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CRIMINAL

Davis v. State, 2017 Ark. App. 496 [**continuance**] In deciding whether to grant or deny a motion for a continuance to secure the presence of a witness, the circuit court should consider: (1) the diligence of the movant; (2) the probable effect of the testimony at trial; (3) the likelihood of procuring the attendance of the witness in the event of a postponement; and (4) the filing of an affidavit, stating not only what facts the witness would prove but also that the affiant believes them to be true. In appellant's case, although he had subpoenaed the witness, he did not know the parameters of the witness's potential testimony or whether the witness would avail himself of his Fifth Amendment Right not to testify. Thus, the trial court did not abuse its discretion when it denied appellant's request for a continuance, which was based upon his desire to secure an additional witness. [**amendment to criminal information**] Because the amendment to the criminal information did not change the nature of the charge, the circuit court did not err in allowing the State to amend the battery charge at trial from first-degree battery under Ark. Code Ann. § 5-13-201(a)(8) to first-degree battery under Ark. Code Ann. § 5-13-201(a)(4). (Dennis, J.; CR-16-857; 10-4-17; Abramson, R.)

Jefferson v. State, 2017 Ark. App. 492 [**motion for new trial; ineffective assistance of counsel**] Because appellant, who received a sentence less than the maximum sentence on each of the offenses for which he was convicted, could not demonstrate that he was prejudiced by his attorney's alleged failure to conduct a sentencing investigation or present mitigating evidence at sentencing, he was not able to meet the second prong of the *Strickland* standard. Thus, the circuit court did not err in denying his motion for a new trial, which was based upon an allegation of ineffective-assistance of counsel during the sentencing phase of his trial. [**Ark. R. Evid. 803(2)**]. When determining if a statement falls under the excited-utterance exception to the hearsay rule the court should consider the following factors: (1) lapse of time; (2) age of the declarant; (3) physical and mental condition of the declarant; (4) characteristics of the event; and (5) subject matter of the statement. In appellant's case, the court did not abuse its discretion when it permitted a law enforcement official to testify that he was told appellant was the perpetrator because the hearsay evidence was admitted pursuant to Ark. R. Evid. 803(2) as a statement that was made minutes after the crime occurred by one of the victims as she was comforting the other victim. [**closing argument**] Appellant's ability to present a defense was not compromised by the circuit court's directive to move on to a new topic during closing argument. (Clawson, C.; CR-16-1039; 10-4-17; Gruber, R.)

Woods v. State, 2017 Ark. 273 [**Batson challenge**] To identify improper racial strikes under *Batson*, the Arkansas Supreme Court has articulated a three-step process. First, the party challenging the strike must present facts sufficient to raise an inference of purposeful discrimination. Second (and only if the challenger has succeeded on the first step), the trial court must request that the striking party provide a race-neutral explanation for the strike. Third, the trial court must determine whether the strike's opponent has proven purposeful discrimination based on the evidence and argumentation presented. By challenging the first juror to be struck, appellant failed to establish that the State had a process or pattern of purposeful discrimination. Thus, it was not necessary to consider the other steps in the *Batson*-challenge process. Although appellant may have satisfied the first step in the *Batson*-challenge process with subsequently struck jurors, he failed to overcome the State's race-neutral explanation for striking those jurors. Accordingly, the trial court's decision to reject appellant's *Batson* challenges was not clearly against the preponderance of the evidence. (Pope, S.; CR-16-659; 10-5-17; Womack, S.)

Cage v. State, 2017 Ark. 277 [**competence to stand trial**] The circuit court, which heard testimony from two experts, reviewed forensic reports, and had an opportunity to observe appellant, did not err in determining that appellant was competent to stand trial. [**jury instructions**] Because appellant failed to present evidence to support the affirmative defense of mental disease or defect, the circuit court did not abuse its discretion when it refused to give AMI Crim. 2d 609 and 610. (Jones, B.; CR-16-1125; 10-12-17; Kemp, J.)

Rogers v. State, 2017 Ark. App. 521 [**Ark. R. Evid. 609**] Crimes involving dishonesty and false statements are regarded as probative of credibility and can be used to impeach a witness's credibility. The Arkansas Supreme Court has interpreted Ark. R. Evid. 609 to include theft of property as a crime involving dishonesty. Accordingly, the trial court abused its discretion when it refused to allow appellant to impeach one of the victims with a misdemeanor conviction for theft of property. (Wright, J.; CR-16-721; 10-18-17; Virden, B.)

Jefferson v. State, 2017 Ark. App. 536 [**Ark. R. Evid. 404(b)**] When evidence of a prior crime reflects a consciousness of guilt, it is independently relevant and admissible under Ark. R. Evid. 404(b). Evidence of flight is admissible to show consciousness of guilt, even if the flight was not immediately after the alleged commission of the crime. Thus, the trial court did not abuse its discretion when it permitted the State to present testimony regarding appellant's flight from the police, which occurred three weeks after the alleged crime, as evidence of his guilt. (Clawson, C.; CR-16-1154; 10-18-17; Hixson, K.)

