APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

FEBRUARY 2015
VOLUME 22, NO. 6

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

Administrative Plans are to be submitted to the Supreme Court by July 1, 2015.

On February 26th, the Supreme Court adopted amendments to Rules of Civil Procedure 3, 11, and 42. The effective date for the changes to Rules 11 and 42 is April 1, 2015, and the adoption of the amendment to Rule 3 is contingent on action by the General Assembly. The per curiams were included in the weekly mailout.

CRIMINAL

Matlock v. State, 2015 Ark. App. 65 **[sufficiency of the evidence; possession of drug paraphernalia with purpose of manufacturing; maintaining a drug premises; possession of a controlled substance]** There was substantial evidence to support appellant's convictions. **[consecutive sentencing]** There is no requirement that the court explain its reason for running sentences consecutively. (Carroll, R.; CR-14-617; 2-4-15; Brown, W.)

Reyes v. State, 2015 Ark. App. 55 **[revocation; suspended sentence]** Despite making a significant effort to complete a condition of his suspended sentence, appellant was effectively prevented from

doing so by the Arkansas Department of Correction. Thus, the violation of the condition was excusable and did not justify revocation. (Medlock, M.; CR-14-625; 2-4-15; Gruber, R.)

Moore v. State, 2015 Ark. App. 58 **[amendment to criminal information]** Because appellant failed to request a continuance and informed the court that he was ready when his case was called, and because appellant's defense at trial was that he did not commit the crimes alleged, appellant failed to establish that he was prejudiced when five days prior to trial the State amended the criminal information. (Looney, J.; CR-14-628; 2-4-15; Whiteaker, P.)

Hunt v. State, 2015 Ark. App. 53 **[404(b)]** Considering appellant's knowledge of the victim's allegations against him almost immediately after they had first been made; the continual, active, and unsuccessful search for appellant throughout the ensuing eleven-month period; the issuance of a warrant for appellant's arrest for the rapes relatively close in time to the arrest attempt and his accompanying flight; and the knowledge of appellant's close friends and family that he was still being sought in connection with the case, one could reasonably infer that appellant knew that he was wanted by the police for the alleged rapes and that he fled to avoid being arrested for them. Thus, the trial court correctly determined that a sufficient showing was made that evidence of appellant's flight was independently relevant to his consciousness of guilt and properly admitted the evidence pursuant to Rule 404(b) of the Rules of Evidence. (Clawson, C.: CR-14-484; 2-4-15; Kinard, M.)

Griffin v. State, 2015 Ark. App. 63 **[sufficiency of the evidence; first-degree failure to report child maltreatment as a mandated report]** There was substantial evidence to support appellant's conviction. **[statutory interpretation; Ark. Code Ann. § 12-18-201]** Arkansas Code Annotated § 12-18-201 is not ambiguous. **[jury instructions]** Because appellant's proffered jury instruction was not a correct statement of the law, the circuit court did not abuse its discretion by refusing to give it. (Sims, B.; CR-13-1095; 2-4-15; Hoofman, C.)

Tate v. State, 2015 Ark. App. 72 **[motion to suppress]** Because appellant's wife consented to the search of their home and gave firearms from the house to law enforcement officials, no unlawful search or seizure occurred. Thus, the trial court did not err when it denied appellant's motion to suppress. (Yeargan, C; CR-14-430; 2-11-15; Virden, B.)

Tennant v. State, 2015 Ark. App. 81 **[sufficiency of the evidence; possession of drug paraphernalia]** There was substantial evidence to support appellant's conviction. **[motion to suppress]** Because appellant's un-*Mirandized* custodial statements were not incriminating, the circuit court did not err in denying appellant's motion to suppress. (Green, R.; CR-13-853; 2-11-15; Whiteaker, P.)

King v. State, 2015 Ark. App. 84 **[motion to suppress]** Probable cause to believe that appellant had committed a felony was established by the confidential informant's reliable information, the officers' corroboration of that information, and appellant's attempt to flee law enforcement to avoid arrest. Accordingly, the officers' warrantless arrest of appellant was justified under Rule 4.1 of the Rules

of Criminal Procedure and the trial court did not err in denying the motion to suppress evidence seized upon his arrest. (Storey, W.; CR-14-642; 2-11-15; Vaught, L.)

Toombs v. State, 2015 Ark. App. 71 **[sufficiency of the evidence; first-degree murder; felon in possession of a firearm]** There was substantial evidence to support appellant's convictions. **[confrontation clause]** Even if the declarant claims to have no memory of events previously testified to, the right of confrontation is not violated where testimonial hearsay is admitted against the defendant, when the declarant is present at trial and available as a witness. **[admission of evidence]** Evidence of appellant's flight, which occurred four days after the alleged commission of the crime, was admissible to show consciousness of guilt. (Johnson, L.; CR-14-123; 2-11-15; Virden, B.)

Proctor v. State, 2015 Ark. 42 **[overruling previous case]** The Supreme Court declined appellant's request to overrule or modify its decision in *Hobbs v. Turner*, 2014 Ark. 19, 431 S.W.3d 283, in which it concluded that the proper State habeas remedy for a sentence rendered illegal based upon the holding in *Graham v. Florida*, 560 U.S. 48 (2010) is to reduce that sentence from life to the maximum term-of-years sentence allowed by law. (Dennis, J.; CV-14-768; 2-12-15; Hannah, J.)

