

# APPELLATE UPDATE

PUBLISHED BY THE  
ADMINISTRATIVE OFFICE OF THE COURTS

DECEMBER 2015  
VOLUME 23, NO. 4

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## CRIMINAL

*Raquel-Dieguez v. State*, 2015 Ark. App. 626 [**Confrontation Clause**] Appellant's confrontation-clause rights were satisfied through his opportunity to cross-examine the analyst who performed the chemical testing and prepared the laboratory report that was introduced into evidence at appellant's trial. Because an earlier report that was prepared by another analyst was not offered for admission at trial, it was not necessary for that analyst to be present at trial or subject to cross-examination by appellant. [**mistrial motion**] The trial court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon statements made by the prosecutor during closing arguments. [**chain of custody**] It is not necessary that every moment from the time the evidence comes into the possession of a law-enforcement agency until it is introduced at trial be accounted for by every person who could have conceivably come in contact with the evidence. Because the analyst in appellant's case was able to address all alleged inconsistencies in the treatment of the evidence, the circuit court correctly found that the State established by a reasonable probability that the evidence had not been tampered with. Thus, the court properly admitted the evidence. (Lindsey, M.; CR-15-235; 11-4-15; Gruber, R.)

*Thacker v. State*, 2015 Ark. 406 [**rape-shield statute**] The trial court did not abuse its discretion when, pursuant to the rape-shield statute, it excluded evidence of DNA from semen samples found on the victim's bedsheet and pillow that were inconsistent with the appellant's DNA. (Clawson, C.; CR-15-80; 11-5-15; Wood, R.)

*Gill v. State*, 2015 Ark. 421 [**sufficiency of the evidence; negligent homicide**] Appellant was convicted of negligent homicide. The evidence established that after he stopped at a stop sign, appellant inexplicably failed to see another driver's vehicle; he then proceeded through the stop sign onto a highway and collided with another vehicle, killing the driver. The evidence did not show that appellant was speeding, that he was driving erratically, that he was under the influence of alcohol, that he was using a phone, or that he was engaged in some similar conduct. Thus, the appellate court concluded that the evidence fell short of criminal negligence. The Supreme Court explained that appellant's actions did not "demonstrate a gross deviation from the standard of care that a reasonable person would observe in the actor's situation considering the nature and purpose of the actor's conduct and the circumstances known to the actor." Accordingly, the trial court erred in denying appellant's motion to dismiss the negligent-homicide charge. (Edwards, R.; CR-15-266; 11-12-15; Brill, H.)

*Ramsey v. State*, 2015 Ark. App. 669 [**motion to suppress**] Because appellant did not own the building that was searched and he failed to establish that he had a legitimate expectation of privacy in the building, the trial court did not clearly err in concluding that appellant lacked standing to assert a violation of his Fourth Amendment rights and contest the search. (Webb, G.; CR-15-560; 11-18-15; Vaught, L.)

*Squyres v. State*, 2015 Ark. App. 665 [**motion for directed verdict; entrapment**] Because there were factual issues to be decided by the jury as to whether the conduct of law enforcement would have caused a law-abiding citizen to commit the crime for which appellant was convicted, entrapment as a matter of law was not established. Additionally, there was substantial evidence to establish that the conduct of law enforcement merely afforded appellant the opportunity to commit the crime for which he was convicted and thus does not constitute entrapment. Accordingly, the trial court did not err in denying appellant's motion for a directed verdict. [**sufficiency of the evidence; internet stalking of a child**] There was substantial evidence to support appellant's conviction. [**alternative sentencing instruction**] Arkansas Code Annotated § 16-97-101 (4), which permits courts to instruct the jury on alternative sentences, is permissive and not required. The decision to allow the instruction will be reviewed for an abuse of discretion. The abuse of discretion standard of review is a high threshold, requiring that a trial court not act improvidently, thoughtlessly, or without due consideration. The appellate court has warned that mechanical imposition of the jury's recommended sentences or an unwavering court policy refusing to instruct the jury on alternative sentences with respect to certain offenses is not an exercise of discretion. [**jury instruction; registered sex offender**] Although Arkansas Code Annotated § 16-97-101(4) authorizes a trial court to instruct the jury on alternative sentences for which the defendant may qualify, nothing in the statute requires that the trial court inform the jury that mandatory registration as a sex offender will be a consequence of the conviction for certain crimes. (Cooper, T.; CR-15-303; 11-18-15; Gruber, R.)

*Rea v. State*, 2015 Ark. 431 [**statutory interpretation; Ark. Code Ann. § 5-27-602**] Arkansas Code Annotated § 5-27-602 does not impose multiple prosecutions for the same offense in violation of the double jeopardy clause. The plain language of the statute demonstrates that the General Assembly unambiguously intended that each act of possession is a discrete and

independent offense. The statute authorizes separate convictions for each prohibited photograph and videotape that is possessed. (Herzfeld, R.; CR-14-555; 11-19-15; Goodson, C.)

*Pelletier v. State*, 2015 Ark. 432 [**error coram nobis**] Because the allegations asserted by appellant in his petition, which included that his guilty plea was the result of a misconception or an erroneous interpretation of the law by his trial counsel, the prosecutor and the judge, are not cognizable in an *error coram nobis* proceeding, the trial court did not err when it denied appellant's petition. (Clawson, C.; CR-15-330; 11-19-15; Hart, J.)

*Johnson v. State*, 2015 Ark. App. 677 [**right to self-representation**] The circuit court denied appellant's motion to represent himself because the court found that appellant had only an eighth or ninth grade education, had no knowledge of the rules of evidence, had never observed a jury trial, had no knowledge of the dangers in representing himself, had never read anything "about the law of the conduct of a trial," had no knowledge of a legal defense that appointed counsel was prepared to pursue at trial, was diagnosed as mildly mentally retarded, and suffered schizoaffective disorder. The circuit court held that based upon the foregoing the appellant was incapable of making a voluntary and intelligent waiver of counsel. After reviewing the applicable hearing, the appellate court concluded that nothing in the colloquy between the court and the appellant addressed the issue of whether appellant's invocation of the right to represent himself was knowingly and intelligently made. Accordingly, the circuit court erred by denying appellant the right to self-representation under the Sixth Amendment to the United States Constitution. (Cox, J.; CR-15-525; 12-2-15; Gladwin, R.)

*Lemley v. State*, 2015 Ark. App. 691 [**sufficiency of the evidence; criminal mischief**] Because the jury was forced to resort to speculation and conjecture to reach its guilty verdict on the charge of criminal mischief, there was a lack of substantial evidence to support appellant's conviction. (Gibson, B.; CR-15-432; 12-2-15; Hixson, K.)

*Bryles v. State*, 2015 Ark. App. 688 [**admission of evidence**] Appellant was convicted of rape. During his trial, the circuit judge did not err when he permitted the medical expert to testify that the victim's injuries were consistent with penile penetration. (Johnson, L.; CR-15-368; 12-2-15; Whiteaker, P.)

*Roe v. State*, 2015 Ark. App. 693 [**DWI**] When a defendant has consented to a blood-alcohol test, the requirements in Ark. R. Crim. P. Rule 12.3 are inapplicable, and there is no conflict between Rule 12.3 (b) and Ark. Code Ann. § 5-65-204 (c)(1). (Wright, J.; CR-15-438; 12-2-15; Hoofman, C.)

*Matthews v. State*, 2015 Ark. App. 692 [**issue preclusion**] Because the issues that appellant raised in his circuit court case had previously been decided by a federal court, the trial court properly dismissed appellant's case and denied appellant's claims pursuant to the doctrine of collateral estoppel. (Honeycutt, P.; CV-15-510; 12-2-15; Hixson, K.)

