

# APPELLATE UPDATE

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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](http://courts.arkansas.gov/opinions/sc_opinions_list.cfm) or Court of Appeals - [http://courts.arkansas.gov/opinions/coa\\_opinions\\_list.cfm](http://courts.arkansas.gov/opinions/coa_opinions_list.cfm)).

## ANNOUNCEMENTS

On May 12th, the Supreme Court adopted amendments to Rules 1.2, 4.2, and 4.3 of the Rules of Professional Conduct. The per curiam was included in the mail out.

On May 12<sup>th</sup>, proposals of the Civil Practice Committee were published for comment. The comment period ends June 20, 2016. The per curiam was included in the mail out.

On May 19<sup>th</sup>, proposals of the Criminal Practice Committee were published for comment. The comment period ends July 1, 2016. The per curiam was included in the mail out.

On May 19<sup>th</sup>, Section 13 of the Regulations of the Board of Certified Court Reporters Examiners was amended regarding emergency certificates. The per curiam was included in the mail out.

## CRIMINAL

*Matar v. State*, 2016 Ark. App. 243 [**motion to suppress**] Because the facts surrounding the interview of appellant by law enforcement officials established that he was not “in custody,” there was no requirement that law enforcement officials read appellant his *Miranda* warnings, and the trial court did not err when it denied appellant’s motion to suppress the statements that he made during the interview. [**continuance**] The trial court did not abuse its discretion when it denied appellant’s request for a continuance that was based upon the State providing appellant with additional discovery shortly before trial because: (1) appellant already had knowledge of the additional discovery, (2) the State provided the additional discovery to appellant as soon as the State received it; and (3) appellant received the additional evidence, not on the eve of trial, but almost two weeks before trial. (Karren, B.; CR-15-741; 5-4-16; Gruber, R.)

*Robinson v. State*, 2016 Ark. 211 [**Rule 37**] Because appellant failed to allege facts sufficient to conclude that his trial counsel’s performance was deficient, and because he failed to state “but for” counsel’s alleged deficiency appellant would have sought a jury trial rather than entering into a plea agreement, the circuit court’s summary denial of appellant’s petition for postconviction relief was not erroneous. (Johnson, L.; CR-15-927; 5-19-16; Hart, J.)

*Reynolds v. State*, 2016 Ark. 214 [**sufficiency of the evidence; kidnapping**] There was substantial evidence to support appellant’s conviction. [**closing argument**] Although it is not good practice for counsel to inject his or her personal beliefs into the closing arguments, mere expressions of opinion by counsel in closing argument are not reversible error so long as they do not purposely arouse passion and prejudice. Because the comments made by the prosecutor during the closing argument in appellant’s case did not seem to be calculated or made with the purpose of arousing any passion or prejudice in the jury, and because the trial court promptly gave a curative instructions, it was not an abuse of discretion for the trial court to overrule appellant’s objection to the prosecutor’s closing argument. (Williams, C.; CR-15-819; 5-19-16; Wood, R.)

*Todd v. State*, 2016 Ark. App. 280 [**sufficiency of the evidence; commercial burglary**] Because appellant did not unlawfully enter or remain at Walmart and he had not been banned from the store’s premises, there was insufficient evidence to support his conviction for commercial burglary. [**sufficiency of the evidence; second-degree forgery; breaking or entering**] There was substantial evidence to support appellant’s convictions for second-degree forgery and breaking or entering. [**motion to suppress**] Law enforcement officials did not make any promises of rewards or leniency in exchange for appellant’s statements. Thus, the trial court did not err when it denied appellant’s motion to suppress. [**Ark. R. Evid. 404 (b)**] The circuit court did not abuse its discretion when it admitted evidence related to appellant’s prior conviction because the testimony was independently relevant to establish appellant’s plan,

knowledge, intent, and an absence of mistake. **[motion for mistrial]** The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon the prosecutor and a juror attending the same church. (Culpepper, D.; CR-15-960; 5-25-16; Virden, B.)

*Medlock v. State*, 2016 Ark. App. 282 **[sufficiency of the evidence; possession of methamphetamine with intent to deliver; possession of drug paraphernalia]** There was substantial evidence to support appellant's convictions. **[motion to suppress]** Law enforcement's initial encounter with appellant was lawful pursuant to Rule 2.2 of the Arkansas Rules of Criminal Procedure. Once the law enforcement official concluded his investigation of the crime pursuant to Rule 2.2, he determined that appellant was in violation of the law and arrested him. Thereafter, an inventory search of appellant's vehicle was permissible. Because law enforcement officials' actions were proper, the trial court did not err when it denied appellant's motion to suppress the items found during the search of his vehicle. (Easley, E.; CR-15-729; 5-25-16; Harrison, B.)

