervene**] Motion to intervene was untimely. By the time Dynasty filed its motion to intervene, the court had entered a judgment, the property had been sold, and the court had approved the sale. City Bank had already paid legal fees for the foreclosure litigation and incurred expenses in publication and court costs. City Bank had also invested in the apartments to improve and re-sell them and had hired a property manager. Dynasty has offered no reason for its delay, though it does assert an ownership interest in the property. (Gray, A.; CV-15-806; 3-2-16; Harrison, B.)

Kilgore v. Robert Mullenax, LLC, 2016 Ark. App. 143 [**arbitration**] The issue of whether the arbitrator's jurisdiction should be exercised pursuant either to the federal or to the state arbitration act was presented to the arbitrator, and he concluded the FAA governed. The trial

court confirmed the arbitration award, finding that “the Arbitration Award of the Arbitrator was proper and that there is no basis for vacating, modifying, or correcting the Arbitration Award.” (Piazza, C.; CV-15-706; 3-2-16; Glover, D.)

Hollis v. Fayetteville School District, 2016 Ark. App. 132 [**FOIA**] The essential legal question presented in this appeal is whether the district commenced a FOIA action by filing a “renewed motion for protective order.” The answer is no for two reasons. First, the district is the custodian of the records sought. The district’s second attempt to obtain a protective order did not formally commence a FOIA case because, by statute, only an Arkansas citizen may request to inspect or copy public records or seek review of the denial of such a request. Ark. Code Ann. §§ 25-19-105(a) (1) (A) & 25-19-107(a). (Martin, D.; CV-15-520; 3-2-16; Abramson, R.)

Hollis v. Fayetteville School District, 2016 Ark. App. 137 [**FOIA**] Because there was no formal FOIA case pending before Judge Martin when Judge Beaumont dismissed this case under Rule 12(b)(8), the Hollis’s FOIA complaint should not have been dismissed in this case pursuant to that rule. (Beaumont, C.; CV-15-109; 3-2-16; Abramson, R.)

GGNSC Holdings, LLC v. Lamb, 2016 Ark. 101 [**arbitration**] In light of public policy favoring arbitration and the legislature’s decision to refrain from specifically limiting a guardian’s ability to enter into arbitration agreements, Williams, as the “Guardian of the Person and the Estate of Lamb,” possessed the authority to enter into the arbitration agreement on behalf of Lamb. The arbitration agreement at issue is valid and encompasses the dispute at issue. The agreement is not impossible to perform nor is it unconscionable. (Guthrie, D.; CV-15-629; 3-10-16; Baker, K.)

Watkins v. Turner, 2016 Ark. App. 158. Issues not preserved for appellate review. (Richardson, M.; CV-15-845; 3-9-16; Gruber, R.)

Gibraltar Lubricating Services, Inc. v. Pinnacle Resources, Inc., 2016 Ark. App. 156 [**trade secret**] The summary-judgment order is reversed because the circuit court engaged in improper credibility determinations. The court not only found that Dr. Wooten was the more credible expert but also found that his estimated cost to reverse engineer each GLS lubricant was so small that the lubricant formulas could be deemed readily ascertainable. Reasonable minds could differ as to whether a price of \$3,500 to \$4,000 per lubricant was small enough to render the formulas readily ascertainable. A formula or product may maintain its status as a trade secret, even though it can be reverse engineered, if the process of reverse engineering is too difficult or costly. A fact question remains as to the cost or difficulty of reverse engineering the GLS formulas. (Hughes, T.; CV-15-469; 3-9-16; Kinard, M.)

Gain, Inc. v. Martin, 2016 Ark. App. 157 [**charitable immunity**] Gain made a prima facie showing of entitlement to summary judgment. Based on the totality of the evidence and the

relevant considerations, Martin did not meet proof with proof sufficient to demonstrate a genuine issue of a material fact when she rebutted the proof of only the single factor of dependence on private donations. No single factor is dispositive of charitable status. Entities with overriding charitable purposes do not lose entitlement to charitable immunity based solely on the fact that they do not depend on donations. Gain established that it was entitled to charitable immunity, and the trial court erred in denying its motion for summary judgment. (Pierce, M.; CV-15-792; 3-9-16; Kinard, M.)