Feuget v. State, 2015 Ark. 43 **[Rule 37]** Appellant's petition for postconviction relief, which was based upon allegations that his attorney's failed to present certain witness testimony and failed to request a particular jury instruction, both matters of which are considered trial tactics and strategy, was properly denied. (Johnson, L.; CR-13-885; 2-12-15; Wood, R.)

Hice v. State, 2015 Ark. App. 97 **[revocation]** The circuit court erred when it denied appellant's motion to dismiss the petition to revoke his suspended sentence. The petition sought to revoke an illegal sentence. (Fitzhugh, M.; CR-14-639; 2-18-15; Abramson, R.)

Simpson v. State, 2015 Ark. App. 103 **[competency]** Arkansas Code Annotated § 5-2-309(c) requires a trial court to hold a competency hearing if the defendant contests the competency finding in a report prepared by a mental-health professional pursuant to Ark. Code Ann. § 5-2-305. (Green, R.; CR-14-349; 2-18-15; Kinard, M.)

Blackwell v. State, 2015 Ark. App. 96 **[chemical testing]** The language of Ark. Code Ann. § 5-65-205 does not limit law-enforcement officers to only one request for chemical testing. **[constitutional rights]** The protections of the Fifth Amendment have not been extended to cover chemical testing and *Miranda* rights do not apply to taking tests under the implied-consent statute. Additionally, submitting to a scientific test is not a critical stage in criminal proceedings subject to the right to counsel under the Sixth Amendment. (Johnson, L.; CR-14-539; 2-18-15; Abramson, R.)

Evans v. State, 2015 Ark. 50 **[motion to suppress]** An anonymous uncorroborated tip did not support a finding that law-enforcement officials had a reasonable belief that appellant resided in the motel room or that he was present in the motel room at the time that the law-enforcement officials entered the motel room without consent, exigent circumstances, or a search warrant. Thus, the

officers' entry into the motel room to serve the arrest warrant was invalid. Accordingly, the circuit court erred when it denied appellant's motion to suppress. (Sims, B.; CR-14-578; 2-19-15; Hart, J.)

Beavers v. State, 2015 Ark. App. 124 **[motion to suppress]** Because appellant's confession was voluntary, the trial court did not err when it denied appellant's motion to suppress. (Wright, J.; CR-14-216; 2-25-15; Gruber, R.)

Vaughn v. State, 2015 Ark. App. 136 **[admission of evidence]** The trial court did not abuse its discretion when during the sentencing phase of the trial it admitted testimony of crimes appellant committed subsequent to the offense for which appellant was on trial because the evidence established appellant's course of continued criminal activity, which was relevant to the jury's determination of an appropriate punishment for appellant. (Yeargan, C.; CR-14-651; 2-25-15; Hoofman, C.)

Riddle v. State, 2015 Ark. 72 **[Rule 37]** There is no constitutional requirement for defense counsel to inform his or her client about parole eligibility, and the failure to impart such information does not fall outside the range of competence demanded of attorneys in criminal cases. However, if an attorney provides incorrect advice about parole eligibility "of a solid nature, directly affecting a defendant's decision to plead guilty," such positive misrepresentations may amount to ineffective assistance of counsel. (Tabor, S.; CR-13-972; 2-26-15; Wood, R.)

Westerman v. State, 2015 Ark. 69 **[error coram nobis]** The trial court did not abuse its discretion when it denied appellant's petition seeking a writ of error coram nobis because appellant's petition raised a claim of ineffective assistance of counsel, which is not a cognizable basis on which error coram nobis can issue. (Kemp, J.; CR-13-598; 2-26-15; Hart, J.)

Young v. State, 2015 Ark. 65 **[postconviction relief]** The circuit court was not clearly erroneous when it concluded that appellant's testimony was not credible that he would not have entered pleas of no contest and guilty if he had not been pressured to do so by his attorney. (Johnson, L.; CR-13-699; 2-26-15; Goodson, C.)

Hundley v. Hobbs, 2015 Ark. 70 **[habeas corpus; Interstate Corrections Compact]** Even though appellant is confined in New Jersey under the Interstate Corrections Compact, for the purposes of our Arkansas's habeas statutes, Hobbs, as the Director of the Arkansas Department of Correction, is the person in whose custody appellant is detained, as he determines where appellant is physically incarcerated. Because Hobbs is in Jefferson County, the Jefferson County Circuit Court has jurisdiction to issue a writ of habeas corpus to Hobbs and make the writ returnable in Jefferson County. (Dennis, J.; CV-14-650; 2-26-15; Hart, J.)

Carter v. State, 2015 Ark. 57 **[habeas corpus; DNA testing]** The circuit court erred in failing to hold an evidentiary hearing to determine whether appellant satisfied the chain-of-custody requirements of Ark. Code Ann. § 16-112-202(4). **[timeliness of petition]** A motion for postconviction DNA testing must be made in a timely fashion. There is a rebuttable presumption

against timeliness for testing if the motion is not made within thirty-six months of the conviction. Although appellant's petition was filed twenty-five years after his conviction, he was able to overcome the presumption that his petition was untimely because no DNA testing methods were available at the time of his trial. Thus, today's DNA testing methods are substantially more probative. (Wright, H.; CR-13-359; 2-26-15; Hannah, J.)