Williams v. State, 2017 Ark. App. 526 [**sex-offender registration**] Arkansas Code Annotated § 12-12-905 provides that the sex-offender registration and registration-verification requirements apply to a person who was serving a sentence of imprisonment on or after August 1, 1997. Additionally, the Arkansas Supreme Court has determined that the statute applies to persons "still serving a sentence of incarceration, probation, parole, or other form of community supervision at the time of the Act's effective date, August 1, 1997." Appellant, who was in prison on August 1, 1997, and not released without supervision until 2014, was subject to the statutory requirements. At the time that appellant's sentencing order was entered, there was no requirement that the obligation to register as a sex offender be included in the order. Thus, the fact that his sentencing order did not mention the obligation, did not remove appellant's statutory duty to register. (Piazza, C.; CR-16-1124; 10-18-17; Harrison, B.)

Moe v. State, 2017 Ark. App. 546 [**motion for new trial**] Because there was no evidence that indicated that the State was attempting to elicit the challenged statement, the circuit court did not abuse its discretion by denying appellant's motion for a mistrial, which was based upon an answer to a question posed by the State. Further, any prejudice that could have resulted was cured when the court admonished the jury to not consider the statement. (Karren, B.; CR-17-13; 10-25-17; Abramson, R.)

Kimbrell v. State, 2017 Ark. App. 555 [**constitutional challenge; Ark. Code Ann. § 5-73-103**] Appellant challenged the constitutionality of Arkansas Code Annotated § 5-73-103(b)(2). He argued that the portion of the statute that was amended after his guilty plea was entered should not be applied to his case. The challenged amendment does not apply to appellant. Therefore, he lacked standing to challenge the constitutionality of Arkansas Code Annotated § 5-73-103(b)(2). (Ryan, J.; CR-17-99; 10-25-17; Whiteaker, P.)

Talley v. State, 2017 Ark. App. 550 [**right to self-representation**] Although appellant sought to represent himself at trial, he denied that he was waiving his right to counsel and he requested permission to hire private counsel. Based upon appellant's actions, the circuit court correctly determined that he did not unequivocally waive his right to counsel and properly denied appellant's motion to represent himself at trial. (Johnson, L.; CR-17-17; 10-25-17; Gladwin, R.)

Williams v. State, 2017 Ark. 287 [**admission of photographs**] Photographs that are inflammatory in the sense that they show human gore repulsive to the jurors may be admissible if they shed light on any issue, assist witnesses in describing a crime scene, or help the jury understand the testimony. Additionally, photographs may be admissible to show the condition of the victim's body, the type or location of the injuries, and the position in which the body was discovered. The photographs in appellant's case assisted a witness in describing the crime scene and helped the jury understand the testimony. The photographs also showed the victim's gunshot wound and the position in which his body was discovered. The photographs depicted images that were not clearly visible on the video and gave the jury a different perspective of the crime scene. Accordingly, the circuit court did not abuse its discretion when it admitted the photographs. (McCallum, R.; CR-16-1135; 10-26-17; Kemp, J.)

CIVIL

Schroeder v. Towmate, LLC, 2017 Ark. App. 516 [**injunction/easement-access**] The circuit court found that the road in dispute was at one time a county road and that it had since been abandoned. When a public road is abandoned, it does not affect the private rights of occupants to ingress and egress. Furthermore, this property right is not diminished merely because the property owner has alternative means of ingress and egress. Therefore, it is immaterial that Schroeder could build a road through his Tract 1 to access Tract 2. (Scott, J.; CV-17-233; 10-4-17; Murphy, M.)

Graham v. Underwood, 2017 Ark. App. 498 [**trusts**] [**summary judgment-affidavits**] The affidavits were filed more than one week after the hearing had ended and were thus untimely filed. The trial court did not abuse its discretion in striking the affidavits under these circumstances. [**undue influence**] Summary judgment was appropriate here because Graham could not meet proof with proof by presenting disputed facts related to undue influence. Although the trial court found that there was no confidential relationship, the trial court alternatively ruled that, even if there had been a confidential relationship, Underwood rebutted the presumption of undue influence. Graham herself knew of no undue influence; Lawson did not witness any undue influence; and Underwood said that she did not discuss Sam's estate planning; she did not ask, pressure, or coerce Sam to make any changes to the trust; she did not

facilitate the amendments by putting Sam in contact with his lawyer; and she did not do anything to cause her father to fear her. (Cox, J.; CV-16-1148; 10-4-17; Virden, B.)

Brown v. UPS, 2017 Ark. App. 501 [**civil rights act**] Appellants' argument that the ACRA does not recognize an "honest belief" rule is incorrect. When construing the ACRA, a court may look for guidance to state and federal decisions interpreting Title VII for persuasive authority. An honest belief has been held to be a legitimate, nondiscriminatory reason under the ACRA in federal courts. Further, there was sufficient evidence for the jury to be charged with an "honest belief" instruction. The decision makers involved in the promotion decision testified that they honestly believed appellants were either ineligible for promotion or less qualified than other candidates. It was within the jury's purview to consider the credibility of witnesses and the weight and value of their testimony. Appellants failed to offer sufficient evidence to infer that discriminatory animus was the real reason for the decision not to promote. The "honest belief" rule is not an affirmative defense under Ark. R. Civ. P. 8(c); it is simply a rule. It was appellants' burden to prove an adverse employment action motivated by intentional discrimination. (Fox, T.; CV-17-41; 10-4-17; Gladwin, R.)