Bishop v. Farm Bureau, Ins., 2016 Ark. App. 168 [**insurance**] The terms “residential premises” and “business exception” are ambiguous and the ambiguity in the insurance policy should have been resolved in favor of Bishop; therefore, the circuit court erred in awarding summary judgment in favor of Farm Bureau. The circuit court erred as a matter of law when it found that Farm Bureau owed no duty to defend or indemnify Bishop for the damage caused to Hardin and Guthrey’s property. (Compton, C.; CV-15-55; 3-9-16; Virden, B.)

Gildehaus v. Ark. Alcoholic Beverage Control Board, 2016 Ark. App. 160 [**liquor permit**] More than mere assertions of injury is required to be entitled to judicial review of an agency decision pursuant to Arkansas Code Annotated section 25-15-212(a). A petitioner must demonstrate injury that is concrete, specific, real, and immediate, rather than conjectural or hypothetical; and the petitioner must also demonstrate how he or she has already sustained or is immediately in danger of sustaining such injury as a consequence of the agency’s action. The “keys to the courthouse” lie in Arkansas Code Annotated section 25-15-212(a). If a petitioner satisfies the injury requirement of this statute, then he or she qualifies for judicial review of agency action. If a petitioner does not demonstrate specific, concrete, real, and immediate injury from the agency’s action, then he or she is not entitled to judicial review of agency action. Gildehaus’s assertions of injury are not sufficient to invoke the trial court’s jurisdiction to review the agency decision. (Scott, J.; CV-15-619; 3-9-16; Glover, D.)

Stone v. Washington Regional Medical Center, 2016 Ark. App. 165 [**deed**] The 1909 Deed effectively released and terminated any rights of reversion held by the Stones that were created by the 1906 Deed. The deeds were not ambiguous. An instrument is unambiguous and its construction and legal effect are questions of law when its terms are not susceptible to more than one equally reasonable construction. The 1909 Deed unambiguously evidenced the intent to release the possibility of reverter. The Stones effectively conveyed the entirety of their interest to the City and had no remaining interest in the property. (Beaumont, C.; CV-15-505; 3-9-16; Hixson, K.)

Moody v. Tarvin, 2016 Ark. App. 169 [**limitations**] Despite appellant’s arguments, his claim is one for assault and battery and the one-year limitations period has run. (Wright, J; CV-15-666; 3-16-16; Abramson, R.)

Bank of the Ozarks v. Walker, 2016 Ark. 116 [**arbitration**] There was not a valid agreement to arbitrate because the agreement lacked mutuality of obligation. The language in the agreement required appellees to pay the expenses that Ozarks incurred in good faith related to the agreement while not imposing the same obligation on Ozarks. (Huckabee, S.; CV-15-107; 3-17-16; Hart, J.)

Quarles v. Courtyard Gardens, 2016 Ark. 112 [**arbitration**] Summary judgment was proper. There was neither laches nor waiver. (McCallum, R.; CV-15-711; 3-17-16; Goodson, C.)

Lipsey v. Giles, 2016 Ark. 124 [**summary judgment**] Giles detailed how plaintiffs failed to provide any proof of damages due to the allegations in the complaint. This is sufficient to demonstrate a prima facie entitlement to summary judgment that would then require appellants to put forth proof of damages in order to defeat the motion, which they failed to do. Their affidavit contains only conclusory statements on the issue of damages and does not rely on any facts to support the claim of a “chilling effect” on appellants’ property values. Conclusory allegations are insufficient to create a factual issue in a summary-judgment situation. (Weaver, T.; CV-15-785; 3-17-16; Wynne, R.)

Baptist Health v. Rutledge, 2016 Ark. 121 [**declaratory judgment**] The requirement of a justiciable controversy is not met. Appellants ask this court to determine whether the Act, which presents an entire statutory scheme, is unconstitutional without any present controversy to examine. The only evidence before the circuit court on the cross-motions for summary judgment was an affidavit of the Director of the Department of Health and a portion of the Hospitals’ responses to appellees’ first set of requests for admissions. Without a sufficient factual record to show an actual, present controversy, this court cannot opine on the merits of the constitutional arguments raised in the Hospitals’ declaratory-judgment suit. (Fox, T.; CV-15-616; 3-17-16; Wynne, R.)