*Patillo v. State*, 2015 Ark. 441 [**cross-examination**] The circuit court may impose reasonable limits on cross-examination to avoid unnecessary duplication of testimony and when it appears

that the matter has been sufficiently developed and clearly presented to the jury. Thus, the circuit court did not abuse its discretion when it limited the scope of appellant's recross-examination of a witness on an issue that was previously addressed and admitted into evidence during the original cross-examination of the witness. (Jones, B.; CR-15-381; 12-3-15; Goodson, C.)

*Thornton v. State*, 2015 Ark. 438 [**action after mandate**] Because appellant's conviction was reversed and dismissed on direct appeal, the circuit court did not have jurisdiction thereafter to hear the State's "Motion for Court to Consider Lesser Included Offenses." (Jones, B.; CR-15-287; 12-3-15; Brill, H.)

*Whalen v. State*, 2015 Ark. App. 706 [**sobriety checkpoint**] The sobriety checkpoint at which appellant was arrested was not conducted according to a plan or in a manner exhibiting explicit, neutral limitations on the officer's conduct. Thus, the circuit court erred in finding that the checkpoint was constitutional. (Tabor, S.; CR-14-980; 12-9-15; Brown, W.)

*Nelson v. State*, 2015 Ark. App. 697 [**ineffective assistance of counsel**] Because appellant's case was distinguishable from *Reynolds v. State*, 341 Ark. 387, 18 S.W.3d 331 (2000), appellant was required to satisfy the elements of *Strickland* to establish a claim for ineffective assistance of counsel. (Griffen, W.; CR-15-113; 12-9-15; Abramson, R.)

*Hill v. State*, 2015 Ark. App. 700 [**sufficiency of the evidence; attempted capital murder**] There was substantial evidence to support appellant's conviction. [**continuance**] The trial court did not abuse its discretion when it denied appellant's request for a continuance, which was partially based upon an amendment to the information, because the facts, witnesses, and evidence for the new charge were identical to those for the original charge. (Storey, W.; CR-15-294; 12-9-15; Gruber, R.)

*Gillean v. State*, 2015 Ark. App. 698 [**sufficiency of the evidence; commercial burglary**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] Because the nature of appellant's relationship to a witness was immaterial to the testimony offered by the witness, the trial court abused its discretion when it admitted testimony related to the sexual relationship between the witness and appellant. However, because the evidence of appellant's guilt was overwhelming and the error was slight, the appellate court concluded that the error was harmless and affirmed appellant's conviction. (Clawson, C.; CR-14-936; 12-9-15; Virden, B.)

*Philyaw v. State*, 2015 Ark. 465 [**writ of habeas corpus**] A review of the judgment and commitment order in appellant's case reveals that he was convicted and sentenced solely for the offense of aggravated robbery. Thus, appellant's assertion that he was wrongly sentenced for the offense of attempted capital murder is unsupported and the circuit court correctly denied appellant's habeas relief on that basis. [**sentencing**] Appellant failed to cite authority for the proposition that the State must include the sentencing range it intends to seek in its criminal information. Additionally, appellant's sentence of life imprisonment was authorized by the statute in effect at the time of the offense. Accordingly, the circuit court correctly rejected appellant's request for habeas relief based upon a challenge to his sentence. [**sentence; cruel and unusual punishment**] Unless a punishment is a barbarous one unknown to law or so wholly

disproportionate to the nature of the offense as to shock the moral sense of the community, the appellate court will not find that punishment authorized by statute to be cruel or unusual. Because appellant's sentence was authorized by statute and found appropriate by a jury, the circuit court did not err when it concluded that the sentence was not cruel or unusual punishment. (Griffen, W.; CV-15-567; 12-10-15; Danielson, P.)

*Watson v. State*, 2015 Ark. App. 721 [**404(b); pedophile exception**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Ark. R. Evid. 404(b), it permitted a witness to testify that appellant raped her when she was a child. [**admission of testimony**] The trial court correctly concluded that a lay witness was not testifying on the "ultimate question" in the case when she testified that she was participating in appellant's trial because she has "three daughters and to know that he did that to that little girl I could never sit back." (Griffin, J.; CR-14-742; 12-16-15; Gruber, R.)

*Sharp v. State*, 2015 Ark. App. 718 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**hearsay testimony**] The trial court did not abuse its discretion when it refused to admit testimony from the victim's neighbor regarding statements the victim made to the neighbor because the testimony was inadmissible hearsay. [**Brady violations**] Although appellant wanted access to certain information in the State's possession that may have been exculpatory, he refused to sign the court ordered protective order to get the information. Thus, the information was not given to appellant. The appellate court determined that there was not a *Brady* violation because the State did not withhold the information from appellant but rather appellant's refusal to sign the protective order prevented his access to the information. (Thyer, C.; CR-15-340; 12-16-15; Kinard, M.)

*Ferguson v. State*, 2015 Ark. App. 722 [**recusal**] A judge who presided over a dependency-neglect proceeding in a juvenile case was not required to recuse from a criminal case that involved the same allegations of abuse that were involved in the dependency-neglect case and involved one of the caregivers from the dependency-neglect case. [**waiver of jury trial**] A defendant in a criminal case may not waive a trial by jury unless the waiver is assented to by the prosecuting attorney and approved by the court. (Elmore, B.; CR-15-388; 12-16-15; Gruber, R.)

*Laymon v. State*, 2015 Ark. 485 [**Ark. R. Crim. P. 24.3 (b)**] Pursuant to Ark. R. Crim. P. 24.3 (b) (iii) an appeal can be heard from a conditional plea following the denial of a pretrial motion challenging the constitutionality of the statute defining the offense to which the defendant pled guilty, regardless of whether the challenge to the statute is an as-applied challenge or a facial challenge. (Pearson, W.; CR-15-291; 12-17-15; Wynne, R.)

*Hinton v. State*, 2015 Ark. 479 [**sufficiency of the evidence; theft of property**] There was substantial evidence to support appellant's conviction. [**Ark. Code Ann. § 16-90-120**] The firearm sentencing enhancement found in Ark. Code Ann. § 16-90-120 (a) may be used to enhance a sentence which results from a conviction for possessing a defaced firearm pursuant to Ark. Code Ann. § 5-73-107. (Johnson, L.; CR-15-12; 12-17-15; Baker, K.)

*Wood v. State*, 2015 Ark. 477 [**Rule 37**] The trial court did not err when it denied appellant's Rule 37 petition, which was based upon claims that were: (1) meritless, (2) not cognizable in a Rule 37.1 proceeding; or (3) not in compliance with the applicable standard for a claim of ineffective assistance of counsel. Because the record conclusively established that appellant was not entitled to postconviction relief, the trial court did not clearly err when it denied appellant an evidentiary hearing on his Rule 37 petition. (Ramey, J.; CR-14-286; 12-17-15; Baker, K.)

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

*Hill v. State*, 2015 Ark. App. 630 (breaking or entering into a vending machine) CR-15-370; 11-4-15; Whiteaker, P.

*Means v. State*, 2015 Ark. App. 643 (aggravated robbery; first-degree battery; theft of property) CR-15-85; 11-12-15; Virden, B.

*Reep v. State*, 2015 Ark. App. 662 (DWI) CR-15-141; 11-18-15; Abramson, R.

*Clark v. State*, 2015 Ark. App. 679 (possession of a controlled substance) CR-15-449; 12-2-15; Virden, B.