Rogers v. Knight, 2017 Ark. 267 [**justiciability**] No justiciable controversy exists. Rogers claims he is parole eligible and has a right to a parole hearing. The State is not contesting his parole eligibility or his entitlement to a parole hearing, and in fact had provided him such prior to the filing of the petition. A controversy is justiciable when "a claim of right is asserted against one who has an interest in contesting it." A case is nonjusticiable "when any judgment rendered would have no practical legal effect upon a then-existing legal controversy." In his petition, (Dennis, J.; CV-16-834; 10-5-17; Wood, R.)

Wilson v. Walther, 2017 Ark. 270 [**illegal exaction-standing**] The funds at issue in this case are derived from taxes and implicate the state treasury such that Wilson, as a taxpayer, has standing in this illegal exaction suit. [**mootness**] The issues involve significant statewide public interest because they concern millions of dollars of taxpayer money. A decision on the constitutionality of these appropriations might avert future litigation, and thus are not moot. [**article 5, section 29**] A "grant" to CAPDD is inadequate under article 5, § 29, just as an appropriation of "state assistance" or "state aid" was held to be unconstitutional in *Wilson II*. The State argues that the purpose of the appropriations can be found in external statutes where it is clear that the statutes are applicable. The State contends that in light of the statutory and regulatory mechanisms expressly governing the disbursement of funds to planning and development districts the only reasonable interpretation of the "distinct purpose" of the challenged acts is to promote economic development for the benefit of the citizens of Arkansas. However, the plain language of article 5, § 29 requires the purpose of the appropriation to be distinctly stated in the bill itself. (Piazza, C.; CV-17-90; 10-5-17; Wynne, R.)

O'Dell v. Peck, 2017 Ark. App. 532 [**standing**] Without holding a hearing on Finley's motion to dismiss, the circuit court dismissed O'Dell's complaint with prejudice. In its order, the court stated that O'Dell "is no longer a qualified beneficiary under the Peck Family Trust and has no standing to bring this action." No explanation was given on how the court reached its decision. O'Dell's complaint alleges that she is a qualified beneficiary under the terms of the Peck Family Trust, and there is nothing on the face of the complaint that suggests that she lacks standing. The facts alleged in the complaint are treated as true and are sufficient to set forth a claim for declaratory judgment. It was error for the circuit court to dismiss the complaint based on lack of standing. (Fox, T.; CV-17-64; 10-18-17; Whiteaker, P.)

Kirshberger v. Frost, 2017 Ark. App. 535 [**negligence-duty- open, obvious danger**] The court ultimately granted summary judgment based on its finding that the risk was an open and obvious condition with which Kirshberger was well acquainted. Here, given Kirshberger's long employment history with Frost, her familiarity with the oil room, and the obvious nature of the condition of the floor, the open and obvious nature of the alleged danger supports the circuit court's grant of summary judgment. (Sutterfield, D.; CV-17-136; 10-18-17; Vaught, L.)

Garner v. Hot Springs Village, 2017 Ark. App. 539 [**property owners' association**] The circuit court did not clearly err when it found that the two-tier assessment was reasonable. The circuit court's thorough order includes detailed findings on the reasonableness of the two-tier assessment. Evidence demonstrates the need for additional funds. Additionally, there is evidence that the decision to implement a two-tier assessment was arrived at after extensive study and that the decision was rationally based on the fact that owners of improved lots used association amenities more often than owners of unimproved lots. The board had the authority to modify protective covenants and create overlay zones. The circuit court's finding that the annual assessment funds will be used for permissible purposes that directly or indirectly promote the health, safety, and welfare of lot owners was not erroneous, including replenishing the POA's cash reserves. (Williams, L.; CV-15-731; 10-18-17; Murphy, M.)

Smith v. Pavan, 2017 Ark. 284 [**birth certificates**] On remand for entry of a final judgment consistent with the mandate of the Supreme Court of the United States, the circuit court should award declaratory and injunctive relief as necessary to ensure that same sex spouses are afforded the same right as opposite-sex spouses to be listed on a child's birth certificate in Arkansas, as required under *Pavan v. Smith*. Extending the benefit of the statutes at issue to same-sex spouses will implement the mandate of the Supreme Court of the United States without an impermissible rewriting of the statutes. (Fox, T.; CV-15-988; 10-19-17; Wynne, R.)

Penn v. Gallagher, 2017 Ark. 282 [**in forma pauperis**] Penn's petition asserts facts to support a colorable claim for relief and is worthy of development at the circuit court level. Given his indigency status and his petition sufficiently stating a colorable cause of action, the circuit

court's denial of Penn's petition to proceed in forma pauperis was clearly erroneous. (Fox, T.; CV-16-387; 10-19-17; Wood, R.)

Wilson v. State, 2017 Ark. App. 553 [**attorney's fees-interest**] Interest runs on attorney's fees from the date of the entry of the award and not from the date of the verdict. (Griffen, W.; CV-17-204; 10-25-17; Harrison, B.)