*Russell v. State*, 2016 Ark. 224 **[writ of habeas corpus]** Where there is an obvious clerical error, a trial court has jurisdiction to correct the clerical error to make the judgment speak the truth and may enter a judgment *nunc pro tunc* to correct an erroneous judgment. The sentencing order in appellant's case did not accurately reflect the sentence pronounced by the judge in open court. Thus, the circuit court was authorized to enter an amended sentencing order. (Gibson, B.; CV-16-121; 5-26-16; Baker, K.)

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

*Robinson v. State*, 2016 Ark. App. 240 (possession of cocaine; possession of marijuana) CR-15-808; 5-4-16; Abramson, R.

*Lewis v. State*, 2016 Ark. App. 257 (second-degree sexual assault) CR-15-920; 5-11-16; Gruber, R.

*Jordan v. State*, 2016 Ark. App. 255 (possession of methamphetamine with intent to deliver; possession of marijuana) CR-15-759; 5-11-16; Virden, B.

*Allen v. State*, 2016 Ark. App. 264 (computer exploitation of a child) CR-15-546; 5-18-16; Gladwin, R.

*Davis v. State*, 2016 Ark. App. 274 (aggravated robbery; theft; firearm enhancement) CR-15-868; 5-18-16; Hixson, K.

*Perez v. State*, 2016 Ark. App. 291 (rape) CR-15-1072; 5-25-16; Hixson, K.

*Muhammad v. State*, 2016 Ark. App. 285 (robbery) CR-15-608; 5-25-16; Whiteaker, P.

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:

*Todd v. State*, 2016 Ark. App. 270 (suspended sentence) CR-15-959; 5-18-16; Kinard, M.

*King v. State*, 2016 Ark. App. 292 (probation) CR-15-801; 5-25-16; Hoofman, C.

*Ware v. State*, 2016 Ark. App. 284 (probation) CR-15-1003; 5-25-16; Gruber, R.

## CIVIL

*Reveley v. Roth*, 2016 Ark. App. 248 [**personal jurisdiction**] The circuit court did not err in considering matters outside the complaint, such as affidavits and exhibits attached to the motion to dismiss, in reaching its conclusions regarding personal jurisdiction. Roth lacked any significant contact with the state of Arkansas, much less any "continuous, systematic, and substantial" contacts that would support a finding of general personal jurisdiction. There is nothing about the sole act of preparing and signing one tax return in another state that would cause Roth to reasonably anticipate being haled into an Arkansas court. (Compton, C.; CV-15-994; 5-4-16; Whiteaker, P.)

*Edgerly v. Vanderbilt Mortgage, Inc.*, 2016 Ark. App. 241 [**replevin**] Edgerly's constitutional challenge to the replevin statute's five-day requirement fails because she has not demonstrated how she was injured by the statute. Edgerly argues that the statutory requirement that the response/objection to the order of delivery must be filed within five days conflicts with Arkansas Rule of Civil Procedure 12, which allows thirty days to file a response to a complaint. Edgerly also asserts that the five-day requirement violates Rule 6 of the Arkansas Rules of Civil Procedure because the computation of the five days does not exclude Saturdays, Sundays and legal holidays. Here, the five-day limitation was not applied to Edgerly. Because Edgerly has not demonstrated how she was injured by the five-day limitation, she has no standing to challenge its validity. [**security interest**] Edgerly claims that Vanderbilt did not produce documents showing

that the name of the lien holder changed every time the debt was transferred or assigned, and thus, the chain of title was not sufficient to show that Vanderbilt can enforce the lien, but the UCC was complied with and Vanderbilt was not required to take more action to perfect its lien. (Murphy, M.; CV-15-584; 5-4-16; Virden, B.)

*Duran v. SWAEC*, 2016 Ark. App. 237 [**negligence-duty-independent contractor**] The circuit court correctly applied the law to find that under these circumstances, SWAEC did not owe a duty to Duran to provide him with a safe work environment or to warn him about the specific dangers of working near an energized PMT. There is no demonstration of an exercise of actual control or violation of the duty to warn by the entity or individual engaging an independent contractor to perform work, and the contract did not retain the right of control or supervision in the owner or prime contractor. Duran argues that SWAEC owed him a duty to warn him against any unusually hazardous conditions. This duty does not contemplate a duty to warn of obvious hazards that are an integral part of the work the independent contractor was hired to perform. In this case, the PMT was an obvious hazard that was an integral part of the work. (Jones, C.; CV-15-732; 5-4-16; Gladwin, R.)