*Sizemore v. State*, 2015 Ark. App. 728 (negligent homicide) CR-15-441; 12-16-15; Hoofman, C.

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:

*Wells v. State*, 2015 Ark. App. 619 (probation) CR-15-399; 11-4-15; Gladwin, R.

*Bass v. State*, 2015 Ark. App. 624 (probation) CR-15-361; 11-4-15; Kinard, M.

*Craft v. State*, 2015 Ark. App. 622 (probation) CR-15-359; 11-4-15; Harrison, B.

*Ramirez v. State*, 2015 Ark. App. 683 (probation) CR-15-591; 12-2-15; Gruber, R.

## **CIVIL**

*Stamps v. Brown-Epps*, 2015 Ark. App. 631 [**unlawful detainer**] Arkansas Code Annotated section 18-60-304 contemplates actions for unlawful detainer to include situations where a landlord-tenant relationship is not present. Section 18-60-304(2) specifically provides that when a person with the right to possession makes a written demand for surrender to one who is holding the property, and the holder fails to surrender, an unlawful detainer occurs. This is true even though

the person holding the property obtained possession by peaceful and lawful means. [**gift**] For an inter vivos gift to be sustained, Arkansas law requires that five elements must be established by clear and convincing proof: (1) the donor was of sound mind; (2) an actual delivery of the property took place; (3) the donor clearly intended to make an immediate, present, and final gift; (4) the donor unconditionally released all future dominion and control over the property; and (5) the donee accepted the gift. All were not present in this case. (Story, B.; CV-14-662; 11-4-15; Whiteaker, P.)

*Burnett v. Rush and Co., Inc.*, 2015 Ark. App. 629 [**promissory note**] The parties disputed whether the note was actually signed by the person to be bound. Due to the conflicting evidence presented, this was a credibility determination for the trial court to make. (Piazza, C.; CV-15-436; 11-4-15; Glover, D.)

*Fleming v. Vest*, 2015 Ark. App. 636 [**med-mal**] Here, the allegation was that Fleming's death occurred because of the professional services (or lack thereof) being provided to the patient by the provider. In recognizing the breadth of the definition of "medical injury," a nonpatient third party may sue a medical care provider for injuries sustained as a result of a patient's improper treatment. Accordingly, Fleming's death was a "medical injury" and falls under the Arkansas Medical Malpractice Act. Because material facts are in dispute as to whether the provider continuously treated the patient, summary judgment based on the statute of limitations was inappropriate. The circuit court also granted summary judgment on a theory of quasi-judicial immunity by finding that the provider was a quasi-judicial officer. Whether immunity from suit exists is a question of law for the courts. The provider argues that he was acting as an "arm of the court and performing a quasi-judicial function." Based on the evidence before the court, the provider is not protected by judicial immunity as a matter of law. (Williams, L.; CV-15-252; 11-4-15; Brown, W.)

*Silkman v. Evangelical Lutheran Good Samaritan Society*, 2015 Ark. 422 [**forum non conveniens**] The trial court did not abuse its discretion in this case by electing to dismiss the complaint under the doctrine of forum non conveniens. Here, the trial court weighed the interests of the parties, as well as the procedural posture of the complaint, and concluded that it was best for the complaint currently in federal court to proceed. The trial court did not exercise its discretion thoughtlessly or without due consideration. (Arnold, G.; CV-15-177; 11-12-15; Wynne, R.)

*Orintas v. Pointe Lookout Property Owners Assn.*, 2015 Ark. App. 648 [**amended complaint**] Rule 15 does not require a written motion, and the court recognized the Board's oral motion at the hearing. The court found that the late filing of the amended complaint was prejudicial to the Board because it would deny the Board the right to address all claims and causes of action asserted by appellants at the scheduled hearing. The trial court did not abuse its discretion. (Williams, L.; CV-14-1099; 11-12-15; Kinard, M.)

*Akers v. Butler*, 2015 Ark. App. 650 [**restrictive covenants**] The dispute here is whether the Butlers are bound by restrictive covenants they did not sign. The trial court found that the Butlers were not bound. For purposes of section 18-12-103, the Butlers constituted "owners of the real property." At the time the Butlers entered into their contract to purchase the property in April 2005, the land-use restrictions had not been executed. The trial court is affirmed. (Wright, J.; CV-15-295; 11-12-15; Glover, D.)

*Ark. Dept. Veteran Affairs v. Mallett*, 2015 Ark. 428 [**class certification**] Even assuming that there are questions common to all class members, these common issues do not predominate over individual issues. Based on the highly individualized nature of the employees' claims, the circuit court abused its discretion in certifying the class action. (Griffen, W.; CV-15-243; 11-19-15; Baker, K.)

*City of Siloam Springs v. La-De, LLC*, 2015 Ark. 433 [**attorney fees/condemnation**] Ark. Code Ann. § 27-67-317(b) allows for an award of a fee against the State of Arkansas. It does not allow for a fee to be assessed against any other entity. There is no statutory authority for an award of attorney's fees against a municipality in a condemnation proceeding. (Smith, T.; CV-15-194; 11-19-15; Wynne, R.)

*Unifirst Corp. v. Ludwig Properties, Inc.*, 2015 Ark. App. 694 [**attorney fees/arbitration**] The circuit court clearly had authority to award attorney's fees pursuant to section 16-108-225(c), as appellee was the prevailing party after the circuit court registered and confirmed the arbitration award after a contested section 16-108- 222 proceeding, regardless of the fact that appellant's motion to vacate the arbitration award was voluntarily dismissed. (Cox, J.; CV-15-293; 12-2-15; Hoofman, C.)

*Young v. Robertson*, 2015 Ark. App. 681 [**easement**] Giving due deference to the trial court's superior position to make credibility determinations and weigh the evidence, the trial court did not err in determining that an easement was not necessary under these circumstances. (Huckabee, S.; CV-15-418; 12-2-15; Virden, B.)

*Dundee v. Horton*, 2015 Ark. App. 690 [**expert witness**] Walton and Dr. Luo did not have to be experts in physics, vehicular biomechanics, engineering, or kinetics to give expert causation testimony in this motor-vehicle-accident case. Their causation opinions did not require them to be experts in any field other than the ones in which they were unquestionably qualified. They were both practicing medicine in the field of orthopedics and had experience in treating patients who had suffered orthopedic injuries as a result of car accidents. They performed exams and tests and consulted with other doctors. The experience and training of Dr. Luo and Walton gave them insight into the subject beyond that of the ordinary person. This is a sufficient foundation under our rules of evidence for the expert-witness causation testimony. In the instant case, it was not necessary for the trial court to engage in a Daubert analysis relating to the reliability of Walton's and Dr. Luo's causation opinions. In reaching their opinions, Walton and Dr. Luo did not employ any novel scientific evidence, theories, or methodology. Rather, their opinions were based on their experience, training, observations, other medical providers' opinions, and generally accepted testing. Finally, the causation testimony of Walton and Dr. Luo is not unreliable because they solely relied on Dundee's subjective complaints, her history of the accident, and her "false medical history." Walton and Dr. Luo testified that they reached their causation opinions based on the history provided by Dundee, their examinations of her, the results of their examinations and objective testing, their review of other medical providers' opinions who treated her, their review of photographs of the vehicles involved in the accident, and their review of her past medical records. The trial court abused its discretion in excluding their opinions. (Cox, J.; CV-14-674; 12-2-15; Vaught, L.)