Ward v. State, 2015 Ark. 60 **[motions to recall mandate]** Appellant failed to establish a breakdown in the appellate process that would warrant recall of the Supreme Court's mandates from: (1) the 1992 direct appeal of his conviction for capital murder; (2) the 1997 appeal from his resentencing; or (3) the 2002 appeal of the denial of his petition for postconviction relief. (CR-91-36; CR-98-657; CR-00-1322; 2-26-15; Danielson, P.; Baker, K; Goodson, C.)

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

Block v. State, 2015 Ark. App. 83 (possession of marijuana; simultaneous possession of drugs and firearms) CR-13-1030; 2-11-15; Vaught, L.

Sandrelli v. State, 2015 Ark. App. 127 (rape) CR-13-916; 2-25-15; Whiteaker, P.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Harris v. State, 2015 Ark. App. 51 (probation) CR-13-130; 2-4-15; Harrison, B.

Johnson v. State, 2015 Ark. App. 68 (suspended sentence) CR-14-758; 2-11-15; Gladwin, R.

Robertson v. State, 2015 Ark. App. 113 (suspended sentence) CR-14-714; 2-25-15; Gladwin, R.

CIVIL

Ogden v. Hughes, 2015 Ark. App. 59 **[Rule 41 dismissal]** Second dismissal was properly dismissed with prejudice because both dismissals resulted from a failure to comply with the service requirements of Rule 4. Contention that a "literal" application of Rule 41(b) leads to "a harsh and absurd result that does not serve the intended purpose of the rule," is without merit. (Martin, D.; CV-14-664; 2-4-15; Whiteaker, P.)

Wilcox v. Wooley, 2015 Ark. App. 56 **[auctioneer contract]** There was no oral modification of the auction contract to the effect that the auctioneer agreed to cancel the auction if there were not sufficient bids received. Any modification of an auction contract must be in writing. There was no basis for an indemnity claim. There was no express contract for indemnity and no basis arises upon an implied or quasi-contract theory. (Pierce, M.; CV-14-565; 2-4-15; Gruber, R.)

Butler v. Finley, 2015 Ark. App. 60 **[conversion]** Appellant is accused of converting a check made payable to the Wilberts by having his signature signed to the check as an endorsement. Appellant was a forger on the instrument—because even though he did not personally forge the instrument, he authorized his sister to forge the instrument—and thus had no defense against the claim of conversion once the instrument had been forged and negotiated in his name. (Griffen, W.; CV-14-619; 2-4-15; Gladwin, R.)

Mancabelli v. Gies, 2015 Ark. App. 67 **[property]** At the time the easement was abandoned, Merritt owned the abutting property now owned by appellants; therefore, ownership of the north twenty-five feet of the abandoned easement vested in Merritt. Merritt then conveyed a portion of her property to a Trust, and the conveyance did not name or mention the twenty-five-foot property previously abandoned by the city. When appellants bought the north-abutting property from the Trust, it did not include the twenty-five-foot property because the Trust could not convey what it did not own. Appellants never acquired any deed conveying ownership of the disputed property to them. Because appellants were not the owners of the disputed property, they could not give permission to appellees for its use. At the time appellees filed their petition to quiet title in the disputed property, it is clear that the owner of the disputed property was the heir of Merritt, deceased, and not Appellants. (Beaumont, C.; CV-14-409; 2-4-15; Brown, W.)

Southern Farm Bureau v. Parsons, 2015 Ark. App. 95 **[interpleader/set aside]** The court did not err in vacating the interpleader order more than 90 days after its entry but before a final judgment was entered in the case. Prior to final judgment, a circuit court is at liberty to reconsider its previous, non-final rulings and decisions. The interpleader order in this case was not a final order. Interpleader permits a stakeholder who may be exposed to multiple liability to file an action naming as defendants all persons who may have claims against him. Interpleader is a two-stage process. In the first stage, the court considers the stakeholder's application for interpleader. In the second stage, the claimants contest their entitlement to the stake. Here, only the first stage had been completed. (Pierce, M.; CV-14-218; 2-18-15; Gladwin, R.)

Fletcher v. Stewart, 2015 Ark. App. 105 **[adverse possession]** Since the claimant's rights to the disputed property vested before 1995, he need not comply with the 1995 statutory change requiring payment of taxes and had to prove only the common-law elements of adverse possession. Under common law, color of title is not an essential element to a claim of adverse possession if there is actual possession. After an individual obtains title to land by adverse possession, his recognition that another may have a claim to the land does not divest title to the land from the adverse possessor nor does this recognition estop the adverse possessor from asserting title. Titled may not be divested by abandonment alone, but an intent to relinquish his claim. **[boundary by acquiescence]** When the adjoining owners occupy their respective premises up to the line they mutually recognize and acquiesce in as the boundary for a long period of time, they and their grantees are precluded from claiming that the boundary thus recognized and acquiesced in is not the true one, although it may not be. (Weaver, T.; CV-14-357; 2-18-15; Kinard, M.)

Central Flying Service, Inc. v. Pulaski County Circuit Court, 2015 Ark. 49 **[workers comp]** Challenge to the constitutionality of the Workers Comp Act does not change the fact that the exclusive remedy provision controls and the issue must first be raised before the Commission. The circuit court lacks subject matter jurisdiction. (writ of prohibition; CV-14-864; 2-1915; Danielson, P.)