*Hill v. Gallagher*, 2016 Ark. 198 [**inmate/civil actions/ACA 16-68-607**] The circuit court erred in finding that lawsuits filed in the federal district court counted as “strikes” under Arkansas Code Annotated section 16- 68-607. Although the statutory language in section 16-68-607 does not expressly indicate whether cases filed in federal court count as strikes under the statute, guidance can be gleaned from the surrounding sections of the code, which expressly limit their application to Arkansas courts. The application of the code is limited to Arkansas courts. (Dennis, J.; CV-15-816; 5-5-16; Goodson, C.)

*Belcher v. Denton*, 2016 Ark. App. 263 [**comparative fault**] It was appropriate for the court to deny appellant’s directed-verdict motion on comparative fault and conclude that there was substantial evidence of Tillman’s negligence. (Palmer, C.; CV-15-982; 5-11-16; Brown, W.)

*Martin v. Jimenez*, 2016 Ark. App. 268 [**sanctions/dismiss complaint**] The court’s May 19 order could not support a sanction because it set a deadline that had already passed. The order requiring Martin to disclose a list of providers by May 15 was not entered until May 19, which made it a technical impossibility for Martin to comply with the order’s May 15 deadline. Consequently, the circuit court’s stated reason for striking the complaint—that Martin failed to comply with its May 15 deadline—cannot support the sanction imposed. (Green, R.; CV-15-1026; 5-18-16; Harrison, B.)

*Dodson v. Lovelace*, 2016 Ark. App. 265 [**quiet title/ACA 18-60-506**] The circuit court erred in finding that Heidi established color of title. The lease-purchase agreement contained only Ernestine’s promise to sell the property upon Heidi paying the monthly payments for eighteen

years. The agreement did not purport to transfer title, and a lease-purchase agreement is not an instrument by which title usually and ordinarily passes. The January 2007 letter further indicates that Heidi did not have color of title. In the letter, Ernestine recognized that Michael and Heidi had fulfilled their obligations under the lease-purchase agreement but admitted that she could not transfer title to the property. Heidi failed to establish color of title, which is a requisite element of prima facie title under section 18-60-506. (Compton, C.; CV-15-1025; 5-18-16; Abramson, R.)

*Fennell v. City of Pine Bluff*, 2016 Ark. App. 275 [**specific findings**] As a general rule, circuit courts are not required to make specific findings when granting motions for summary judgment. However, the supreme court has established a pertinent exception to this general rule in cases involving Civil Rights Claims. [**whistle blower act**] Fennell failed to provide any proof that the alleged adverse actions were retaliation for her reporting of Reynolds' activities. (Wyatt, R.; CV-15-751; 5-18-16; Hoofman, C.)

*Convent Corp. v. City of North Little Rock*, 2016 Ark. 212 [**class certification/appeal**] The circuit court denied the motion for class certification because Convent did not present any evidence at the hearing in support of its motion. In determining whether to grant or deny the motion, however, the circuit court should have considered the evidence in the record, which would have included any admissible evidence submitted as exhibits by the parties in support of their contentions that the motion for class certification should have been granted or denied. Thus, the circuit court abused its discretion in denying Convent's motion solely on Convent's failure to present evidence at the hearing. Further, because the circuit court has not yet considered the elements of Rule 23 of the Arkansas Rules of Civil Procedure relating to the certification of class actions, case is reversed and remanded. (Gray, A.; CV-15-912; 5-19-16; Hart, J.)

*Walther v. Carrothers Constr. Co.*, 2016 Ark. 209 [**tax exemption**] DFA argues that the circuit court erred in granting Carrothers's motion for summary judgment and in ruling that Carrothers was entitled to the manufacturing exemption. Specifically, DFA contends that because the water-treatment plant cleans water and does not manufacture it, Carrothers is not entitled to a manufacturer's tax exemption. Carrothers responds that the complex three-phase chemical and mechanical process of converting raw surface water into potable drinking water does constitute manufacturing under the statute. The issue then is whether the water-treatment plant engaged in manufacturing. Russellville's water-treatment plant did not manufacture or process a new product. Through an elaborate three-phase process, the water-treatment plant turned river water into drinking water. That water was taken from the Illinois Bayou, and that water was supplied to the residents of Russellville. It was water in the beginning, and it was water in the end. Carrothers acquired materials and constructed a facility to treat and clean the water, but it did not manufacture the water. Thus, Carrothers is not entitled to the manufacturing exemption pursuant to section 26-52-402. (Griffen, W.; CV-15-799; 5-19-16; Brill, H.)