*The Logan Centers, Inc. v. Walker*, 2015 Ark. App. 687 [**extension/Rule 6**] The trial court erred in denying Logan Centers' timely motion for an extension of time to respond to the complaint. Rule 6(b) (1) does not require the defendant to request a ruling on its timely filed motion for extension before the time to answer expires. Rule 6(b) does not require a party that has filed a timely motion for extension to then additionally request the trial court to rule on that motion prior to the expiration of the time to answer. Neither does the rule require an evidentiary hearing. The rule requires only the showing of cause for requesting an extension. (Simes, L.; CV-15-442; 12-2-15; Glover, D.)

*O'Neal v. Love*, 2015 Ark. App. 689 [**tenancy**] The trial court found that, because the 1995 Warranty Deed did not expressly convey the property to Herbert and Gloria as "husband and wife" or as tenants by the entireties, it only created a tenancy in common between the married couple. This was clear error because the law presumes that Herbert transferred whatever interest he had in the property by virtue of the 1995 Warranty Deed to Gloria as a tenancy by the entirety regardless of the language used in the deed. As for the 1995 letter or affidavit that accompanied the deed, it is contended to be hearsay that should not have been admitted without accounting for the original document. However, the letter testimony was proper under the hearsay exception set forth in Rule 803(3) of the Arkansas Rules of Evidence because it showed Herbert's intent that his interest in the property be conveyed to his wife. As for the claim that the document was not properly authenticated under Arkansas Rule of Evidence 1004, the actual authenticity of the document is not questioned or argued to be unfair under the circumstances. Arkansas Rule of Evidence 1003 allows duplicates in place of the original unless a genuine question is raised as to its authenticity or if its admission would be unfair under the circumstances. (Fox, T.; CV-15-583; 12-2-15; Whiteaker, P.)

*Gladden v. Trustees of Pruitt Family Trust*, 2015 Ark. App. 680 [**summary judgment**] Summary judgment was proper because the party's response to the motion did not establish facts to be in dispute. [**attorney fees**] The circuit court found that the parties had entered into a real estate contract, that the Gladdens had breached that contract by not updating their Seller Disclosure Statement with information concerning the Pruitts' letter threatening litigation, and that the contract should be rescinded because of that breach. The damages awarded were based in contract—return of the McClures' purchase price and other consequential damages incurred. No compensatory or punitive damages typically associated with tort claims were awarded. The circuit court used equity to put the parties back where they were prior to the execution of the contract. . Because the Gladdens do not challenge the reasonableness of the fees awarded, or the fact that a prevailing party may be awarded fees, and the circuit court properly considered the appropriate factors in awarding attorney's fees. [**posttrial motion/preserve issue**] It was not until the posttrial motion seeking to have the circuit court set aside its order that the Gladdens raised the due-process argument they now make. An objection first made in a posttrial motion is not timely. Any error argued on appeal must have first been directed to the circuit court's attention in some appropriate manner, so that the court has an opportunity to address the issue. A party cannot wait until the outcome of a case to bring an error to the circuit court's attention. (Cook, V.; CV-15-218; 12-2-15; Virden, B.)

*Hartness v. Rick Nuckles*, 2015 Ark. 444 [**breach of warranty**] Giving notice is a prerequisite to filing a breach-of-warranty lawsuit in non-UCC cases. [**unjust enrichment**] A party is not entitled to expectation damages for unjust enrichment; instead, he is entitled to restitution. Because there was no evidence regarding the amount of wrongful gain, the circuit court's ruling that Hartness could not recover for unjust enrichment is affirmed. [**conversion**] Hartness argues that the circuit court should have granted him relief on his conversion claim because Nuckles kept the old parts from the car and never returned them. The court denied this claim because, it found, the old parts had been damaged and were generally worthless. The court ruled that Nuckles simply discarded the old parts near the shop because he did not see any further use for them. The circuit court's findings were not clearly erroneous (Tabor, S.; CV-14-869; 12-3-15; Wood, R.)

*Integrated Direct Marketing, LLC v. May*, 2015 Ark. 454 [**certified question accepted**] Under Arkansas' tort of conversion, can intangible property such as electronic data, standing alone and not deemed a trade secret, be converted? (U.S. E.D. VA; CV-15-944; 12-3-15)

*Burton v. DHS*, 2015 Ark. App. 701 [**termination of disability assistance**] DHS's determination is supported by substantial evidence. (Davis, B.; CV-15-304; 12-9-15; Glover, D.)

*Wise v. Harper*, 2015 Ark. App. 702 [**default judgment**] Rule 55 allows the circuit court to set aside a default judgment for several reasons, including "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." The fact that Wise disputes the factual allegations found in the complaint simply does not fall within this category. The underlying default judgment was proper, and the only remaining issue to be settled on remand is the amount of damages. Where, as here, liability due to default has been established, a damages hearing is limited in scope. (Davis, B.; CV-15-632; 12-9-15; Vaught, L.)

*Citibank, N.A. v. Carruth*, 2015 Ark. App. 704 [**summary judgment/vacating**] The trial court erred in vacating the summary judgment more than ninety days after entry of the summary-judgment order. There were no findings in support of setting aside the order under Rule 60(c) of the Arkansas Rules of Civil Procedure. There were no changed circumstances since entry of the order of summary judgment, and none of the grounds listed in Rule 60(c) were either asserted or demonstrated. Moreover, the order cannot be characterized as a default judgment rather than a summary-judgment order. Although the summary-judgment order stated that Carruth failed to respond to Citibank's summary-judgment motion, the order further stated that, by failing to file a response, Carruth failed to meet proof with proof, failed to demonstrate the existence of a genuine issue of material fact. (McCormick, D.; CV-15-104; 12-9-15; Hixson, K.)

*Derrick v. Derrick*, 2015 Ark. App. 696 [**unjust enrichment**] It logically flows that when a third party makes improvements at the request of a life tenant, with full knowledge of the ownership interests and without any agreement from the remaindermen, that third party cannot recover from the remaindermen either. Accordingly, the trial court's determination that restitution was not warranted is not clearly erroneous. (Tabor, S.; CV-15-611; 12-9-15; Gladwin, R.)

*Shelter Insurance v. Goodner*, 2015 Ark. 460 [**insurance**] Labor may not be depreciated in calculating the actual cash value of a covered loss under an indemnity insurance policy. To do so would violate Arkansas law. (Haltom, B.; CV-15-111; 12-10-15; Danielson, P.)

*Duit Construction Co. v. State Claims Comm.*, 2015 Ark. 462 [**claims against state**] Duit failed to establish a conflict of interest on the part of either the ASCC or the General Assembly sufficient to overcome the presumption of impartiality to which both are clearly entitled. In failing to do so, Duit has not demonstrated an unconstitutional act on the part of the Appellees that would except its due-process claim from the doctrine of sovereign immunity. The circuit court's dismissal of Duit's due-process claim are barred by sovereign immunity. (Fox, T.; CV-15-278; 12-10-15; Danielson, P.)

*Caldwell v. Columbia Ins. Co.*, 2015 Ark. App. 719 [**insurance**] The trial court's determination to rescind the insurance policy is affirmed. The false statement in the application as to the size of the property was a material misrepresentation that voided the policy. (Story, B.; CV-15-276; 12-16-15; Kinard, M.)