Ramsey v. Dodd, 2015 Ark. App. 122 **[discovery violation]** Trial court did not abuse its discretion in dismissing the complaint for discovery violations. While the dismissal of a complaint with prejudice is obviously a severe sanction, it is expressly provided for under Rule 37 when a party fails to comply with an order to provide discovery, and it is crucial to the judicial system that trial courts retain the discretion to control their dockets. (Williams, L.; CV-14-751; 2-25-15; Kinard, M.)

City of Siloam Springs v. LA-DE, LLC, 2015 Ark. App. 130 **[condemnation]** Statute authorizing attorney's fees against the State of Arkansas in a condemnation case does not authorize attorney's fees against the City in a condemnation by the municipality. City did not assume the liabilities of the State Highway Commission. Proceeding was brought under municipal condemnation authority. (Smith, T.; CV-14-631; 2-25-15; Vaught, L.)

Bigge Crane & Rigging Co. v. Entergy Arkansas, Inc., 2015 Ark. 58 **[arbitration]** Subcontractor sought to arbitrate tort claims as a purported third-party beneficiary of a contract between Entergy and Siemens Energy. Circuit court properly ruled that the court had the authority to decide whether the dispute was arbitrable. This is not a dispute between two signatories to an arbitration clause, but the issue is the arbitrability of a dispute between a nonsignatory, Bigge, and a signatory, Entergy. Bigge was merely an incidental beneficiary of the contract and was not entitled to invoke arbitration as a third-party beneficiary. Furthermore, it could not compel Entergy to arbitrate its claims through the doctrine of equitable estoppel. (Sutterfield, D.; CV-14-549; 2-26-15; Hannah, J.)

Abraham v. Beck, Chairman of State Medical Board, 2015 Ark. 58 **[physician/drug dispensing]** Statute requiring approval from Medical Board in order for a physician to dispense "legend drugs" was constitutional. It was not vague; it was not an unconstitutional delegation of authority by the legislature; and it was not special legislation. (Piazza, C.; CV-14-559; 2-26-15; Wynne, R.)

Federal Nat'l Mortgage Ass'n. v.Taylor, 2015 Ark. 78 **[foreclosure/redemption]** The foreclosure deed recited that it was subject to the rights of redemption of the former record owners of the property as set forth in "Ark. Code Ann. Section 14-212-432." There is no such section of the Arkansas Code. The sole allegation regarding the foreclosure decree is that the circuit court cited the incorrect redemption statute in the decree. However, this allegation does not render the decree void and subject to collateral attack. Erroneous judgments are not necessarily void judgments. The court had jurisdiction of the subject matter and the parties and the challenge does not involve fraud. Thus, the collateral attack on the foreclosure decree based on her allegation that the redemption period cited in the decree is incorrect cannot be sustained. (Crow, K.; CV-14-330; 2-26-15; Wynne, R.)

DHS v. Ft. Smith School Dist., 2015 Ark. 81 **[sovereign immunity]** School district challenged requirement that all licensed child-care centers carry general liability insurance. Sovereign immunity is not a defense because the State has waived it in suits for declaratory judgment regarding the validity or applicability of agency rules. However, attempt to recover monetary damages in the form of costs and attorney's fee was barred by the doctrine of sovereign immunity. (Piazza, C.; CV-14-666; 2-26-15; Wynne, R.)

Philip Morris Companies v. Miner, 2015 Ark. 73 **[class action]** Class certification is challenged as to issues of predominance and superiority and whether the class is ascertainable. The class plaintiffs alleged that Philip Morris deceived them by advertising Marlboro Lights as being safer and having less tar and nicotine than other cigarettes. The circuit court certified the plaintiffs' class action based on the Arkansas Deceptive Trade Practices Act. Because common issues predominate, because the class-action mechanism is a superior method to adjudicate at least some parts of the plaintiffs' cause of action, and because the class is ascertainable, the circuit court's order certifying the class is affirmed. (Fox, T.; CV-14-193; 2-26-15; Wood, R.)

DOMESTIC RELATIONS

Beggs v. Beggs, 2015 Ark. App. 86 **[alimony]** This appeal is from the circuit court's refusal to reduce the appellant's alimony obligation to his former wife, the appellee. When the parties divorced, the wife was awarded custody of their two minor children, the appellant was ordered to pay child support, and he was ordered to pay alimony of $4500 a month to the appellee, who had not worked outside the home for seventeen years. Alimony was to increase to $5500 a month when the parties' older child graduated from high school, and was to continue until the appellee reached age sixty-two. His income at the time was $23,318 a month. The appellant alleged that both children have now graduated from high school, that his income has substantially decreased through no fault of his own, and that the appellee is now employed full-time. He said that he was terminated from his previous position and his stock bought out by his brother, the major shareholder, after they disagreed over how to run the business. At the time of the hearing, he was earning about $60,000 in annual investment income, and had $3,300,000 in assets, up from $1,000,000 at the time of the divorce. The appellee testified that she is employed as a data specialist at a hospital and earns $754 biweekly, has IRA accounts worth about $201,000, and about $31,000 in stocks and bonds, with a debt of $109,000 on her house. The Court of Appeals noted that, even though he is no longer employed at his previous company, he received $1,184,700 from the sale of his stock and his assets had increased since the divorce. He has no debt, and he earns investment income from which alimony can be paid. Although not working at the time of the hearing, he is capable of future employment. The appellee is working but at comparatively low earnings and income potential. Under the terms of the decree, appellant's alimony obligation will end in ten years. There is no evidence that his ability to pay alimony has decreased and, in fact, his assets have increased significantly. It remains clear that the appellee still has a need for alimony. The decision was affirmed. (Moore, R.; No. CV-14-419; 2-11-15; Hixson, K.)