*Taylor v. Doss*, 2016 Ark. App. 288 [**malicious prosecution**] There was probable cause to issue the warrant; there was no evidence of malice; and defendants were entitled to the advice-of-counsel defense because they made a full, fair, and truthful disclosure of all facts known to them, including the security video, to competent counsel—the prosecuting attorney. (Beaumont, C.; CV-15-726; 5-25-16; Vaught, L.)

*Patton Hospitality Management, LLC v. Bella Vista Village*, 2016 Ark. App. 281 [**contract**] The circuit court correctly determined that the 2013 Tri-Party Agreement superseded the 2004 Affiliation Agreement. The Association was not required to provide notice of Patton’s termination to ETC. [**contempt**] The order was not ambiguous; it was definite in its terms and clear as to what duty it imposed; therefore, the contempt finding was appropriate. (Scott, J.; CV-15-771; 5-25-16; Virden, B.)

*Gerber Products Co. v. Hewitt*, 2016 Ark. 222 [**employment/compensation**] The circuit court found that the Arkansas Minimum Wage Act (AMWA) required Gerber to treat the time required by employees to complete the mandatory donning and doffing activities as compensable work time. On appeal, the issue is whether the mandatory donning and doffing activities constitute compensable work time pursuant to the AMWA despite contrary custom and practice under the collective-bargaining agreement. Upon arrival, the employees are required to change into uniforms and shoes, use a lint roller on their clothing, don protective gear, wash their hands, and walk to the preshift meeting. At the completion of their shifts, the employees are required to doff their protective clothing. The donning and doffing activities at issue constitute “work” because these activities are performed pursuant to strict procedures developed by Gerber and are performed for the benefit of Gerber. Gerber and the Union, through the collective-bargaining agreement, are not permitted to agree to not compensate the employees for donning and doffing activities. (Cox, J.; CV-15-966; 5-26-16; Baker, K.)

## DOMESTIC RELATIONS

*Stibich v. Stibich*, 2016 Ark. App. 251 [**child custody; child support; property division; attorney’s fees**] The parties have had lengthy and contentious postdecree litigation. This appeal followed “over twenty days of trial and more than 200 motions, countermotions, and various other requests for relief.” The appellant mother’s allegations on appeal challenge the circuit court’s decisions concerning custody, child support, property division, and attorney’s fees. The Court of Appeals affirmed the court’s decision in part and reversed and remanded in part. On the issue of child support, the circuit court determined that a material change in circumstances had occurred to justify a change from custody with the mother to joint custody. The Court of Appeals reversed the custody decision and remanded for the trial court to reconsider custody

based upon the best interest of the children. The Court said that mutual cooperation between the parties is integral to an award of joint custody and the evidence showed these parties' "unwillingness to cooperate on anything" (from the trial court's letter opinion). This, along with the court's other comments, led the Court of Appeals to the conclusion that an award of joint custody was erroneous. Besides the custody decision, the Court also remanded the trial court's decision about child support, since the decision about child custody would affect that decision as well. The court affirmed the trial courts decisions concerning an offset between the parties for the father's arrearages owed the mother versus an amount for debt the mother owed the father. It also affirmed a decision regarding the court's order that the appellant reimburse the appellee an amount of money the appellee father paid toward indebtedness on the marital home. The Court of Appeals did not address the appellant's argument concerning an award of attorney's fees to the appellee because she never raised the argument at trial. (Rogers, R., No. CV-13-949; 5-4-16; Hoofman, C.)

*Fitts v. Lively*, 2016 Ark. App. 246 [**grandparent visitation**] In this grandparent-visitation case, the circuit court granted visitation to the grandparents, finding that they had a significant and viable relationship with the two children and that it was in the best interest of the children that visitation between them and the grandparents occur. In reversing and dismissing, the Court of Appeals found that, with regard to best interest, the testimony raised concerns that the "guidance" part of the best-interest requirements was missing, especially as to the grandmother. In addition, the Court said there was no evidence in the record that the loss of the relationship with the grandparents would harm the children. The grandparents had not seen the children for about two years and the appellant mother testified that the two children did not remember their grandparents. The Court said it was an abuse of discretion for the circuit court to award visitation because the appellees failed to meet the burden of showing that it was in the children's best interests for visitation to occur. (Zimmerman, S.; No. CV-15-1036; 5-4-16; Glover, D.)