*Elslegerl v. Runsick*, 2015 Ark. App. 716 [**deed reformation**] The circuit court erred in reforming the correction deed. Allowing a correction deed to effectuate a different mineral exception or mineral reservation than the original deed was legal error. A correction deed that adds reservation or exception language not stated in the original deed burdens the recording system. The same can be said for calling the forgotten mineral reservation or exception a scrivener's error. Adding a reservation or adding a property interest goes beyond the scope of what a correction deed can do. The proper use of a correction deed is narrow in scope and can only be used to correct some facial imperfection in the title, like to correct a defective description of a single property when a deed recites inaccurate metes and bounds or to correct a grantor's name. Our recording system is designed to allow a person to rely on it without using any outside research. The court erred in changing or adding a mineral reservation or exception because this falls outside the limited scope of what a correction deed can do. (Williams, L.; CV-15-500; 12-16-15; Harrison, B.)

*State Highway Dept. v. Ram Outdoor Advertising*, 2015 Ark. App. 713 [**billboard**] Considering the deference the appellate court gives agencies in the interpretation of their regulations and, given the supreme court's conclusion in *Files*, there is substantial evidence from the administrative hearing to support the agency's decision upholding the denial of RAM's application to convert the billboard to a digital display. (Fitzhugh, M.; CV-15-404; 12-16-15; Virden, B.)

*Patel v. Patel*, 2015 Ark. App. 726 [**promissory note**] The handwritten agreement represented a binding contract, and the applicable statute of limitations is five years. (Hearnberger, M.; CV-15-563; 12-16-15; Vaught, L.)

*Davis v. City of Blytheville*, 2015 Ark. 482 [**late fee/municipal water service**] There is statutory authority for a city to impose a late fee on overdue accounts, and the amount imposed in this case is not usurious. (Honeycutt, P.; CV-15-118563; 12-17-15; Hart, J.)

## DOMESTIC RELATIONS

*Tanner v. Gregersen*, 2015 Ark. App. 623 [**criminal contempt**] The Court of Appeals affirmed the circuit court's decision on both points. On the first allegation, the Court found substantial evidence to support the circuit court's finding that the appellant father violated the court's order. On the second allegation, the Court found that the circuit court did not abuse its discretion in sentencing the appellant to thirty days' imprisonment and \$1500 in attorney's fees to the appellee. (Hughes, T.; No. CV-15-416; 11-4-15; Harrison, B.)

*McPeak v. McPeak*, 2015 Ark. App. 638 [**divorce—marital debt; child support**] The appellant argued that the circuit court erred in failing to set the appellee's child support based upon her income and the Family Support Chart. The Court of Appeals said that, even if the point were preserved for appeal, it would still fail because child-support obligations cannot be modified without proof of a change in circumstances, which the appellant did not do. The decision was affirmed. (Smith, V.; No. CV-15-355; 11-4-15; Brown, W.)

*Newkirk v. Burton*, 2015 Ark. App. 627 [**adoption—jurisdiction; UCCJEA**] This adoption case involves the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The issue on appeal is whether the circuit court abused its discretion in determining that Lonoke County, Arkansas, was an inconvenient forum and that DeSoto County, Mississippi, was a more appropriate forum. The child's appellant father is incarcerated in Arkansas; the other appellant is the child's paternal grandmother. The appellees are the prospective adoptive parents who are the child's successor guardians and residents of DeSoto County, Mississippi, where the child has lived with them for over a year. The Court of Appeals analyzed the UCCJEA and noted that a court that has jurisdiction may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. "That is precisely what the circuit court in this case determined." The Court held that the circuit court did not abuse its discretion in declining to exercise jurisdiction over the adoption petition, and the decision was affirmed. (Feland, W.; No. CV-15-321; 11-4-15; Gruber, R.)

*Eversole v. Eversole*, 2015 Ark. App. 645 [**child custody; visitation; child support; parenting-plan agreement; material change in circumstances**] The parties divorced in Georgia and their parenting-plan agreement incorporated into the decree set out visitation and communication details between the child and the non-custodial, appellant father. After the mother and child moved to Arkansas, communication between father and child became problematic. The parties agreed to register the Georgia decree in Arkansas, and a hearing on the disputed issues was held. Detailed testimony outlined their respective positions—the appellant father's difficulties adhering to the plan's provision for visitation and a change in circumstances that he alleged warranted a change in visitation and/or custody. The appellee mother outlined her attempts to accommodate some of his requests but her difficulty in agreeing to all, primarily because of her work schedule. The circuit court ruled that the parties would create a communication schedule and would clarify the summer-visitation schedule, which the court found ambiguous in the plan. It found that the difficulties and costs the appellant encountered in exercising visitation did not amount to changed circumstances but, to the contrary, was the situation the parties had contemplated and provided for in the plan. The court increased the appellant's visitation with an option to decrease it when he

exercised visitation. The court found there was no change in circumstances to support a modification in the plan, but found it should be made more specific where the terms were ambiguous. The Court of Appeals found no errors in the circuit court's determination and it affirmed the decision. (Looney, J.; No. CV-15-296; 11-12-15; Virden, B.)

*Burr v. Burr*, 2015 Ark. App. 640 [**divorce—child custody**] After the parties' filed for divorce and custody, the circuit court ordered temporary custody to the appellee mother and visitation to the appellant father. The court also ordered the parties and their child, E.B., to see a family counselor. About two weeks later, the appellee mother filed an ex parte petition to suspend the appellant's visitation upon the recommendation of the family counselor. The court suspended visitation for thirty days. The following month, the father filed an emergency motion to reinstate his visitation, which the court granted. Several months later, the appellee mother was charged with aggravated assault, criminal mischief, and arson, resulting in a motion for emergency relief and the court's setting a hearing. After the hearing, the court granted a divorce and ordered the parties to follow the temporary visitation schedule until it entered a supplemental order after the mother was sentenced on the criminal charges. The court subsequently ordered the mother to have custody of the children and made the temporary visitation order permanent. It also ordered child support. The Court of Appeals held that the circuit court did not clearly err in ordering that the temporary visitation schedule become permanent or in awarding the appellee custody of the children. The Court said that the record reflected that the temporary visitation schedule, which the parties had been following since 2012, had worked well and that the children appeared to be doing well and were happy. The Court affirmed the decision. (Ryan, J.; No. CV-15-474; 11-12-15; Abramson, R.)

*Tanner v. Tanner*, 2015 Ark. App. 668 [**divorce—visitation; child support**] The parties were divorced in May of 2014 and custody of the parties' children was awarded to the appellee father. On appeal, the appellant mother challenges the trial court's decisions concerning supervised visitation, an evidentiary ruling on hearsay, and the court's calculation of child support. In affirming the decisions, the Court of Appeals said that it found no abuse of discretion in the manner in which the trial court fashioned visitation given the facts and circumstances. The mother had moved to Florida and the circuit court did not have before it information about the mother's living situation, her medical situation, including treatment and medication, or other evidence the court needed to allow anything but supervised visitation in Arkansas. On the issue of the court's alleged evidentiary ruling on hearsay, the Court said that although the court erred in its evidentiary ruling, it was not convinced that the error was prejudicial and it did not provide a basis for reversal. Finally, on the issue of the calculation of child support, the court based its calculation on the evidence presented, and the appellant failed to meet her burden to provide the court with information in a timely manner. The decision was affirmed. (Singleton, H.; No. CV-14-1092; 11-18-15; Glover, D.)