Martin v. Martin, 2015 Ark. App. 93 **[divorce–visitation]** The appellant appealed from the circuit court's limiting his visitation with his two-year-old daughter to "an average of 4.5 hours per week and in requiring that all visitation be supervised." In noting that "the facts of this case are anything but ordinary," the Court of Appeals said that the circuit court was in the best position to judge the witnesses, the evidence, and the best interest of the child. The appellant argued that the report and testimony of his expert witness weighed in favor of his receiving unlimited and unrestricted visitation. The Court of Appeals said that if testimony or documentary proof shows a questionable basis for an expert's opinion, the issue becomes one of credibility for the fact-finder to make. The expert testified that he did not have all of the evidence when he assessed the appellant and wrote his report. He also failed to bring all the documentation he relied upon to court when he testified. The circuit court disagreed with the expert's opinion that appellant should have unsupervised visitation with the child and, although the court admitted the report into evidence, it found that the report lacked credibility. Therefore the Court of Appeals found no error in the circuit court's decision not to follow the expert's recommendations. The decision was affirmed. (Williams, C.; No. CV-14-621; 2-11-15; Brown, W.)

Starr v. Starr, 2015 Ark. App. 110 **[divorce–child custody]** The appellant husband filed a complaint for divorce based upon general indignities and sought custody of the parties' child, S.S. The appellee wife counterclaimed for divorce based upon general indignities and for custody of S.S. At the hearing, the appellant alleged that the appellee had a drinking problem and was abusive to their child and his three children, who lived with them. The appellee alleged that the appellant was physically and mentally abusive to her. Both parties presented witnesses and testimony supporting their respective positions. The circuit court granted a divorce to the appellant husband and granted custody of S.S. to the appellee mother, finding that to be in the child's best interest. The Court of Appeals said the trial court heard all of the conflicting evidence, determined the credibility of the witnesses, weighed the evidence, and found in favor of the appellee on the issue of custody, and that evidence supported the decision. Testimony was that S.S. had done well under her mother's care. She did well in school and her mother attended her school events. Evidence showed that the appellee would not frustrate the child's relationship with her father and her half-sisters. She had made extra efforts to drop off and pick up the child at her father's house every school day so that she could ride the bus to and from school with her half-sister, T.S. The child was permitted to spend the night with her father and her half-sisters. In contrast, the Court said, the father would not permit his daughter, T.S., to spend the night with the appellee and S.S. Several witnesses testified that the appellee did not have a drinking problem that affected her work and that she was a loving mother. On the issue of separating S.S. from her three half-sisters, the Court of Appeals said the primary consideration in child-custody cases is the welfare and best interest of the child involved and all other considerations are secondary. "While one factor the court must consider in determining the best interest of the child is whether the child will be separated from her siblings, the polestar consideration in every child-custody case is the welfare of the individual child." The decision was affirmed. (Lindsay, M.; No. CV-14-608; 2-18-15; Vaught, L.)

Guthrie v. Guthrie, 2015 Ark. App. 108 **[child support; attorney's fees]** The appellant father appealed from an order requiring him to pay $508 per month in child support for his twenty-five-

year-old disabled son, and from an order awarding $4,000 in attorney's fees to the child's mother. The Court of Appeals affirmed the circuit court's orders to continue to pay child support and to pay the appellee's attorney's fee, but modified the monthly support obligation to correct a small error in the calculation of support. The Court noted that although a parent ordinarily has no legal obligation to support a child beyond age eighteen, a parent may have a duty to provide continuing support to a child who is disabled upon reaching his majority. The common-law duty to support a disabled adult child set out in Arkansas case law was not included in section 9-14-237 (enacted in 1993), which provides for automatic termination of child support when a child reaches eighteen or nineteen (if still in high school), whichever is earlier. That provision makes no exception for disabled children. However, the courts have continued to recognize a parent's ongoing duty to support a disabled adult child. The Court concluded that "section 9-14-237 sets forth the *general* rule that parental support automatically ceases when a child reaches the milestones that traditionally signal emancipation. However, the statute does not automatically terminate a parent's continuing, common-law duty to support a child who is disabled upon attaining his majority and who needs further support....Here, there is no dispute that J.G. was disabled upon reaching age eighteen and remained so at the time of the hearing." The Court affirmed the payment of child support, but noted that the correct chart amount for the appellant's monthly income was $436 rather than $467. Using $436, the Court applied the circuit court's upward deviation of $41 to reach the amount of $477 as the modified monthly child support obligation. (Gray, A.; No. CV-14-575; 2-18-15; Glover, D.)