OPC, LLC v. City of Springdale, 2017 Ark. App. 543 [**ordinance enforcement**] Statute requiring challenge to ordinance enforcement must be filed within 45 days did not apply to certain of the violations. (Beaumont, C.; CV-17-174; 10-25-17; Gruber, R.)

Thomas v. Clear Investigative Advantage, LLC, 2017 Ark. App. 547 [**background check**] The circuit court properly held that Clear Investigative "reasonably relied upon public records such that summary judgment is appropriate" and that the circuit court properly granted Clear Investigative's motion for summary judgment on the FCRA claims. The information contained in Thomas's report was correct as of January 2014 based on the public records then existing in the State of Arkansas about his criminal background and as reflected on the AOC website. Clear Investigative reasonably relied on the information provided by CCI and took additional measures to verify the information reported, including verifying Thomas's name, middle name, and date of birth. Clear Investigative conducted a reasonable investigation and reported the information from legally reliable sources, including the AOC. (Piazza, C.; CV-17-19; 10-25-17; Abramson, R.)

Fayetteville Express Pipeline, LLC v. PSC, 2017 Ark. App. 557 [**ad valorem taxes**]. The circuit court found that the Commission's decision to affirm the assessment of FEP's property was supported by substantial evidence in the record. The Commission properly considered FEP's evidence purporting to show that the pipeline was economically obsolete when it reviewed the assessment of FEP's property. (Griffen, W.; CV-16-815; 10-25-17; Vaught, L.)

Russellville Holdings, LLC v. Peters, 2017 Ark. App. 561 [**spoliation**] Here, plaintiffs sent a letter to preserve the documents before they were destroyed and converted into an electronic format yet destruction of the evidence still occurred. It is undeniable that appellant was on notice of a potential suit. Appellant was put on notice long before litigation commenced that it was to preserve "original dictation related to the intake, discharge, or care of Mr. Peters, whether maintained in digital, cassette tape format or otherwise." Moreover, appellant acknowledged the request and originally sequestered the paper records. On appeal, appellant asserts that it was in compliance with the obligations under Arkansas law regarding the retention and preservation of medical records. However, that is not sufficient because not only was it reasonably foreseeable that the original medical records would be material to a potential claim, but also because the paper records existed at the time the letter was sent, and appellant agreed to retain them. It was not unduly burdensome for appellant to maintain the paper records. Unlike the example of the

burdensome requirement that a corporation to preserve all e-mail correspondence, appellant was not required to keep all the patients' paper records, just Mr. Peters's. In granting the motion to strike the answer, the court acknowledged that striking the answer of a party is very serious but that the conduct was most egregious as evidenced by the fact that appellant was "clearly placed on notice not to destroy these critical documents," yet it proceeded to destroy the original file anyway. The circuit court further considered the alternative to instruct the jury on spoliation of evidence, but found that it would be insufficient given the importance of the factual dispute surrounding which documents were in the original file. Because the circuit court clearly found that appellant willfully destroyed the paper medical records and that a curative instruction would be insufficient, the court did not abuse its discretion by striking the answer. (Sutterfield, D.; CV-17-58; 10-25-17; Murphy, M.)

DOMESTIC

Bonds v. Bonds, 2017 Ark. App. 518 [**no material change in circumstance to warrant a modification of custody**] The appellate court found error in the circuit court's ruling that there was a material change in circumstance to modify custody to Appellee. The appellate court stated that the circuit court focused on social media posts made by Appellant's boyfriend and his use of profanity toward or in the presence of the minor children. The appellate court found that these actions were insufficient to warrant the custody modification, and that all these things had either happened before the divorce decree or had been ongoing since before the divorce. The appellate court found that the circuit court failed to outline exactly what the material changes of circumstance were, and there was no independent basis in the record for concluding that a material change in circumstance had occurred. (McCain, G.; CV-16-1115; 10-4-17; Brown, W.)

Barham v. Bowman, 2017 Ark. App. 507 [**contempt powers of circuit court; child support arrearage interest**] The appellate court found no error in the contempt findings, as the circuit court found certain testimony more credible and concluded that Appellant's conduct was disparaging and interfered with visitation in violation of the circuit court's previous orders. The appellate court also found no error with the circuit court placing Appellant in jail while holding Appellee's jail time in abeyance on the condition that he paid his child support arrearage. The appellate court recognized that contempt powers belong to the court, that it is not relevant that Appellee never requested for Appellant to be incarcerated, and that the court was under no obligation to assign the exact same contempt punishments to the parties. The appellate court remanded the remaining issue regarding interest on the child support arrearages, so that the circuit court could consider the applicability of Ark. Code Ann. § 9-14-233 to the facts of this case. The order made no provision for interest on the arrearage judgment -- a portion of which was a stipulated amount and an additional amount awarded by the Court. (Schrantz, D.; CV-17-125; 10-4-2017; Glover, D.)