*Earl v. Earl*, 2015 Ark. App. 663 [**child custody**] The appellant mother appeals from the circuit court's awarding custody of the parties' two children to her former husband. She contends the court erred in finding that she committed abuse of the children and that, because there was no abuse, the court erred in finding a material change in circumstances. She admitted slapping each girl on the face, but contends it was a one-time incident, that no physical injury occurred, and that

the court erred in finding it was abuse within the definition of the juvenile code. The Court of Appeals agreed that the circuit court erred in finding that she committed abuse as defined in the juvenile code, but said that it does not necessarily follow that the court erred in finding a material change of circumstances. The Court noted that the evidence showed that the appellant and her two daughters were fighting, which had increased and become volatile, and that both girls expressed that they were happier now and wished to remain in their father's custody. The Court held that the circuit court did not clearly err in finding that a material change of circumstances warranting a change of custody had occurred and that the change of custody was in the children's best interest. The decision was affirmed. (Zimmerman, S.; No. CV-15-299; 11-18-15; Harrison, B.)

*Gerking v. Hogan*, 2015 Ark. App. 678 [**grandparent visitation; contempt**] The appellants' daughter and the appellee were divorced in 2012 and the daughter died the next year. The appellee has custody of the two minor children of the marriage. The appellants were awarded visitation with their two grandchildren for three weeks each summer and on alternating weekends. A condition of the visitation order was that the appellants not consume any alcoholic beverages or use any illegal controlled substances in the presence of the children. The appellants filed a petition to have the appellee held in contempt for denying them visitation. The appellee said that he refused to let the children visit because of the appellants' alleged excessive use of alcohol in the presence of the children and he requested that the court deny the petition for contempt. The court held a hearing on the "visitation problems," after which it reduced the appellants' visitation to nine hours once a month. The appellants appealed from that order reducing their visitation. In reversing, the Court of Appeals said it is clear that the trial court failed to make the necessary findings of fact to support its decision, and that there is virtually no evidence to support the trial court's decision. There was no testimony from anyone who witnessed the appellants consuming alcohol in the children's presence after the court's order prohibiting it. The grandmother testified that she had not, at any time since the order was entered, consumed alcohol in the children's presence. The Court said that the decision was based on speculation and conjecture. Absent any evidence to support the contention, there was no change in circumstances since the last order was entered to support the change in visitation. (Looney, J.; No. CV-15-136; 11-2-15; Abramson, R.)

*Potts v. Potts*, 2015 Ark. App. 720 [**divorce—property division; child custody**] The parties announced at a hearing before their divorce that they had reached a custody agreement that had not yet been reduced to writing, but that it was for joint custody of the parties' young child with custody alternating each week. It included a right of first refusal to care for the child when the party with custody was unable to care for the child. The party unable to keep the child was allowed make-up time. At the divorce hearing, testimony was taken only to establish grounds for divorce and residency. The parties claimed they were still working on a property settlement; no decree was to be entered until a settlement was reached. The attorneys for the parties sent a number of letters to the circuit court regarding custody and property-division issues. At one point, the appellant asked the court for ten more days for settlement negotiations and the appellee told the court he still had not received a counteroffer from the appellant. The court informed the parties by letter that it saw no need for an additional hearing and gave the parties nine more days to reach a property agreement. The appellee's attorney subsequently sent the court a letter with two proposed decrees, one with a division of property that he claimed was "very close" to the only proposal he had ever received from the appellant. A decree was entered about a week later,

dividing the parties' property and debts and providing for joint custody without the right of first refusal, which had not worked out. On appeal, the appellant argued that the court's findings about the parties' assets and their division was not supported by evidence. However, the Court of Appeals said that she failed to identify any specific division of property with which she disagrees or to explain what evidence she would have presented. She did not meet her burden to demonstrate and explain reversible error. She had repeatedly asked for more time to reach a settlement, which the court had allowed. The appellee's last letter to the trial court asked that his proposed decree be entered and said that it reflected a property division very close to what the appellant wanted. She did not respond to that letter. The record does not indicate that she ever proposed a property division or identified any property in dispute over which she requested a hearing. The Court of Appeals affirmed the property portion of the decree. The appellant also contends that the court erred in modifying the custody agreement without a hearing, and she argued that the original agreement should have remained in effect until a hearing. Before the divorce decree was entered, both parties had requested a custody hearing because they no longer agreed on their original proposal. In this case no testimony was taken on custody, visitation or best interest. The appellant was denied the opportunity to submit evidence regarding the initial custody determination, so the Court of Appeals reversed and remanded the custody determination for further proceedings. (Spears, J.; No. CV-15-413; 12-16-15; Kinard, M.)

*Williams v. Arnold*, 2015 Ark. App. 715 [**divorce—military retirement; contempt**] When the parties divorced in 2007, the divorce decree provided that the appellee wife would receive 32.5% of the appellant husband's military retirement, based upon their having been married for thirteen years while he served in the military. At the time of the divorce, he was already retired and receiving retirement benefits. The decree provided that the parties "shall cooperate together so as to ensure that the Plaintiff [appellee] receives the proper amount directly from the military payment center." The appellee received no retirement benefits from the government or from the appellant. Nearly seven years after the divorce, she filed a motion for contempt. After a hearing, the circuit court found that the appellant had received 100% of his retirement, over \$130,000. It found that the appellee was entitled to \$43,564 as her 32.5% share, but subsequently ordered a reduction to allow the appellant a credit offset for the amount of taxes that would have been paid. The court ordered an amortization schedule and ordered him to make monthly payments until the debt was satisfied. The Court of Appeals affirmed the decision. The Court held that it was not clearly against the preponderance of the evidence that the appellant willfully disobeyed a valid court order that he "cooperate together so as to ensure" the appellee received her portion of the retirement benefits. She was not required to obtain her share directly from the government, nor does it prevent the court from ordering the appellant to repay her for benefits he knowingly kept and spent. The circuit court could properly enforce its decree to ensure that it was delivered to her. The appellant had raised the affirmative defense of laches and the Court of Appeals held that the circuit court's decision that laches did not apply was not clearly erroneous. He did not rely, to his detriment, on her delay, nor was it unjust to order him to repay her the benefits that he kept and spent. He knew she was supposed to get the benefits that he was already receiving and he did nothing to help her get the money. She testified that he lied to her about whether she could get the benefits after she remarried. The Court said it found no error in the laches decision. (Feland, W.; No. CV-15-373; 12-16-15; Harrison, B.)

## PROBATE

*Treat, Executrix, v. Hyde*, 2015 Ark. App. 628 [**decedent's estate**] This appeal and cross-appeal are from an order of the circuit court involving the estate of Freddie Hyde, deceased. The circuit court found that certain real property in trust, which the decedent transferred from the family trust to himself during his lifetime, was not part of the estate because the trustee's deed was null and void, and that the property remained in the trust. The court also found that the decedent's son, Jason Hyde, was entitled to his father's life-insurance proceeds as beneficiary of the policy. The Court of Appeals reviewed the trust instrument and extrinsic evidence presented to the trial court and found that the decedent had the right to "sell any property of the Trust for cash or credit at public or private sale. . . ." and that pursuant to Exhibit A of the trust, he was deemed to own 100% of the property at issue here." The Court found that the trust language did not give the appellee a right of first refusal, and found that the Hydies did not have to act collectively as one trustee. The Court reversed the trial court's finding that the trustee's deed that the decedent executed was null and void, finding that it was valid and transferred the property out of the trust and to Mr. Hyde individually, making the property part of his estate. On the issue of the proceeds of the life-insurance policy, the Court affirmed the trial court, finding that the ownership of the policy was never placed in trust. It remained in Mr. Hyde at the time of his death, and he retained the power to change the beneficiary of the policy, which he did. In doing so, he did not dispose of any property belonging to the parties and he did not violate his fiduciary duties as trustee. (Hughes, T.; No. CV-15-236; 11-4-15; Glover, D.)