Browning v. Browning, 2015 Ark. App. 104 **[child support]** This is the second appeal of this case. The first appeal was based upon a hearing on August 9, 2010 on a petition to reduce child support and a motion for contempt on arrearages. The appellee and his attorney failed to appear and the circuit court found him in contempt for being thirty-eight weeks in arrears, child support was set at $250 per week, and the appellant was awarded attorney's fees. On September 10, 2010, the appellee filed a motion to set aside the August 2010 order under Rule 60, alleging that he had not received notice of the hearing. After a hearing on the motion, the court entered an order amending the order and the Court of Appeals reversed and remanded, instructing that the August 2010 order be reinstated. On remand, after a hearing, the circuit court found that a material change in circumstances had occurred, and the court reduced the appellee's child support and applied it retroactively to the date of the filing of the original petition. The court also determined that, based on the modification, the appellee had overpaid and granted him a credit toward future payments. The appellant appealed that order. The Court of Appeals affirmed the reduction in child support to $150 a week, but modified the retroactive application to the date the appellee filed his motion for modification. The Court said the amount of payments made and owed must be recalculated using the new date. (Foster, H.G.; No. CV-14-167; 2-18-15; Kinard, M.)

Fischer v. Fischer, 2015 Ark. App. 116 **[divorce--property settlement agreement]** The parties entered into a long and detailed property settlement agreement that was incorporated into the decree. The agreement had a number of category headings including one entitled "Primary Education (K - 12th Grade), which provided that the appellant would be solely responsible for all tuition and books for the three children's primary education at a specified parochial school and then for their high school education at a specified parochial high school. Three years after the decree was entered, the

appellee filed a motion for contempt after being notified that the appellant would no longer be making tuition payments to either school. He filed a motion to modify the decree, arguing that his child-support obligation should be decreased based upon lower earnings and that the children should attend public school. The circuit court found that the school payments were contractual between the parties and not modifiable, and found that the appellant's income had changed to justify a reduction in his bi-weekly child support obligation. The court also ordered him to reimburse the appellee for tuition she had paid. He argued on appeal that the educational expenses were more closely related to child support than to property settlement or alimony and that the court erred in finding it did not have jurisdiction to modify the payments. The Court of Appeals said that courts have long held that an independent property-settlement agreement, if approved by the court and incorporated into the decree, as in this case, may not be subsequently modified by the court. Addressing the appellant's argument that these payments were really in the nature of child support payments, the Court said that the agreement was very specific and divided into categories. Neither the child-support section nor the primary-education section linked the tuition payments to child support, and that if that had been intended, the parties' able counsel would have included it. The Court noted specifically that "this issue presents a case-by-case determination, and under other circumstances, private-school tuition could be a factor for the lower court to consider when modifying child support." However, under these facts, the parties made a separate and independent agreement, signed by both and incorporated into the decree, and the circuit court was correct in concluding it did not have jurisdiction to modify the provision. The decision was affirmed. (Herzfeld, R.; No. CV-14-692; 2-25-15; Abramson, R.)

Foust v. Montez-Torres, 2015 Ark. 66 **[visitation; standing]** The appellant and appellee lived together as a family unit from 1994 to 2009. In 2005, the appellee had a brief relationship with someone else and conceived M.F., who was born in 2006. After the parties' relationship ended in 2009, the appellee and the child moved out of the home, but the appellee allowed the child to visit the appellant until 2013, when appellee ended the visitation. After that, the appellant filed an action for custody or, in the alternative, visitation with the child. At the hearing, the appellant testified that she was present when M.F. was born and that she had lived in the home with the child from 2006-2009. She also testified that the child had her last name. The appellee testified that after the separation, she learned that the appellant was having romantic partners stay overnight while M.F. was visiting and that, although she voiced her objection to the appellant, the practice continued. Appellee stopped the visitation altogether after the parties had words and ultimately a confrontation resulting in appellee's removing th child from appellant's home in the middle of the night. The Supreme Court said the circuit court did not clearly err in holding that the appellant was not in loco parentis for the entirety of M.F.'s life. Having concluded that the appellant did not stand in loco parentis to M.F., the Court said that it need not reach the appellant's contention that the circuit court erred in finding that it was not in the child's best interest to permit visitation with her. If she did not stand in loco parentis when she filed her action, she did not have standing to seek visitation with the child. Because she lacked standing to bring the action, the circuit court reached the right result in denying her request for custody and visitation, even though it may have announced a different reason. The decision of the circuit court was affirmed. (Smith, P.; No. CV-14-192; 2-26-15; Goodson, C.)

PROBATE

In the Matter of the Guardianship of S.H., a minor, 2015 Ark. 75 **[guardianship–termination]** On the second appeal of this case after remand from the Supreme Court, the circuit court again denied the appellant mother's petition to terminate a guardianship over her child. The Court held that the circuit court applied a legal standard that failed to safeguard the natural parent's fundamental right with respect to the care, custody, and control of her child. The Court clarified that when a fit parent consents to a guardianship, he or she "puts forth sufficient evidence, and meets the burden going forward, by revoking consent and informing the court that the conditions necessitating the guardianship no longer exist. That is because a fit parent is presumed to act in his or her child's best interest. ... [citing *Troxel v. Granville*]...Thus, a fit parent is presumed to act in the child's best interest when consenting to the guardianship and, later, when terminating the guardianship." The Court also held that, to rebut this presumption that termination of the guardianship was in the child's best interest, the appellee grandparents' burden was by clear and convincing evidence. The Court said this is a "two-step, burden-shifting procedure." The Court reversed and remanded to the circuit court for entry of an order returning the child to her mother's custody. (Henry, D.; No. CV-14-475; 2-26-15; Wood, R.)