*Schwartz v. Lobbs*, 2016 Ark. App. 242 [**grandparent visitation**] In this grandparent-visitation case, the Court of Appeals reversed and remanded for the court to comply with Ark. Code Ann. Sec. 9-13-103(f)(1)(Repl. 2015) by providing with the order denying the request for grandparent visitation a written statement of "any and all factors considered by the court in its decision to grant or deny visitation." (McCallister, B.; No. CV-15-871; 5-4-16; Kinard, M.)

*Wilson v. Wilson*, 2016 Ark. App. 256 [**divorce--marital property—inequitable division**] The appellant husband argued on appeal that the trial court erred in finding that certain property was marital property and in making an inequitable division of the property. The appellee wife filed a cross-appeal, arguing that she had a fifty percent nonmarital interest in certain property. The trial court found that one asset, a corporation the parties agreed was set up just before their marriage, was marital property because the court found the parties intended to make a joint investment through the corporation. The Court of Appeals said that the stock-purchase



agreement reflected that the appellant purchased the interest in his name, and the evidence shows that the initial capital contribution came from his checking account. Although the appellee testified that the parties intended to make a joint investment, the Court of Appeals said that appellant purchased the interest by himself before the marriage. The trial court clearly erred in finding the property to be marital property instead of the appellant's nonmarital property. The appellee failed to show that she had a fifty percent nonmarital interest, so the cross appeal was affirmed. Since the trial court erroneously treated the property as marital property, the Court reversed and remanded for the trial court to award the Reeves interest to the appellant as his nonmarital property, absent a specific statutory finding to justify any distribution to the appellee. The appellant also contended that the trial court failed to divide equitably the parties' assets. Because the trial court did not specify whether all of the contested assets were marital or nonmarital, nor did it state reasons for every unequal division, the Court remanded to the trial court to reconsider the entire division, making findings in support thereof when it redistributes the property that was awarded to both erroneously as marital property. (Smith, T.; No. CV-15-569; 5-11-16; Kinard, M.)

*Kelly v. Kelly*, 2016 Ark. App. 272 [**divorce--alimony**] In this divorce case, the circuit court directed that the appellant husband's alimony obligation would automatically increase as child-support payments decrease to ensure that the appellee wife would continue to receive the amount of alimony she requested each month, \$16,659. In reversing and remanding for entry of an order consistent with the Court of Appeals' opinion, the court held that the circuit court abused its discretion both in determining the initial award of alimony and in providing an "escalator clause" for alimony each time child support was automatically reduced. The Court said that modification of alimony must be based on a significant and material change in the parties' circumstances, with the burden to show such change in circumstances always being on the party seeking the change. The Court noted that either party is free to return to the circuit court to seek an increase or a decrease in the alimony award based upon changed circumstances. (Taylor, J.; No. CV-15-231; 5-18-16; Glover, D.)

## **PROBATE**

*Whaley v. Beckham*, 2016 Ark. 196 [**guardianship**] The appellant is the grandson of a 93-year-old woman, the ward in this guardianship, and the appellees are the ward's neighbors and temporary guardians. The appellant's sole argument on appeal is that the circuit court erred in allowing the permissive intervention of the appellees in this guardianship case. The Supreme Court noted that a previous, related appeal involved the ward's granddaughter and these same appellees, who intervened in the case and were appointed guardians of the person of the ward. The Court of appeals in that case reversed the circuit court for lack of an affidavit and of the testimony regarding a professional evaluation of the ward, and did not reach the other issues,

including a challenge to permissive intervention. *Autry v. Beckham*, 2014 Ark. App. 692, 450 S.W.3d 247. At the same time the Court of Appeals issued its mandate, the appellant in this case, the ward's grandson, filed an ex parte petition to be appointed temporary guardian and permanent guardian of his grandmother, and the appellees filed another petition to intervene and for appointment as guardians of the ward. The circuit court granted the intervention in this case, the Court of Appeals affirmed, and the Supreme Court granted review. In affirming, the Supreme Court noted that permissive intervention is within the circuit court's discretion and the standard of review is abuse of discretion. The Court held that "Rule 24(b), as applicable here, provides for permissive intervention when the Beckham's claim or defense and the main action, the probate proceedings, have a question of law or fact in common." The Court set out statements the appellees made in their motion to intervene regarding the history and facts of this case. The Court reviewed the facts and said that the record demonstrates that the underlying litigation and the motion to intervene clearly have a common question of fact. The Court said it was "unpersuaded" that the court below erred in denying the motion to dismiss the appellees' motion to intervene in the probate proceedings. The circuit court was affirmed and the Court of Appeals' opinion was vacated. (Parker, A.; No. CV-15-745; 5-5-16; Baker, K.)