Alexander v. Eastern Tank Services, Inc., 2016 Ark. App. 185 [**ADA/summary judgment**] Even in summary-judgment cases, the circuit court must evaluate employment-discrimination cases using the McDonnell Douglas framework, and it must explain its findings. Here, there is no mention in the circuit court’s order about a prima facie case of discrimination, a legitimate, nondiscriminatory reason for the discharge, or pretext for discrimination. (Cox, J.; CV-15-686; 3-30-16; Hoofman, C.)

Covenant Presbytery v. First Baptist Church, 2016 Ark. 138 [**trust**] The will created a testamentary trust for the sole purpose of managing the property and paying income to the life-estate beneficiaries. First Presbyterian’s interest vested upon Carpenter’s death, and the will did not direct the trustee to maintain the property for any charitable purpose. Therefore, the will did

not create a charitable trust. Because First Presbyterian's interest in the trust vested upon Carpenter's death without limitation, it was freely assignable. The *cy pres* doctrine has no application. (Philhours, R.; CV-15-391; 3-31-16; Wood, R.)

Southwest Power Pool, Inc. v. Kanis and Denny Roads Water Improvement District, 2016 Ark. 135 [**improvement district/assessment**] Arkansas Code Ann. § 14-92-225(c) prohibits an assessment of the corporation's facilities. The statute as a whole makes clear that the benefits to be assessed and taxed are those arising from the improvements constructed by the improvement district, not those arising from improvements constructed on the taxpayer's real property by the taxpayer. SPP's commercial facility, an improvement on its property that is connected to the City of Little Rock's waterworks system, cannot be assessed. (Reif, M, R.; CV-15-606; 3-31-16; Danielson, P.)

DOMESTIC RELATIONS

Shields v. Kimble, 2016 Ark. App. 151 [**contempt; UCCJEA**] This case involves a custody dispute between appellant mother and appellee father of a child. Although the primary legal issue involves contempt, the case provides a good illustration of a dispute between the courts of two states, Arkansas and Montana, over jurisdiction of custody under the UCCJEA. The parties divorced in Arkansas in 2007, the appellant was awarded custody and shortly after the divorce moved to Montana with the child. The appellee father filed a petition in Arkansas for change of custody or to set specific visitation. The appellant filed an objection to jurisdiction, alleging that Arkansas did not retain jurisdiction under the UCCJEA and that Montana was a more appropriate forum. There were filings by both parties in the courts of the two states; there were allegations of abuse in both states and involvement of both states' Departments of Human Services. Custody orders were entered by both states. Although the Arkansas circuit judge attempted to communicate with the Montana judge, as provided for in the UCCJEA, the Montana judge was "not available" to speak to him, and the Montana judge never attempted to speak with the Arkansas judge. Ultimately, the Montana Supreme Court reversed the Montana court's order of custody and noted that the Montana court "had 'exceeded its jurisdiction under The UCCJEA.'" The Montana Supreme Court vacated all of the orders entered concerning the child as "void for lack of jurisdiction." The crux of the contempt involved a finding of contempt against the appellant by the Arkansas Court, a show cause hearing at which the appellant failed to appear, and the circuit court's award of attorney's fees and costs of \$15,539, with a sentence of 120 days in jail if she failed to pay within 180 days. On appeal, the Court of Appeals found sufficient evidence to support the contempt finding and the decision was affirmed. (Smith, P., No. CV-15-365; 3-9-16; Abramson, R.)

Moore v. Moore, 2016 Ark. 105 [**divorce—nonmarital property**] The Supreme Court expressly overruled a line of Arkansas cases which it said “redefined marital property through the ‘active appreciation’ rule, which conflicts with section 9-12-315....” It said that the circuit court erred in considering the appellee wife’s contributions to the husband’s company which increased the value of the company as a marital asset. The Court found it “appropriate to return to the statute’s plain language, which states that ‘the increase in the value of property acquired prior to marriage’ is nonmarital.” (McCormick, D.; No. CV-15-180; 3-10-16; Wood, R.)