Vest v. Vest, 2017 Ark. App. 530 [**material changes in circumstance must occur after filing of last order regarding custody --not after visitation order; factors in determining material change in circumstance and best interest**] The appellate court found no error in the trial court's ruling that, based on the totality of the evidence, there was a material change in

circumstance since entry of the last custody order and it was in the best interests of the minor children to modify custody. Appellant argued that it had been less than four months since the last custody modification was made, but the appellate court found no error in the trial court's determination that the last time custody of the children was litigated was in 2008 and all subsequent modification orders dealt with visitation only. The appellate court recognized that there were multiple changes in circumstance since entry of the 2008 Decree considered by the circuit court: the child's diabetes diagnosis, the parties' ability to provide support and treatment to the child, the Appellant's hostility towards Appellee, the child's preference, the parties' remarriages, Appellant's moving and changing the children's schools, as well as many positive changes in Appellee's life and relationship with the children. The appellate court also recognized some of the factors a circuit court may consider in determining best interest, which includes the psychological relationship between the parents and children, the need for stability and continuity in the relationships, the past conduct of the parties towards the child, and the reasonable preference of the child. While the trial court gave considerable weight to the eldest child's preference, the trial court also considered Appellant's disdain for Appellee and the impact it had on the children, and the circuit court determined that Appellee would likely foster Appellant's relationship if he became the custodial parent. (Sutterfield, D.; CV-17-3; 10-18-2017; Glover, D.)

Dace v. Doss, 2017 Ark. App. 531 [**alimony after remarriage; mathematical formula to figure alimony amount; permanent alimony award**] The appellate court found that Ark. Code Ann. § 9-12-312(a)(2)(A) did not require the circuit court to terminate Appellant's alimony obligation upon Appellee's remarriage. The statute provides "Unless otherwise ordered by the court or agreed to by the parties, the liability for alimony shall automatically cease upon... the date of the remarriage of the person who was awarded the alimony." Appellant acknowledged that the circuit court originally ordered alimony to be paid for the remainder of Appellee's life, but he argued that the new order did not "order otherwise" and that it should terminate upon remarriage. The appellate court found however that the circuit court had complete knowledge of Appellee's remarriage at the hearing, the circuit court determined Appellant had an ongoing duty to pay alimony, and the circuit court clearly "ordered otherwise" as to termination. The appellate court also found no error in the circuit court's finding that Appellee still had a need for alimony, as the circuit court took into consideration the fact that her remarriage relieved her of paying certain expenses but found she still had a need for continuation of alimony in a lower amount. Furthermore, the appellate court found no error in the circuit court's mathematical formula used to modify the alimony award. While no "cookie-cutter" mathematical equation can be universally applied to all cases of alimony because there should be flexibility with the unique facts of each case, the rule does not prohibit circuit courts from considering each party's financial needs and earning capacity in arriving at a numerical calculation of disparity in income. Lastly, the appellate court rejected Appellant's argument that revised Ark. Code Ann. § 9-12-312 only allows for awards of rehabilitative alimony and not permanent alimony. (Hannah, C.; CV-17-51; 10-18-2017; Glover, D.)

Haggard v. Haggard, 2017 Ark. App. 542 [**parol evidence rule of prior agreement and contract construction applied in interpreting divorce decree**] The appellate court found no error in the circuit court's dismissal of Appellant's petition to add that the parties should equally divide the children's expenses. The parties' written agreement was unambiguous, and it did not

provide for the equal division of expenses for the children. The transcript from the hearing in which the parties' prior agreement was read into the record before entry of the divorce decree constituted parol evidence and is not admissible to show the parties had a different agreement from what was written into the decree. The parties' unambiguous agreement is an independent contract, and the circuit court construed the writing in accordance with the plain meaning of language employed. The intent of the parties is not relevant and is not admissible to add to the written terms, i.e. that the parties' divide certain expenses. However, while a circuit court has no authority to modify the parties' independent contract, the contract is still subject to judicial interpretation. The appellate court found no error in the circuit court's interpretation of the parties' decree that alimony was to be paid every 30 days when the decree stated it was to be paid "per month". (Beaumont, C.; CV-17-18; 10-25-2017; Gruber, R.)

Kirby v. Semeyn, 2017 Ark. App. 556 [**child support automatic-escalation clause; child support order requirements per Administrative Order No. 10; trust payments not considered child support**] The appellate court found no error in the circuit court's ruling that the parties' agreement did not contain a child support automatic-escalation clause and that modification of child support was not automatic. While the appellate court has recognized such automatic increases in child support, the courts will do so only when the language in the decree clearly provides for automatic increases-- and the courts refuse to recognize them when there is no language providing for the automatic increases and no mechanism for gathering income information. As noted by the circuit court, the parties' decree did not set forth any guidelines for the reevaluation of child support, it did not provide an annual date upon which support should be calculated, it did not specify how income was to be computed, and it did not state which chart should be used. Therefore, the child support was not modified automatically. Second, the appellate court found error in the court's calculation of child support because the record contained no evidence of Appellee's 2015 income and the order was facially deficient, as it did not meet the requirements of Administrative Order No. 10. The child support modification issue was remanded for the circuit court to complete the record with evidence of income as well as for entry of an order in compliance with Administrative Order No. 10 which requires child support orders to contain the court's determination of the payor's income, recite the amount of support required under the guidelines, and recite whether the court deviated from the chart. Third, the appellate court found error in the circuit court's finding that the payments into the child's special-needs trust constituted child support. The payments were to be paid by both the custodial and noncustodial parent, the amount was based upon a percentage of income rather than the child support chart, the trust payment provision was not included in the "support and maintenance of the children" section of the decree, and the trust funds were to revert back to the parents if the child died. For these reasons, the appellate court found error in the circuit court's ruling that the trust-fund payments constituted child support, and the award of 10% interest and attorney's fees on those amounts was likewise erroneous. (Meyer, H.; CV-16-1028, 10-25-2017; Whiteaker, P.)