*Whaley v. Beckham*, 2015 Ark. App. 675 [**guardianship; permissive intervention**] This appeal is from a circuit court order denying the appellant's motion to dismiss the appellees' petition to intervene, granting the appellees' intervention, and reappointing the appellees as temporary guardians of the person of Louise Whaley Shepherd and the First Community Bank of Searcy as the guardian of her estate. The sole argument on appeal is that the circuit court erred in allowing the permissive intervention of the appellees. The dispute is between the appellant family of the Ward and her appellee neighbors, who claimed that they should be allowed to intervene and to be appointed temporary and permanent guardians of the person of the Ward. In affirming the appellees' intervention, the Court of Appeals first considered whether the order granting permissive intervention is immediately appealable. The Court reasoned that it was under Arkansas Rule of Appellate Procedure—Civil (2)(a)(12) (2014), which provides that an appeal may be taken from statutes including Ark. Code Ann. Sec. 28-1-116, which provides for immediate appeals from any provisions of the Probate Code except for two exceptions not pertinent here. Ark. Code Ann. Sec. 28-65-218(i) provides that the chapter of the Probate Code governs temporary guardians "and an appeal may be taken from the order of appointment of a temporary guardian." The Court said no exception is made between temporary and permanent guardianships, that guardianships will not be stayed on appeal, and that appeals may be taken from appointment of a temporary guardian. Therefore, the Court said, it had jurisdiction to hear the appeal. On the issue of granting the intervention, the Court said the standard of review is abuse of discretion. The appellants contended on appeal that the appellees are "strangers to the record" and have no standing to appear as a party, so it follows that they have no standing to intervene, but the Court said their arguments go to the issue of the actual appointment of a guardian rather than the issue of intervention. The Court held that the appellant failed to demonstrate an abuse of discretion as to the specifically-appealed issue



of intervention, and further held that the circuit court did not abuse its discretion in granting their petition to intervene in a guardianship proceeding. (Parker, A.; No. CV-15-196; 11-18-15; Gladwin, R.)

*Sharp v. Pike*, 2015 Ark. App. 670 [**adoption—ICWA—consent of a parent**] This is a stepparent adoption case in which the appellant natural mother appeals based upon the trial court's finding that the mother's consent was not required because she failed significantly and without justifiable cause to communicate with the child or to provide for the care and support of the child as required by law or judicial decree. On her allegation that the circuit court clearly erred in finding that her consent to adoption was not required, she did not contest the court's finding that the adoption was in the best interest of the child. The Court of Appeals said the facts were undisputed that for more than a year she failed to provide any care for support for the child. She acknowledged that she had a duty of support whether court-ordered or not, but she contended that she offered support and the child's father declined it. The circuit court found that her failure was significant and without justifiable cause. She was employed for twenty months before the hearing. Although she claimed that she had purchased Christmas and birthday presents for two years for her child, she never attempted to deliver them. She never attempted to see her child at school or to meet with teachers or the principal or to obtain records, although she was never precluded from doing that. In fact, she obtained records right before the hearing, which the school provided at her request. The record also indicated that the child did not want to see the appellant or to have what she called the constant disappointment or drama in her life. In addition, the father testified that the appellant had never offered to pay him support and that he had never declined it. The Court held that the trial court did not clearly err in finding that her consent was not required based upon Ark. Code Ann. section 9-9-207(a)(2)(ii). The decision was affirmed. (Scott, J.; No. CV-14-1017; 11-18-15; Vaught, L.)

*Martini v. Price*, 2015 Ark. App. 684 [**stepparent adoption**] The appellant natural father of a daughter, E.M., appealed the adoption that was granted to the child's step-father without the appellant's consent, based upon his significant failure for a period of at least one year, without justifiable cause, to communicate with the child. He contended that he had justifiable cause for his failure to communicate because (1) he did not know where the child was located and (2) he was under a no-contact order which prohibited him from communicating with the mother of his young child without violating the order and risking incarceration. The Court of Appeals noted that the parties were married in Arkansas and lived in Arkansas for a time after they married. The mother of the child testified that she was living with her mother, that her mother had lived in the same home in Kensett for twenty-five years, and that appellant had been to the home twenty times or more. Secondly, the no-contact order prohibited him from communicating only with the appellee, not his children. He testified that both his probation officer and an Arkansas attorney he talked with had said not to communicate with the children's mother, even though she attempted to set up Skype with him so he could talk to the children. He testified that they told him to wait until his probation was over or he would end up in jail. He believed he was being "set up." He failed for nearly three years to communicate with them except for "three terse emails," according to the majority opinion in the Court of Appeals. The Court found the trial court's determination that his "excuses were either not credible or not sufficient to constitute justifiable cause" was not clearly erroneous, and affirmed the step-father adoption. (Foster, H.G.; No. CV-14-1080; 12-2-15; Gruber, R.)

*Norris v. Davis*, 2015 Ark. 442 [**decedent's estate—family-settlement agreement; res judicata**]  
This case involves a decedent's estate, the decedent's paternity of a child of the appellee, and a family-settlement agreement that divided the decedent's estate between three minor children. On appeal, the appellee contends that the case was dismissed before she was given the opportunity to have a "fair opportunity to conduct discovery" regarding her claim that the appellee committed fraud in obtaining the settlement agreement. She did not challenge on appeal the circuit court's findings that the issue of paternity and "proportionate entitlement to inherit" were litigated and that res judicata precluded her from again litigating the issues. The Supreme Court said the issue is considered abandoned on appeal. The only claim on appeal was that the case was dismissed prematurely because she was not allowed to conduct discovery to establish her claim of fraud. The Court said that the circuit court decided that its ruling on res judicata "'rendered moot' the appellee's motion to compel discovery. Generally, a case becomes moot when any judgment rendered would have no practical legal effect upon a then existing legal controversy." The Court said that the circuit court acted properly because such discovery would have had no practical legal effect given the circuit court's decision on res judicata. The court's consideration of the merits of the motion to compel discovery would have been advisory only. The circuit court's decision was affirmed. (McCallister, B.; No. CV-14-1018; 12-3-15; Hart, J.)

## JUVENILE

### *Z.L. v. State*, 2015 Ark. 485 [**EJJ – Jurisdiction**]

The circuit court lacked jurisdiction to enter a criminal sentence concerning the appellant at a review hearing because the appellant had reached the age of 21 before the hearing was scheduled and conducted. The court lost jurisdiction over appellant once he turned 21. As a result, the court lack the authority to conduct the review hearing and to impose an adult sentence. Reversed and dismissed. (Erwin, H.; CR-14-1030; 12-17-2015; Wood, R.)

### *D.F. v. State*, 2015 Ark. App. 656 [**Delinquency Adjudication**]

Appellant was found delinquent on charges of theft by receiving. Theft by receiving requires at least constructive possession of the stolen property, requiring that the appellant had both the power and intent to control the property. Yet, the evidence showed that the defendant was a passenger in a stolen vehicle and that is not sufficient to establish constructive possession to connect the appellant to the crime. Delinquency reversed. (Fergus, L.; CR-15-78; 11-12-2015; Brown, W.)

The following cases had co-defendants in companion cases based on the same charges and decided on the same analysis reversing the delinquency:

*I.G. v. State*, 2015 Ark. App. 654 (Fergus, L.; CR-15-74; 11-12-2015; Brown, W.)

*A.I.M. v. State*, 2015 Ark. App. 650 (Fergus, L.; CR-15-79; 11-12-2015; Brown, W.)