Brown v. Brown, 2016 Ark. App. 172 [**divorce--marital property**] The Court of Appeals found that the circuit court had failed to set forth its reasons for distributing the parties’ marital property unequally. It failed to value the stock of Pine Valley, Inc., the parties’ golf course, which it awarded to the appellant husband, and it awarded the appellee wife the marital home and all its equity without specific explanation in the decree. Although the circuit court wrote a detailed letter opinion stating its reasoning for making the distribution it made, the letter opinion was not incorporated into the divorce decree, and the decree did not repeat the trial court’s detailed findings found in the letter. A letter opinion does not constitute a judgment or a decree, but is simply the basis upon which the judgment or decree is subsequently rendered, and is not conclusive unless incorporated into the judgment. The Court of Appeals reversed and remanded for the court to value and divide the parties’ assets on remand in accordance with Ark. Code Ann. Section 9-12-315(a), and *Moore v. Moore*, 2016 Ark. 105. (Moore, R.; No. CV-15-702; 3-16-16; Glover, D.)

Wills v. Wills, et al., 2016 Ark. App. 174 [**change of visitation; in loco parentis**] The appellee stepmother of the appellant father’s child intervened in a custody case between the appellant and his former wife, the mother of the child, when the appellant and appellee were married. The appellee was allowed to intervene after the court’s finding that she stood in loco parentis to the child. The court found in that case that the appellant father be the custodial parent, but that the appellee be granted visitation and that she receive one-half of the child-support payments the child’s mother paid to the father. The following year, the appellant and appellant divorced. Two years later, the appellant father filed a motion to terminate the appellee’s visitation rights with the child, alleging that the acrimony in the parties’ divorce constituted a change in circumstances warranting a modification of visitation. The court found a change in circumstances and ordered the parties to have equal visitation on a week-on, week-off format. The court also found appellant in contempt for failure to give the appellee her share of the child-support payments he had received and to pay her back child support within sixty days. The appellant argued that his constitutional rights to control and rear his child were violated when the trial court refused to terminate appellee’s visitation. However, the Court of Appeals did not consider the constitutional argument because he failed to obtain a ruling on the issue from the circuit court, precluding review on appeal. On the issue of changed circumstances, he failed to provide

persuasive authority or argument to support his position. The decision was affirmed. (Taylor, J.; No. CV-15-639; 3-16-16; Vaught, L.)

Fallin v. Fallin, 2016 Ark. App. 179 [**property-settlement agreement; attorney's fees**] The appellee wife filed a pro se complaint for divorce, to which she attached the appellant husband's entry of appearance and waiver of service of summons. The waiver of service included a paragraph stating that, contemporaneously with the waiver of service, the parties had reached a property settlement agreement (PSA) regarding all issues of property and debt. About a month later, the appellant filed withdrawals of his entry of appearance and waiver of service of summons, along with a statement that he wished to be represented by counsel and to be present at the final hearing. On the same day, his counsel filed an answer to appellee's complaint for divorce and a counterclaim for divorce. In his answer, he stated that any attempts the parties made at settlement before the final hearing were inadmissible and should not be considered by the court. The appellee filed a motion asserting that the parties had entered into a PSA and she asked the court to enforce the agreement and to find the appellant in contempt for selling the marital business. She attached the PSA to her motion. Initially, the circuit court ruled that the PSA was unenforceable, but ruled that the appellee could introduce it into evidence. After the presentation of all the evidence at the hearing, the circuit court informed the parties that it planned to change its oral ruling and enforce the PSA, but that it would strike one paragraph that provided for frequent contact between the parties. The court adopted the appellee's proposed findings of fact and conclusions of law, specifically found that the PSA was an equitable division of the marital property when the parties executed the agreement, and made other specific findings, including that the appellant's deceptive conduct had substantially increased the litigation, and the court awarded the appellee \$10,000 in attorney's fees. In affirming the decision in its entirety, the Court of Appeals found, among other things, that the PSA did not have to follow the statute for the equitable division of marital property, as a court would be required to do if it found the agreement unenforceable. In affirming the award of attorney's fees to the appellee, the Court noted that a trial court has the inherent power to award attorney's fees and whether it should or the amount is within the court's discretion. The appellate court's standard of review on this issue is abuse of discretion. The circuit court is intimately acquainted with the record and the quality of services rendered, and the circuit court has a superior perspective in assessing the applicable factors. No fixed formula exists for determining what is reasonable. The circuit court specifically considered both parties' finances and found that appellant's income was nearly twice as much as the appellee's. The court also found that the appellant's deceptive conduct had substantially increased the litigation. There was no abuse of discretion in the award. (Singleton, H.; No. CV-15-350; 3-30-16; Abramson, R.)