Sipes v. Brantley, 2017 Ark. App. 560 [**circuit court's burden to use powers of perception in evaluating evidence in child custody and visitation matters; prior circumstances can be considered in determining if there is a change in circumstance to warrant modification**] A case involving child custody and visitation places a heavier burden on the circuit court to use to the fullest extent its powers of perception in evaluating the witnesses, testimony, and best interest of the children; therefore, the deference to the circuit court is even greater. For these reasons, the

appellate court affirmed the circuit court's finding that it was in the best interest of the child to expand portions of the custody arrangement while finding that the majority of Appellant's visitation shall remain supervised and not expanded. While Appellant argued that the circuit court should have restricted evidence to facts that have arisen since issuance of the prior order, the appellate court acknowledged that the prior circumstances must be fully considered in order to determine whether there has been a change of circumstance. (Goodson, D.; CV-16-1133, 10-25-2017; Murphy, M.)

PROBATE

Marshall v. Rubright, 2017 Ark. App. 548 [**Appellant failed to challenge all bases for the granting of stepparent adoption without consent**] Because the Appellant did not sufficiently challenge the circuit court's two alternative bases for finding his consent to the adoption was not required, the appellate court affirmed the circuit court's granting of the adoption petition. Appellant only argued the "failure to communicate" basis for granting the adoption, and he failed to attack the circuit court's alternative bases for its ruling, i.e. (1) failure to support and (2) unreasonably withholding consent to adoption. When an appellant fails to attack a circuit court's independent, alternative basis for its ruling, the appellate court will not reverse. (Duncan, X.; CV-17-65; 10-25-2017; Abramson, R.)

JUVENILE

Brown v. Ark. Dep't of Human Servs., 2017 Ark. App. 497 [**TPR—sufficiency of the evidence**] Rights were terminated with regard to a child with medical issues. On appeal, appellant argued that there was insufficient evidence to show that the child is adoptable and that termination was therefore not in the child's best interest. The Court of Appeals affirmed, noting that a caseworker's testimony that a child is adoptable is sufficient evidence of adoptability. Here, the case worker testified in detail about the child's medical condition and how it had improved and that the child was happy and bonding with her foster family. The court contrasted the caseworker's detailed testimony with other cases, one where a caseworker testified generally that "all children are adoptable" and another where the evidence of adoptability was the child's testimony that she wanted to be adopted, both of which were reversed due to insufficient evidence of adoptability. The court also rejected the appellant's argument that termination was not in the child's best interest because it severed her interest with relatives that may be interested in adopting her, where there was no evidence that the child had a relationship with any of the relatives and none of the relatives appeared in court. (Medlock, M.; JV-15-57; October 4, 2017; Abramson, R.)

Dowdy v. Ark. Dep't of Human Servs., 2017 Ark. App. 504 [**TPR—sufficiency of the evidence**] Nine-day-old infant was removed from mother living in a home with friends that was littered with dog feces and lacked a crib, after DHS had been working with family in a protective services case involving four-year-old and three-year-old siblings due to physical abuse

allegations. The older siblings were living with grandparents during the protective services case because the appellant mother tested positive for THC and did not participate in services. By the time of the termination hearing more than a year after removal, appellant was homeless, jobless, and incarcerated, but testified that she would “have everything together” within four weeks of being released from jail. The appellate court found sufficient grounds for termination where the mother failed for more than a year to secure appropriate housing, stable employment, and transportation and was incarcerated. Appellant also argued that termination was not in the children’s best interest because they had been placed with grandparents, but the court rejected this argument because evidence was presented in the termination hearing that the grandfather pleaded guilty to sexual assault of a minor in his home. (Medlock, M.; JV-15-287; October 4, 2017; Klappenbach, N.)

Furnish v. Ark. Dep’t of Human Servs., 2017 Ark. App. 511 [**TPR—sufficiency of the evidence**] Evidence was clear and convincing that termination was warranted based on factors that arose subsequent to the filing of the original DN petition where appellant mother failed repeatedly to comply with case plan and court orders by failing to visit with children, failing to remain drug free, failing to complete drug treatment, failing to maintain stable employment or income, and failing to complete parenting classes. Regarding appellant’s argument that there was insufficient evidence that the children would be adopted, the appellate court explained that Ark. Code Ann. § 9-27-341(b)(3)(A)(i) does not require the trial court to make a finding that the child is adoptable, rather, the court must consider the child’s adoptability along with other factors in determining best interest. (Thyer, C.; JV-15-410; October 4, 2017; Whiteaker, P.)