*Patton, et al. v. Fulmer*, 2016 Ark. App. 260 [**decedent's estate; construction of a will**] The appellants are the nephews and niece of the decedent and beneficiaries of a residuary trust created by his will. The appellee is the decedent's widow and the executrix of his estate. In this appeal, the appellants challenge the circuit court's ruling on the construction of the will, the bequest to the appellee, and the award of the distribution of the appreciation of the probate estate's assets. They also raised the court's refusal to allow two attorneys to testify on the issue of the construction of the will and the application of certain probate or estate tax laws. The Court of Appeals concluded that the circuit court erred in its construction of the will and was not consistent with the testator's intent and it reversed and remanded on that point. The court's error in the construction of the will also led to a miscalculation of the distribution of the appreciation of investment accounts and the Court ordered that, upon remand, the calculation and distribution be done in a manner consistent with its opinion. The Court also said that a final accounting would be required before the distribution of assets and the closing of the estate. The Court found that the circuit court did not abuse its discretion in excluding the extrinsic testimony of Bill Haught, who prepared the will, because there was no finding of ambiguity by the court. In addition, there was no abuse of discretion in excluding the testimony of the appellant's expert witness in tax law. The case was affirmed in part, and reversed and remanded in part. (Gray, A.; No. CV-14-1072; 5-11-16; Hixson, K.)

*Wingate-Mickles v. Harris*, 2016 Ark. App. 253 [**decedent's estate—attorney's fee**] The only issue in this case is the payment of an attorney's fee of \$6,989.64 to a previous attorney for the estate who had filed a successful will contest. The appellant, the current, successor executrix, raised four points on appeal, but the Court of Appeals reversed and remanded on one, making

consideration of the others unnecessary. The attorney's fee was ordered, based upon a claim against the estate, without a hearing. The appellant objected and maintained on appeal that pursuant to section 28-50-105(a)(3), a hearing should have been held because it was objected to by the lawfully-appointed executrix. The Court of Appeals agreed, and, in reversing and remanding for further proceedings consistent with its opinion, said the order to pay violates the Code provision by ordering payment of the attorney's fee listed in the attorney's claim without the due process of a hearing. (McGowan, M.; No. CV-15-883; 5-11-16; Gladwin, R.)

*Hood, et al. v. Hood, et al.* 2016 Ark. App. 266 [**temporary guardianship; termination of guardianship**] The appellees, Jimmy and Ruth Ann Hood, were appointed temporary guardians of the appellant's two children. A hearing was scheduled, but was continued upon the motion of the appellant mother. An "Agreed Order of Continuance" was entered, continuing the case "until the parties reset it for a full trial. The guardianship shall continue through the next trial." Visitation was ordered for the maternal grandmother, the Intervenor in this case. The appellees subsequently moved to set aside the agreed order, alleging that the grandmother was allowing the mother to care for the children while she worked. No hearing was held on the motion. The appellant mother filed a motion to set aside the order, for dismissal or termination of the emergency, temporary guardianship, and for return of the children. The Court of Appeals agreed with the appellant's contention that the trial court had no authority to continue the temporary guardianship. The Court also agreed with the appellant's alternative argument that, even if she had consented to the guardianship, once she withdrew that consent, the guardianship should have ended automatically because she had not been found to be an unfit parent, relying on *Matter of Guardianship of W.L.*, 2015 Ark. 289, 467 S.W.3d 129. The Court said there has been no evidentiary hearing in this case, "much less one adjudicating ... [the mother] ... unfit as a parent. Pursuant to *W.L.*, because she has not been found unfit, she is fit, and her decision regarding her children controls." Based upon that precedent, the decision was reversed. (Arnold, G.; No. CV-15-663; 5-18-16; Virden, B.)

## JUVENILE

*Beisner v. Ark. Dep't of Human Services*, 2016 Ark. App. 290 [**TPR – witness**] Appellant's only argument on appeal was that her due process rights were violated because the circuit court erred in proceeding with the termination hearing in the absence of a critical witness, who was believed to be the father of one of her children and who had made allegations against the appellant. At the termination hearing, appellant's counsel stated that she planned on questioning the witness, but that she had not subpoenaed him. The circuit court stated that unless someone provided a compelling reason that the termination hearing should not proceed, it would continue; however, no objection was made. As a result this issue was not preserved for appeal. (James, P.; CV-16-995; 5-25-2016; Vaught, L.)