JUVENILE

Mode v. Ark. Dep't of Human Services, 2015 Ark. 69 **[DN Adoption]**
Appellants, maternal grandmother and step-grandfather, appealed the denial of their adoption petition. The circuit court was correct in denying appellant's adoption petition because appellants did not present any evidence that DHS had consented to the adoption or that it was being unreasonably withheld. The circuit court could not grant a petition without evidence that consent had been obtained or excused and that it was in the children's best interest. (Branton, W.; CV-14-623; 2-4-2015; Gladwin, R.)

Ark. Dep't of Human Service v. Nelson, 2015 Ark. 98 **[Child Maltreatment Registry]**
The circuit court reversed the decision of the DHS Office of Appeals and Hearings, which found that appellee physically abused her son by striking him on his face causing injury without justifiable cause, and DHS appealed. The administrative law judge's findings were confusing and contradictory, finding that appellee was carelessly swinging the belt and she knowingly struck her child in the face causing injury. The circuit court was affirmed and there was not substantial evidence to place appellee's name on the Child Maltreatment Registry. (Fitzhugh, M.; CV-14-774; 2-18-2015; Abramson, R.)

K.D. v. Ark. Dep't of Human Service v. Nelson, 2015 Ark. 75 **[Child Maltreatment Registry]**
Appellant argued that the notification he received indicating that there was some credible evidence of child maltreatment did not meet due process grounds. The appellate court found that the notice was inadequate to inform appellant that there was a true finding against him and that he had a right to appeal. Reversed and remanded for an administrative hearing on the merits. (Fox, T.; CV-14-814; 2-11-2015; Harrison, B.)

Ferguson. v. Ark. Dep't of Human Services , 2015 Ark. App. 99 **[DN adjudication]** Appellant failed to preserve a claim for judicial bias below by objecting or moving for the judge to recuse. Appellants also failed to demonstrate prejudice. There was sufficient evidence to support the adjudication with the doctor's testimony and appellant's own admission that she struck the boys with a vacuum cleaner attachment. (Elmore, B.; CV-14-867; 2-18-2015; Virden, B.)

Lively v. Ark. Dep't of Human Services, 2014 Ark. App. 655 **[TPR – grounds sufficiency]** The termination order was based on three separate termination grounds and appellant only challenged the sufficiency of two grounds. The unchallenged ground is sufficient to affirm the termination order as to the grounds. **[best interest]** The circuit court's finding that the children were adoptable was not supported by the evidence and it was legally irrelevant since the children have a permanent home with their mother. The court's reliance on adoptability in determining the child's best interest was clearly erroneous. Reversed and remanded. The appellate court noted that children had a stable relationship with their paternal grandparents and would benefit from their father's continued financial support. The court also stated that the circuit court did not address if a less dramatic alternative, such a supervised visitation or a no-contact order with appellant, was in the children's best interest. (Zimmerman, S.; CV-14-901; 2-25-2015; Vaught, L.)

Tillman. v. Ark. Dep't of Human Services , 2015 Ark. App. 119 **[TPR – failure to remedy]** Appellant argued that DHS failed to make reasonable efforts to provide services to rehabilitate her and correct the conditions that caused removal. Appellant failed to preserve this argument for appeal. The appellate court noted that while DHS did contribute to the delay in receiving some services, appellant failed to take any responsibility for her actions in thwarting providers' attempts to contact her and failing to participate in services she had started. The court noted there was sufficient evidence to support termination based on the failure to remedy ground alone. **[subsequent issues]** Appellant's failure to take advantage of drug treatment and her continued use of drugs demonstrated her indifference to remedy the subsequent factors. (Elmore, B.; CV-14-931; 2-25-2015; Virden, B.)

Ward *v. Ark. Dep't of Human Services*, 2015 Ark. App. 106 **[TPR – jurisdiction]** Appellant argued the first time on appeal that the circuit court lacked jurisdiction to reopen a prior closed dependency-neglect case and that the termination is null and void. The appellate court stated that while the circuit court may have erred in allowing a prior closed dependency-neglect case to be reopened, the court had subject matter jurisdiction to hear the termination petition and enter the termination order. (Spears, J.; CV-14-926; 2-18-2015; Kinard, M.)

Brumley v. Ark. Dep't of Human Services, 2015 Ark. App. 900 **[TPR – failure to remedy]** The circuit court erred in finding the failure to remedy ground against appellant because appellant did not cause his child's removal. **[subsequent factors]** Appellant argued that his incarceration was not a subsequent factor because he was imprisoned when the case began. The appellate court agreed with DHS that appellant's continued incarceration was a subsequent factor. Appellant was incapable of completing the case plan and building a relationship with his child. Appellant's request for more time was not a sufficient basis for reversal when the intent of the termination statute is to provide

permanency when return to the family home cannot be accomplished in a reasonable time as viewed from the child's perspective. **[incarceration]** The appellate court also found that the evidence supported the additional ground that a parent is sentenced in a criminal proceeding for a period of time that would constitute a substantial period of the juvenile's life. This ground was pled, but not contained in the circuit court's order. Appellant was expected to be incarcerated for the next nine months and would need additional time to prove he was capable of parenting his child. He had not had contact with his child for six years prior to being incarcerated and had not seen his child since 2007. **[best interest]** There was evidence that the child was thriving with an aunt and uncle who wanted to adopt him and who had already adopted two of his siblings. Appellant's continued uncertainty and failure to ask for custody was evidence of potential harm. [Zimmerman, S.; CV-14-203; 2-11-2015; Brown, W.)