Ross v. Ark. Dep’t of Human Servs., 2017 Ark. App. 503 [**TPR—sufficiency of the evidence; PPH—consideration of permanency goals**] Appellant mother appealed order terminating her parental rights and the earlier permanency planning order that changed the goal of the case to adoption, arguing that the third-ranked preferential goal of placement with parent, guardian, or custodian should have prevailed over the fourth-ranked goal of adoption. The appellate court affirmed both orders because appellant had not met her burden of demonstrating that she was complying with the case plan and orders of the court, making significant and measurable progress, and diligently working toward reunification. The trial court did not err in changing the goal to adoption and ultimately terminating rights, especially considering that it refrained from changing the goal of the case at the first permanency planning hearing and gave appellant an additional three months to work the case plan. (Medlock, M.; JV-15-115; October 4, 2017; Klappenbach, N.)

McNeer v. Ark. Dep’t of Human Servs., 2017 Ark. App. 512, [**TPR-adoptability**] Appellant argued that the order terminating her rights should be reversed due to insufficient evidence that her eight-year-old twins are adoptable. The appellate court affirmed the order of termination, explaining that the termination statute does not require the trial court to make a finding that

children are adoptable when terminating parental rights. What the law mandates is that the trial court shall consider, along with other factors, the likelihood that a child may be adopted in determining whether termination is in a child's best interest. Here, the DHS caseworker and the CASA volunteer testified concerning the adoptability of the children, and the trial court considered this testimony along with other evidence in determining the children's best interest. The appellant also argued that there was insufficient evidence that returning the children to her presented a risk of potential harm, but the court found the mother's long history of drug addiction and lack of stability sufficient. (McCallum, R.; JV-15-28; October 4, 2017; Whiteaker, P.)

Welvaert v. Ark. Dep't of Human Servs., 2017 Ark. App. 513 [**TPR—appellant father incarcerated and unable to attend hearing**] Appellant father who was incarcerated out of state and unable to attend the termination hearing appealed, arguing that his due process rights were not protected at the hearing due to ineffective assistance of counsel because the attorney did not make objections or present closing argument on his behalf. The appellate court rejected the arguments and affirmed termination, finding that trial counsel presented the best defense available under the circumstances, where appellant had been convicted of sexual abuse of a child and was serving a twenty-five or thirty year sentence and his stepson testified that appellant should never be around children. (Sullivan, T.; JV-16-47; October 4, 2017; Vaught, L.)

Krecker v. Ark. Dep't of Human Servs., 2017 Ark. App. 537 [**TPR-adoptability**] Appellant father sought reversal of termination order on the basis that evidence of adoptability was insufficient as to one child, while not challenging termination of rights as to two other children. Appellant argued that S.K. had significant issues and barriers that made adoption unlikely. The child's therapist testified that S.K. needed to continue working toward reunification and that adoption would be difficult, but the case worker testified that S.K. is adoptable. The appellate court affirmed termination, finding no clear error where the trial court considered the issue of adoptability when determining best interest. (Medlock, M.; JV-15-33; October 18, 2017; Hixson, K.)

Lessley v. Ark. Dep't of Human Servs., 2017 Ark. App. 528 [**TPR—Rule 60; ICWA**] The trial court erred in relying on Ark R. Civ. P. 60 to reopen the record in order to admit additional evidence, but the error did not prejudice either party. Appellant mother argued from the time of adjudication that the children were members of the Cherokee Nation and that the case fell under ICWA, but the trial court found at adjudication that ICWA did not apply based on information received from the Cherokee Nation and a lack of evidence from the mother. The mother did not bring the issue up again or attempt to admit any further evidence of tribal membership prior to the termination hearing. Lastly, the appellate court rejected the mother's argument that the children were not likely to be adopted, as the case worker testified that they are adoptable. The court affirmed termination after children were removed due to mother's

methamphetamine related arrest, where mother remaining incarcerated throughout much of the case and had no home, car, or driver's license at the time of the termination hearing. (Smith, T.; JV-15-718; October 18, 2017; Harrison, B.)

White v. Ark. Dep't of Human Servs., 2017 Ark. App. 529 [TPR—sufficiency of the evidence] Termination affirmed where appellant father was incarcerated seventeen of the twenty months prior to the termination hearing and during the time he was not incarcerated, he failed to comply with the case plan. Appellant argued that termination was not necessary and was not in the child's best interest where the child was in the custody of the grandmother and could remain there while Appellant continued to work the case plan. The appellate court disagreed and affirmed termination, distinguishing other cases where termination was unnecessary while child was in the custody of a family member because in those cases the parent was making progress in working the case plan. (Zimmerman, S.; JV-16-5; October 18, 2017; Klappenbach, N.)

Garner v. Ark. Dep't of Human Servs., 2017 Ark. App. 563 [TPR—sufficiency of the evidence] Termination was affirmed where child was removed due to mother's drug use and the environmental condition of the home. Evidence was clear and convincing that the conditions that led to removal had not been remedied where the mother continued to use methamphetamine ten months into the case and had failed to complete drug treatment, had not attended counseling, and had not followed the recommendations of her psychological evaluation. Under these circumstances, termination was in the child's best interest. (Williams, L.; JV-16-25; October 25, 2017; Murphy, M.)