PROBATE

Robinson v. Estate of Robinson, et al., 2016 Ark. App. 130 [**wills—mental capacity; testamentary capacity; competency; undue influence**] The circuit court declined to set aside the decedent's will, finding that the appellee wife met her burden beyond a reasonable doubt that the decedent possessed mental capacity, testamentary capacity, and competency to execute the will, and that she also met her burden beyond a reasonable doubt that she did not procure the will through undue influence. The Court of Appeals reviewed the evidence and noted that "it is clear that the circuit court considered all of the testimony and evidence presented and thoroughly analyzed it in the comprehensive forty-eight-page opinion," holding that the circuit court's findings were not clearly erroneous. (Story, B.; No. CV-15-643; 3-2-16; Gladwin, R.)

Pulliam v. Murphy, et al., 2016 Ark. App. 133 [**administration of trust—breach of duty; summary judgment**] The circuit court granted summary judgment to the appellee co-trustees of a family trust in the appellant's action alleging breach of the trust agreement. She argued on appeal that the appellees owed her a duty of loyalty in their administration of the trust and that genuine issues of material fact exist regarding whether they breached that duty. In reversing and remanding, the Court of Appeals agreed that, while the trial court correctly construed the trust agreement to require a majority of the trustees to take action, that did not end the analysis. The core issue in a summary-judgment proceeding is not to try the issues, but to determine whether there are issues to be tried, and "if there is any doubt whatsoever, the motion should be denied." Here the Court of Appeals noted a number of disputed issues of fact and said that summary judgment in this case was inappropriate. (Hill, V.; No. CV-15-630; 3-2-16; Virden, B.)

Rutland v. McWhorter, et al., 2016 Ark. App. 163 [**guardianship**] Appellant paternal grandmother filed for guardianship of her two grandchildren, making various allegations about the appellee parents of the children. Appellant presented her allegations at a hearing at which she testified. After she presented her evidence, the appellees moved for a "directed verdict." In reversing and remanding, the Court of Appeals said that "[t]he credibility of the witnesses is a matter for the court acting as a finder of fact at the close of all the evidence, not as a matter for the court in evaluating whether the petitioner had presented a prima facie case for purposes of a motion to dismiss." (Herzfeld, R.; No. CV-15-571; 3-9-16; Whiteaker, P.)

Chandler v. Harris, 2016 Ark. App. 155 [**intestate estates**] This contested estate case involves a dispute between the appellant administratrix/daughter of the decedent and the decedent's wife, the appellee, over estate property after the decedent died intestate. The circuit court found that all estate property should go to the decedent's surviving spouse, the appellee. The appellant alleges the court erred in applying Ark. Code Ann. Section 28-39-101(b)(Repl. 2012), involving spousal allowances and ownership of certain corporate property. The Court of Appeals ruled that the appellee's request for statutory allowances was timely. The Court found that the circuit

court did err in awarding appellee her statutory allowance out of corporate property, and it reversed and remanded on that point. The Court affirmed on the finding that appellee owned 150 shares of corporate stock in her own right. Finally, the Court affirmed the circuit court's finding that certain corporate property passed to appellee outside of probate as payable-on-death accounts. (Kilgore, C.; No. CV-15-547; 3-9-16; Virden, B.)

Newkirk v. Hankins, et al., 2016 Ark. App. 186 [adoption] The appellant birth father appealed from a decision granting the appellees' petition to adopt the appellant's son. He contended on appeal that the circuit court erred in finding (1) that appellant's consent was not required under Ark. Code Ann. Section 9-9-207, and (2) that it was in the child's best interest that the adoption be granted over appellant's objection. On the first issue, the circuit court had found that the appellant "willfully failed to pay child support for the minor child in excess of one year[.]" The appellant was incarcerated. The evidence was that for four-and-a-half years, the appellant had received deposits in his prison account of over \$13,000, which he spent on materials to make crafts and on items from the prison canteen. The appellant admitted the money had come into his account from his mother and that he would pay support for the child if the adoption were denied. He had never sent money to the child's first guardians or to the appellees after they became successor guardians. He testified that he did not know he could write checks on his account for child support, thinking he would have to have a court order. He admitted that he could have used the money for the child's care and support. He testified that he did not remember the court telling him at a previous hearing that nothing prevented him from financially supporting the child, although he did remember receiving the order in which that was expressly stated. The appellant knew that the child's mother was not providing support for the child. He knew that the child's first guardians were having severe financial troubles, to the point that they advised him they could no longer care for the child. The Court of Appeals agreed with the circuit court that the appellant had willfully failed to provide any support for his son. The circuit court had noted that his failure was voluntary, and therefore, unjustifiable. On the issue of best interests, appellant contended that the adoption was not necessary and therefore, not in the child's best interest, because without the adoption, he would still be in the home of the appellees, his guardians. The Court of Appeals noted evidence which showed that all was positive with respect to the appellees' relationship with the child. They had "stepped up and fulfilled every role that appellant either could not or would not perform in the past and cannot or will not perform currently." That was in contrast to all other relationships in the child's life. The appellant had been incarcerated since the eight-year-old child was eleven months old. In the first five years of his life, he had lived with the appellant, his first guardians, and the appellees. He had had no interaction with appellant, appellant's family, or his first guardians for a number of years and was doing fine. The appellant is eligible for parole in 2020, but nothing guarantees he will be granted parole then. The appellant did not request a new guardian because of any detriment from remaining with the appellees; he simply asked that the adoption be denied so that the relationship between the appellant and his family might continue. The Court said the circuit