Moore v. Ark. Dep't of Human Services, 2015 Ark. App. 87 **[TPR – failure to remedy]** Appellant, an admitted methamphetamine addict, argued that the evidence failed to show that she failed to remedy the causes for her children's removal because she no longer had a drug problem. Appellant claimed she could care for her children even if she was a drug addict, although she no longer believed she was an addict. The evidence showed that appellant refused to take drug tests or tested positive for drugs, except for two tests on either side of her incarceration. She was discharged from inpatient rehabilitation within one week for noncompliance and was jailed for felony forgery and drug court violations. Appellant had not remained drug free or completed her treatment. **[subsequent factors]** Appellant had not been employed and had periods of incarceration, and had just been released on parole a week before the termination hearing. (Halsey, B.; CV-14-899; 2-11-2015; Hixon, K.)

Sarut v. Ark. Dep't of Human Services, 2015 Ark. App. 76 **[TPR – failure to remedy]** There was sufficient evidence that appellant failed to remedy the conditions where appellant failed to have a drug and alcohol assessment; did not obtain inpatient drug treatment; continued to be addicted to methadone; and still lived in a home deemed inappropriate for her children. **[failure to support]** Appellant testified that she was behind on child support payments, but that she did not have enough money to support her children. She also failed to provide any evidence of court ordered child support payments and the case worker testified that none had been made on behalf of the children. **[potential harm]** Appellant, after three years of treatment, had failed to wean off methadone or comply with the court ordered assessment or inpatient treatment to address her addiction. She failed to obtain or maintain stable and appropriate housing. She had a relationship with her husband, whose rights had been previously terminated, and with whom the court had determined that continued contact would be harmful to her children. [Zimmerman, S.; CV-14-878; 2-11-2015; Gruber, R.)

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

Sims v. Ark. Dep't of Human Services, 2015 Ark. App. 137 (Branton, W.; CV-14-945; 2-25-2015; Hoofman, C.)

Cloniger v. Ark. Dep't of Human Services, 2015 Ark. App. 123 (Sullivan, T.; CV-14-887; 2-25-2015; Kinard, M.)

Mosher v. Ark. Dep't of Human Services, 2015 Ark. App. 111 (James, P.; CV-14-855; 2-18-2015; Hoofman, C.)

Taylor v. Ark. Dep't of Human Services, 2015 Ark. App. 50 (Branton, W.; CV-14-861; 2-4-2015; Abramson, R.)

Miller v. State, 2015 Ark App. 117 **[Transfer]** Appellant was charged with aggravated robbery and first degree battery. He argued that the circuit court erred in denying his motion to transfer his case to the juvenile division. The circuit court cannot rely solely upon the allegation in the information. There must be some evidence to substantiate the serious and violent nature of the charges contained in the information. The circuit court relied on other evidence and held a meaningful hearing that considered all of the statutory factors. Issues as to the constitutionality of the statute and discovery violations were not preserved for appellate review. (Sims, L.T.; CV 14-501; 2-25-2015; Virden, B.)

N.W. v. State, 2015 Ark App. 57 **[Delinquency – *Crawford* testimonial statements]** Appellant argued that the circuit court erred in admitting the Child Advocacy's Center's taped interview of the victim because it was testimonial. In *Crawford*, the Supreme Court held that testimonial statements of witnesses absent from trial are only admitted when the declarant is unavailable and when the defendant has had a prior opportunity to cross examine. In *Davis,* the Court held that statements are testimonial when there is no ongoing emergency and the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. In this case there was no evidence the interview was used to determine if any medical treatment was needed. The interview was watched by the police detective and the interviewer consulted with the detective to make sure all the questions were asked. The detective also took a copy of the interview with him when he left. The appellate court held that the interview was testimonial, with the primary purpose for the prosecution, and its introduction violated appellant's right to confront witnesses against him. The victim's CAC interview was the only evidence of rape presented by the state. Without the statement there is not enough evidence to support the adjudication and it is not harmless error. Reversed and remanded. (Smith, T.; CV 14-573; 2-4-2015; Glover, D.)

DISTRICT COURT

Lawson v. Capital One Signet Bank, Virginia, 2015 Ark. App. 73: **[District Court Rule 9]** Capital One Bank obtained a default judgment against appellant in the district court in 2003. In 2013, Capital One filed a petition to revive the judgment which the district court granted. Appellant filed an "Objection" to the writ alleging that the district court did not have personal jurisdiction in the 2003 case due to improper service. The objection was denied and the writ granted. Appellant attempted to appeal this decision. Capital One moved to dismiss the appeal for lack of jurisdiction based on an untimely appeal of the 2003 judgment. Though the matter was not raised by the parties, subject matter jurisdiction may be raised by the appellate court sua sponte. If the circuit court lacked

jurisdiction, the Court of Appeals is likewise without jurisdiction to hear an appeal. The Court of Appeals held that although appellant filed a "Transcript on Appeal to Circuit Court" this was not a certified copy of the docket sheet from district court as required by District Court Rule 9. Rule 9 requires strict compliance. Because circuit court never acquired jurisdiction to hear the appeal, the Court of Appeals did not have jurisdiction to hear this appeal. Dismissed, order of reviver in district court stands. (Glover, D.; CV-14-551; 2/11/2015; Virden, B.)