Chandler-Sivage v. Ark. Dep't of Human Servs., 2017 Ark. App. 544 [TPR—sufficiency of the evidence] Clear and convincing evidence supported termination where mother had history of drug abuse, including participating in drug court for three or four years, completing more than one drug treatment program, yet failed to maintain sobriety during the pendency of the case. The trial court further noted that the mother had continued to engage in criminal behavior and failed to complete other components of her case plan. Due to mother's failure to remedy the issues that led to removal, termination was in the child's best interest. (Blatt, S.; JV-15-486; October 25, 2017; Gruber, R.)

Hughes v. Ark. Dep't. of Human Servs., 2017 Ark. App. 554 [TPR—sufficiency of the evidence] Termination was affirmed after trial court terminated on numerous grounds, including the mother failing to remedy the circumstances that led to removal, subsequent factors that arose, and aggravated circumstances. The trial court considered the children's best interest and potential harm that may befall the children and found the evidenced clear and convincing in favor of termination. The facts were that the mother had had her rights terminated to a previous child, she exposed the children to criminal behavior, one child tested positive for two drugs, the mother failed to obtain stable housing, failed to maintain stable employment, had no income or

transportation, she posted pictures on social media of her young children “giving the finger”, and consistently demonstrated a lack of good judgment. The trial court characterized the mother as a toxic individual. (Branton, W.; JV-15-755; October 25, 2017; Klappenbach, N.)

Oliver v. Ark Dep’t of Human Servs., 2017 Ark. App. 565 [**TPR—sufficiency of the evidence**] Termination was affirmed after mother failed to remedy the circumstances that led to removal of the child and termination was in the child’s best interest. The child was removed due to inadequate supervision and neglect and the mother failed to demonstrate during a trial home placement and throughout the case that she would consistently provide adequate supervision and tend to the needs of the child. During the trial home placement, the mother had multiple men in and out of her home that were not authorized by DHS, she brought the child to day care with a soiled diaper, during the case the mother tested positive for illegal drugs, and her visits with the child were inconsistent. (Richardson, M.; JV-15-154; October 25, 2017; Brown, W.)

Parish v. Ark. Dep’t of Human Servs., 2017 Ark. App. 552 [**TPR—aggravated circumstances; little likelihood of successful reunification**] The appellate court will not reweigh the evidence because to do so would allow the appellate court to act as a super fact-finder or to question the trial court’s credibility finding, which is not the function of the appellate court. The Department proved aggravated circumstances and little likelihood of successful reunification where it initially became involved with family after mother dragged her eighteen-month-old child by the hair, and during fifty-four months of working with the family, the mother continued to abuse and neglect the child. Termination was affirmed. (Sullivan, T.; JV-27; October 25, 2017; Gladwin, R.)

Willis v. Ark. Dep’t of Human Servs., 2017 Ark. App. 559 [**TPR—aggravated circumstances; little likelihood of successful reunification**] Two fathers of two children of the same mother appealed termination but mother did not appeal. Neither father had been involved in the child’s life or visited the child at all nor had either participated in the case plan. Both fathers were incarcerated at times during the pendency of the case. The evidence was clear and convincing that there was little likelihood of successful reunification and that termination was in the best interest of each child. Termination was affirmed. (Hendricks, A.; JV-15-332; October 25, 2017; Hixson, K.)

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

Baxter v. Ark. Dep’t of Human Servs., 2017 Ark. App. 508 (James, P.; JV-16-229; October 4, 2017; Glover, D.)

Butler v. Ark. Dep't of Human Servs. 2017 Ark. App. 517 (Keaton, E.; JV-16-192; October 4, 2017; Murphy, M.)

Mercado v. Ark. Dep't of Human Servs., 2017 Ark. App. 495 (Spears, J.; JV-16-284; October 4, 2017; Gruber, R.)

Barnes v. Ark. Dep't of Human Servs., 2017 Ark. App. 525 (Harrod, L.; JV-15-116; October 18, 2017; Virden, B.)

J.N.A. v. State, 2017 Ark. App. 502 [**EJJ; aggravated assault**] Seventeen-year-old juvenile appealed adjudication of five separate offenses adjudicated under Extended Juvenile Jurisdiction. Appellant filed to file timely notice of appeal after the EJJ Order and failed to specify the EJJ Order in the notice of appeal that was ultimately filed, thus appellate court lacked jurisdiction to consider appeal of the EJJ Order. Aggravated assault adjudication was affirmed where juvenile ran from officer who was attempting to arrest the juvenile for breaking into vehicles, the chase ended in a wet and slippery drainage canal, the officer fell and fractured his arm, and the juvenile then placed his hand in his pocket to pull out a gun, which the officer managed to grab and throw out of range. Based on an examination of the juvenile's overall conduct, the appellate court affirmed the aggravated assault adjudication, finding that the evidence supported a finding that the juvenile's actions created a substantial danger of death or serious physical injury to another person. (Zuerker, L.; JV-16-324; October 4, 2017; Klappenbach, N.)

DISTRICT COURT

Wright v. City of Bearden, 2017 Ark. App. 534 [**District Court Appeal**] [**Ark. R. Crim. P. 36**] [**Ark. Const. amend 80**] District court appeals to circuit court are de novo. Failure to raise a constitutional argument in district court does not preclude the circuit court from ruling on such argument on appeal. (Guthrie, D.; CR-16-1152; 10/18/2017; Vaught, L.)