court's finding that the adoption was in the best interest of the child was not clearly erroneous. The decision was affirmed. (Parker, A.; No. CV-15-667; 3-30-16; Brown, W.)

JUVENILE

In Re Administrative Order Number 15.1, 2016 Ark. 131 [**Attorney Standards in DN Proceedings**] The Administrative Order was amended effective immediately. Section 1(c) was amended to provide an individualized clinical component commensurate with the attorney's experience that may include but is not limited to participation in staffings, mediation and hearings with an experienced attorney, and assigning a mentor attorney. Sections 2 and 3 were amended to clarify the attorney's communication responsibilities with their clients.

Ark. Dep't of Human Services v. Veasly, 2016 Ark. 175 [**Sua Sponte Dismissal Order**] The trial court entered an ex parte order for emergency custody and later entered a probable cause order. The mother's children were removed due to her infant's positive drug test at birth and mom's continued drug history. Mom also tested positive for various drugs at the PC hearing, where the parties stipulated to probable cause. The trial court at the end of the hearing raised concerns about the provisional relative placement. The next day, the trial court sua sponte entered an order dismissing the petition and closing the case. The Court of Appeals held that the trial court erred when it failed to conduct the scheduled adjudication hearing and take evidence on the issue as to whether the children were dependent-neglected and whether assessments, evaluations, and services to rehabilitate the mother were needed. The appellate court further noted that the dismissal removed the necessary safeguards for the children and effectively denied services the mother was entitled to receive. The Court of Appeals reversed the trial court's order dismissing the case and reinstated the ex parte and probable cause order previously entered. Remanded for further proceedings in conformity with the Arkansas Juvenile Code (James, P.; CV-15-995; 3-16-2016 Hixson, K)

Note: There is a priority for relative foster care placement with custody with DHS and placement with a relative, if the relative meets the child protection standards and it is in the child's best interest. A.C. 9-28-108 (c.)

Sisemore v. Ark. Dep't of Human Services, 2016 Ark. App. 187 [**PPH - custody**] Appellant argued that that the trial court erred in in placing her child with a relative at the PPH because she had made significant and measurable progress towards remedying the issues that caused the removal. Further, DHS, AAL and CASA recommended an additional three months to transition her child into her home. The Court of Appels found that the trial court findings were not clearly erroneous. The trial court found the appellant was not a fit parent and had not complied with the court orders and case plan. The trial court also found that appellant was not making significant and measureable progress toward reunification, and appellant had not maintained stable housing

or employment, obtained a driver's license, or taken her mental health medications as prescribed. **[best interest]** Appellant argued that it was not in the child's best interest to be placed with the relative due to questions about the care she was being provided in their home and because she would be separated from her sibling. The trial court heard testimony about unexplained injuries and a chronic diaper rash and found it was in the child best interest to remain in the relatives care because the child had special needs and required stability and permanency. The sibling argument was not preserved for appeal and the appellate court defers to the trial judge to assess the credibility of witnesses and saw no error. (Zimmerman, S.; CV-15-990; 3-30-2016; Brown, W.)