*Clark v. Ark. Dep't of Human Services*, 2016 Ark. App. 286 [**Review - Custody**]

Appellant argued that the trial court used the wrong standard in placing custody of her child with their father, and in the alternative that the evidence was insufficient to change custody. The appellate court found that the juvenile code applies and that the court did not follow the statutory guidelines, including a home study for a transfer of custody. However, trial counsel did not object and argued the incorrect standard (change of circumstances) at trial and cannot now complain on appeal. The appellate court noted that there was some evidence to support the trial court's decision to transfer custody and its finding that it was in the child's best interest to transfer custody to the father. However, the appellate court reversed and remanded, finding that the order was insufficient by failing to fully consider the effect of transfer of custody, including separation from siblings. (Keaton, E.; CV-15-882; 5-25-2016; 15-882, Whiteaker, P.)

*James v. Ark. Dep't of Human Services*, 2016 Ark. App. 276 [**TPR - continuance**]

Appellant's only argument was that the trial court abused its discretion in denying her motion to continue the termination hearing. Appellant did not seek a continuance at the pre-trial conference but waited three days prior to the TPR to file a motion to continue. Lack of diligence is a sufficient reason to deny a continuance and appellant failed to show prejudice. (Capehart, T.; CV-16-52; 5-18-2016; Brown, W.)

*Kerr v. Ark. Dep't of Human Services*, 2016 Ark. App. 144 [**TPR – best interest/ adoptability**]

The appellate court found that child's testimony, that she wanted to be adopted by her foster parents, was not evidence as to the likelihood that the children would be adopted. The appellate court reversed as to best interest, as there was no evidence as to adoptability or a finding that the circuit court made a finding that absent evidence of adoptability, it made no legal difference to the ultimate decision of best interest. [**grounds/meaningful efforts**] Appellant argued that DHS failed to provide meaningful effort to correct the conditions that cause removal after her children were removed from her the second time after a trial placement. However, the court based its consideration over the entire four years of the case and reasonable efforts findings were made to provide appropriate services. Further, the trial court recognized that appellant had received services for four years and had not benefited from services and her circumstance had not improved in the court's finding of aggravated circumstances that there was likelihood that further services would result in successful reunification, (Zuerker, L.; CV-16-71; 5-18-2016; Gruber, R.)

*Ferguson v. Ark. Dep't of Human Services*, 2016 Ark. App. 258 [**PPH /TPR – custody with**

**dad**] Appellant's adoptive children were removed as a result of mother's physical abuse and the father's failure to protect. They argue that the trial court erred in following the preferential goals in the permanency planning statute by not placing the children with their father or relatives, which resulted in a termination which should also be reversed. Appellants argued that the father had complied with the case plan and made significant measurable progress toward remedying the

cause of removal entitling him to custody. The appellate court found that the trial court did not err. Although the father had complied with the case plan, he did not make significant measurable progress toward achieving the goals of the case plan and toward remedying the conditions that caused removal. There was evidence that appellants continued to deny the physical abuse occurred, despite a felony conviction for battery. There was also testimony from a psychologist that the father would not protect the children and that he would not benefit from services making reunification impossible. He further testified that the father was unattached and apathetic toward the children; that he was passive and submissive to his wife and supported her throughout the case; and that he denied his wife abused the children, despite evidence provided by his child of the abuse. Although the father testified that he would choose his children over his wife for the first time at the PPH, the trial court did not find his testimony credible finding that he had chosen his wife over his children. **[custody with relatives]** Appellant's alternative argument was that their children should be placed with the mother's brother and sister. They argued that placement with relatives was an exception to termination. However, the appellate court noted that the relative placement exception to TPR must be based on the child's best interest and upheld the trial court. There was evidence that the relatives also did not believe that mother had abused the children and the psychologist testified that it would be damaging to the children to be placed with relatives who would not believe that there had been abuse. The appellate court affirmed the PPH order for adoption as the goal and the resulting termination order. (Elmore, B.; CV-15-991; 5-11-2016; Vaught, L.)

*Hernandez v. Ark. Dep't of Human Services*, 2016 Ark. App. 250 **[TPR – failure to remedy]**  
This case resulted in removal because appellant failed to follow a DCFS protection plan to not allow other adults in the home and to not leave her children with inappropriate care givers which resulted in allegations of sexual abuse. There were also allegations of neglect. The trial court was affirmed as to failure to remedy ground where there was evidence that appellant remained unfit and unable to care for her children. The court relied on a psychological evaluation that she continued to have problems with judgment and inappropriate relationships as demonstrated by remaining married to her husband whose fear-based parenting style was deemed harmful to the children who had been diagnosed with post-traumatic stress. She also continued to make poor decisions including a plan to have people she did not know come into her home and care for her children. The court also did not err in finding that DHS made meaningful efforts to correct the conditions that caused removal where there was evidence of numerous services provided to the family. **[best interest/ potential harm]** Appellant did not learn or understand the significance of having people unfamiliar to her living with or caring for her children, which she reported to DHS she planned to do. The appellate court noted that the trial court's finding that she did not find that appellant would protect her children was supported by her dependent-personality disorder. (Zimmerman, S.; CV-15-1069; 5-4-2016; Vaught, L.)