*J.F. v. State*, 2015 Ark. App. 641 (Fergus, L.; CR-15-72; 11-12-2015; Virden, B.)

*Huskey v. Huskey*, 2015 Ark. App. 639 [**FINS – Guardianship - termination**]

Appellant (mother of A.S.) did not preserve her argument for appeal that her constitutional rights and Arkansas law was violated. Appellant argued that since she originally consented to the guardianship of her child and that she was entitled to terminate the guardianship because she had not been declared unfit. [**Recusal**] Appellant's motion for the judge to recuse was untimely and waived. Appellant must make a timely motion for recusal to preserve a claim for judicial bias for review. Appellant filed a motion in September 2014 for the trial court's conduct in August 2012, January 2012 and May 2013. The appellate court found the motion was untimely and therefore waived. The appellate court further held that the mere fact of adverse ruling is not enough to demonstrate bias. [**due process**] Appellant argued that the guardianship order was invalid because there was no petition and it was not served on the parties and therefore lacked due process. The appellate court failed to reach the merits of this argument because appellant failed to provide any convincing arguments or citations as to authority on point. (French, T.; CV-14-937; 11-12-2015; Gladwin, R.)

*Edwards v. Ark. Dep't of Human Services*, 2015 Ark. App. 402 [**DN – Custody, Final Order**]

Appellants (grandparents of M.A.E.), had successfully intervened and received a custody order concerning M.A.E's siblings. They appealed the trial court's denial of custody of M.A.E. The Court of Appeals dismissed and the Supreme Court granted appellant's petition for review. The Supreme Court found that the denial of custody was not a final order for failure to comply with Rule 54(b). The trial court failed to include specific findings of any danger of hardship or injustice that could be alleviated by an immediate appeal. Appeal dismissed for lack of jurisdiction. (Huckabee, S.; CV-15-395; 11-5-2015; Danielson, P.)

*Miller v. Ark. Dep't of Human Services*, 2015 Ark. App. 727 [**TPR – aggravated circumstances**]

The trial court did not error in finding that appellant had subjected her children to aggravated circumstances because there was little likelihood that services would result in successful reunification where appellant testified that she never believed and would never believe that her daughter had been repeatedly sexually abused by her husband for over a year. The trial court was correct in finding that appellant's failure to protect her children would continue due to appellant's denial of sexual abuse and her disregard for her child's welfare.

(Coker, K.; CV-15-652; 12-16-2015; Hixson, K.)

*Brown v. Ark. Dep't of Human Services*, 2015 Ark. 725 [**TPR – best interest**]

[**adoptability**] The trial court erred in finding that termination was in the child's best interest where there was no evidence introduced at the termination hearing regarding adoptability or a finding that in the absence of evidence, adoptability made no legal difference to the ultimate decision of the child's best interest. [**potential harm**] The circuit court erred in denying appellant the ability to rebut evidence or present evidence distinguishing prior cases with the current case with regard to the potential harm factor. Reversed and remanded. (Cook, V. CV-15-52; 12-16-2015; Whiteaker, P.)

*Velasco v. Ark. Dep't of Human Services*, 2015 Ark. 724 [TPR – best interest]

**[potential harm]** Although appellant made strides towards putting her life back on track, the trial court found appellant's testimony not credible and that if she remained with her husband there would be future drug activity around the children. The children were removed as a result of a drug raid and a second drug raid was made after the children were in foster care. The circuit court's finding as to potential harm was not clearly erroneous where appellant knew of the drug activity in her home, and put her relationship with her husband and his criminal activity above the welfare of her children. (Branton, B; CV-15-656; 12-16-2015; Glover, D.)

*Vogel v. Ark. Dep't of Human Services*, 2015 Ark. App. 671 [TPR – due process]

**[service]** Appellant argued that her due process rights were violated because she was not provided adequate notice and an opportunity to participate in the termination hearing. Appellant acknowledged that these issues were not raised below but argued that her trial attorney's failure to raise these issues at the termination hearing was ineffective assistance of counsel so flagrant and egregious it falls within the *Wicks* exception requiring that the trial court, on its own motion, should have taken steps to remedy it. The appellate court disagreed and found that prior to the appeal there had never been a claim that the original service in the dependency-neglect case was improper so there was no basis to require anything more than Rule 5 service of the termination petition on appellant's attorney. The trial court found and it was undisputed that Rule 5 notice of the TPR petition was provided. **[presence/participation in hearing]** Appellant also argued her due process rights were violated because her attorney failed to take any steps to have her participate in the termination hearing falling within the *Wicks* exception. The appellate court found that federal courts do not provide a right for prisoners to be present at civil hearing. This includes termination proceedings, as long as the inmate is represented by counsel, counsel, participates in making evidentiary objections, cross-examining witnesses, and the inmate has the opportunity to present testimony by deposition or other recorded format, if that testimony could influence the outcome of the proceeding. The appellate court found that this did not fall within the *Wicks* exception requiring the circuit to step in. The appellate court stated that appellant's attorney presented her case effectively and it is very unlikely that appellant's deposition or recorded testimony would have influenced the outcome. It is undisputed that she had her rights to three children terminated, she had ongoing drug problems and was currently incarcerated in Texas and unable to care for her child. **[ineffective assistance of counsel]** The ineffective assistance claim also failed because appellant did not demonstrate a reasonable probability that the court's decision would have been different without the alleged errors by the trial attorney. Appellant's attorney cross-examined each witness effectively, demonstrated her client's compliance with most the case-plan requirements, and provided alternative explanations for negative testimony. The evidence overwhelmingly supported termination. (Arnold, G.; CV-15-607; 11-18-2015; Vaught, L.)

*Wilson v. Ark. Dep't of Human Services*, 2015 Ark. 666 [TPR – potential harm]

The court's findings as to best interest was not clearly erroneous. Appellant (mom) argued that it was not in her children's best interest to terminate her parental rights, specifically with regard to two of her children who had been placed with their father arguing that that *Caldwell* applied. However, the appellate court distinguished this case from *Caldwell* because the trial court made specific findings that the children would be harmed if placed in appellant's custody and that they had been harmed by the ongoing violent domestic violence in the home. Further, there was no

evidence that the children had a relationship with appellant's parents or family members. Appellant (dad) also argued insufficient evidence as to S.A. Yet, the circuit court considered potential harm as to the continuing domestic violence in front of and to S.A. and the parents' failure to address these concerns. **[failure to remedy]** Appellants did not seek domestic violence counseling until after the termination petition was filed, 18 months after the children were removed due to domestic violence. **[hearsay]** Without any showing of prejudice, any judicial error as to the admissibility of evidence is harmless and cannot be grounds for disturbing a court's order. **[appointment of counsel]** Appellant (dad) argued that the termination should be reversed because he was not appointed counsel until the termination hearing. Yet he retained counsel earlier in the case, and failed to preserve this argument for appeal. (French, T.; CV-15-656; 11-18-2015; Gruber, R.)

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

*Morin v. Ark. Dep't of Human Services*, 2015 Ark. App. 695 **[drug issues – aggravated circumstances]** (Keaton, E.; CV-15-556; 12-2-2015; Brown, W.)

*Hardy v. Ark. Dep't of Human Services*, 2015 Ark. App. 674 (Sullivan, T.; CV-15-628; 11-18-2015; Brown, W.)

*Blankenship v. Ark. Dep't of Human Services*, 2015 Ark. App. 620 **[drug issues – failure to remedy & other factors]** (Talley, D.; CV-15-351; 11-4-2015; Abramson, R.)