Vail v. Ark. Dep't of Human Services, 2016 Ark. App. 150 **[TPR – Best Interest: potential harm]** Appellant (mom) argued that there was insufficient evidence as to the trial court's finding that termination of parental rights was in her child's best interest, specifically as to potential harm. The court is not required to find actual harm and the potential harm analysis is reviewed in broad terms. The trial court was not clearly erroneous where after nearly two years of services appellant was not employed and not ready to care for her child, and there was evidence that she had learned little in spite of services provided. No error was committed in finding that termination was in the child's best interest as to Appellant (father), where after a year in the case he still could not articulate a plan to care for his child and continued to have financial and housing instability **[subsequent factors]** Appellant (father) also argued that there was insufficient evidence as to the statutory grounds. The appellate court addressed the subsequent grounds factor and found sufficient evidence, including two positive drug tests after the petition was filed and continued instability with relationships, finances and housing. (King, K.; CV-15-854; 3-9-2016; Gladwin, R.)

Campbell v. Ark. Dep't of Human Services, 2016 Ark. App. 146 **[TPR - continuance]** Appellant's only argument was that the trial court abused its discretion in denying her motion to continue the termination hearing pending her criminal charges. The existence of criminal charges relating to a termination case do not automatically require a stay of the termination until the charges have been resolved. *Hathcock v. Ark. Dep't of Human Services*, 347 Ark. 819 (2002). Appellant cannot demonstrate prejudice because she voluntarily abandoned her appeal of the adjudication order that contained the trial court's previous denial of her motion to continue and the factual finding related to her pending criminal charges that were reiterated in the termination order. (Smith, T.; CV-15-914; 3-2-2016; Vaught, L.)

Caldwell v. Ark. Dep't of Human Services, 2016 Ark. App. 144 **[TPR – Best interest]** **[adoptability]** Appellant argued that there was no evidence that his son would be adopted given his behavior and the caseworker's testimony that it would be a challenge. The appellate court found that while the likelihood of adoption must be considered by the trial court it is not required to be found by clear and convincing evidence. A caseworker's testimony that a child is

adoptable is sufficient to support an adoptability finding. The trial court found the caseworker to be credible and relied on her testimony in finding the child was likely to be adopted [**potential harm**] The trial court's decision was not clearly erroneous where there was evidence that appellant was unaware of what was happening in his child's life since he had been removed from appellant's mother home due to alleged sexual abuse and drug and alcohol issues. Appellant had only visited his child once and had not met any of the requirements in the case plan. He was unemployed, did not have an approved home, had no way to support his child and had taken no interest in this son's medical diagnoses and treatment. (Edwards, R.; CV-15-925; 3-2-2016; Glover, D.)

Case in which the Court of Appeals affirmed No-Merit TPR and Motion to Withdraw Granted:

Duhon v. Ark. Dep't of Human Services, 2016 Ark. App. 141 [**failure to remedy and subsequent factors**] (James, P.; CV-15-739; 3-2-2016; Kinard, M.)

Hardin v. State, 2016 Ark App. 178 [**Transfer**] Appellant, age 17 at the time of the alleged offense, was charged with aggravated robbery, a Class Y felony, terroristic act, a Class B felony, and aggravated assault, a Class D felony. The circuit court did not err in denying appellant's motion to transfer his case to juvenile division. Appellant's disagreement with how the evidence was weighted provides no basis for reversal. [**EJJ**] Appellant argued that the court erred in designating his case as an EJJ case. The appellate court found this issue moot. An EJJ designation is only available if the case is transferred to juvenile division and the juvenile transfer denial was upheld. (Phillips, G.; CR 15-790; 3-30-2016; Gladwin, R.)

Nelson v. State, 2015 Ark. App. 148 [**Transfer**] Appellant, at age 17, was charged in criminal division with four counts of rape. Appellant contends that the circuit court erred in denying his motion to transfer or for an EJJ designation, and argued specifically that the court erred in giving appropriate weight to evidence concerning his intellectual ability and educational background. The circuit court was not clearly erroneous. The circuit court specifically found that although appellant suffered from an intellectual disability, that the evidence of his prior juvenile offenses indicated his ability to plan crimes and that he was street smart. The court also found that there was no evidence that his premature birth and health problems as a young child had affected his conduct, but rather he wanted to be treated like an adult. Further, there was evidence from teachers of his low functioning, but that he understood the difference between right and wrong and that there were consequences to his actions. (Lindsey, M.; CR-15-714; 3-2-2016; Hoofman, C.)