*Miller v. Ark. Dep't of Human Services*, 2016 Ark. App. 239 **[TPR – best interest/adoptability]**

The Court of Appeals affirmed the best interest finding as to T.C. where there was evidence by foster parent that she would like to adopt T.C. However, there was no evidence about adoptability or a finding by the court that the lack of such evidence would not have mattered as to T.M. The appellate court reversed and remained as to the adoptability of T.M.

**[abandonment]** Appellant's argument that DHS did not allege abandonment in its petition is wrong. DHS alleged that the mother abandoned the children, not the appellant. (Braswell, T.; CV-15-1010 5-4-2016; Gladwin, R.)

*Miller v. Ark. Dep't of Human Services*, 2016 Ark. App. 249 **[TPR – best interest/adoptability]**

This is a companion case to *Miller v. Ark. Dep't of Human Services*, 2016 Ark. App. 239. Appellant's only argument is that the trial court lacked evidence of adoptability as his daughter J.M. The appellate court acknowledge that the circuit court erred in attributing testimony to a witness that was not present at the hearing, but affirmed because the court reached the right conclusion based on the record. (Braswell, T.; CV-15-1011 5-4-2016; Vaught, L.)

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

*Kula v. Ark. Dep't of Human Services*, 2016 Ark. App. 287 [memorandum opinion] (Spears, J.; CV-16-94; 5-25-2016; Whiteaker, P.)

*Conley v. Ark. Dep't of Human Services*, 2016 Ark. App. 267 [memorandum opinion] (Zimmerman, S.; CV-16-123; 5-18-2016; Virden, B.)

*Hardin v. State*, 2016 Ark App. 178 **[Transfer]**

Appellant, was charged with capital murder and aggravated robbery The circuit court did not err in denying appellant's motion to transfer his case to juvenile division. Appellant argued that the following factors did not justify prosecution in criminal division. Protection of Society: The trial court did not err due to the serious and violent nature of the charges. Previous History: The trial court did not err when in the juvenile transcript appellant admitted that he was in a school fight and threatened to return with a gun and shoot people. Rehabilitation: The appellate court could not say that the trial court erred in finding that appellant could not be rehabilitated. (Johnson, L.; CR 15-298; 5-25-2016; Brown, W.)

*Brown v. State*, 2016 Ark. App. 234 **[Transfer]**

Appellant, at 17 and nine months of age, was charged with capital murder, aggravated murder and two counts of committing a terroristic act. Appellant argued that that the court misapplied the protection of society factor arguing that his mother testified that he was a good son, had not been in trouble and not exhibited any violent in the home. The court did not err with evidence that there were three victims during a robbery and one of the victims was killed Appellant

contends that the circuit court erred in not appropriately considering testimony concerning rehabilitation programs in the juvenile system. The appellate court noted that the circuit court did not ignore the evidence, it simply weighted it differently than appellant desired. [EJJ] Although there was testimony about EJJ, appellant raised his request for EJJ on appeal -- failing to request EJJ in a motion or at the transfer hearing -- and as such will not be considered on appeal. Further the EJJ designation is moot because EJJ applies only when a case is pending in the juvenile division (Sims, B.; CR-15-369; 5-11-2016; Abramson, R.)

## U.S. SUPREME COURT

*Betterman v. Montana* [speedy trial] Petitioner Betterman pleaded guilty to bail jumping after failing to appear in court on domestic assault charges. He was then jailed for over 14 months awaiting sentence, in large part due to institutional delay. He was eventually sentenced to seven years' imprisonment, with four of the years suspended. Arguing that the 14-month gap between conviction and sentencing violated his speedy trial right, Betterman appealed, but the Montana Supreme Court affirmed the conviction and sentence, ruling that the Sixth Amendment's Speedy Trial Clause does not apply to postconviction, presentencing delay.

*Held:* The Sixth Amendment's speedy trial guarantee does not apply once a defendant has been found guilty at trial or has pleaded guilty to criminal charges.

(No. 14-1457; May 19, 2016)