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CRIMINAL

Smith v. State, 2015 Ark. App. 418 [**motion to suppress; photo lineup**] The pretrial identification procedures that were used in appellant's case were not unnecessarily suggestive. Accordingly, the trial court did not err when it denied appellant's request to suppress the pretrial identifications that were made by the victim and an eyewitness. (Johnson, L.; CR-14-997; 8-26-15; Gladwin, R.)

Phillips v. State, 2015 Ark. App. 419 [**motion for new trial**] Although the jury was deadlocked during portions of its deliberations, ultimately it reached a unanimous decision. Thus, the trial court did not abuse its discretion when it denied appellant's motion to declare a mistrial. (Jones, B.; CR-14-499; 8-26-15; Abramson, R.)

Northern v. State, 2015 Ark. App. 426 [**expert testimony**] Based upon the witness's numerous years of training, education, and experience and the fact that he could offer specialized information that was beyond the common knowledge of the jury, the trial court did not abuse its discretion when it concluded that the chief firearm and toolmark examiner from the Arkansas State Crime Laboratory was an expert pursuant to Rule 702 of the Rules of Evidence. Additionally, the trial court properly applied the criteria from *Daubert* to determine that the field of firearm and toolmark examination is a reliable science. [**jury instructions**] Second-degree murder under Ark. Code Ann. § 5-10-103(a)(1) is a lesser-included offense of first-degree murder under Ark. Code Ann. § 5-10-102(a)(2).

Because the jury could have concluded that appellant knowingly caused the death of another person under circumstances manifesting extreme indifference to the value of human life in that he was “practically certain” that his conduct would cause the death of his victim, there was a rational basis for giving the second-degree-murder jury instruction and the trial court did not abuse its discretion by doing so. (Thyer, C.; CR-14-1002; 8-26-15; Vaught, L.)

Brown v. State, 2015 Ark. App. 427 [**jury instructions**] The failure to give the “mere presence” jury instruction found at AMI–Criminal 404, even when it is properly requested, cannot be reversible error when AMI–Criminal 401 is given. However, the failure to give the instruction will be reversible error when the omission affects the entire trial such that the resulting conviction violates due process. Additionally, because AMI–Criminal 401 is a complete and accurate statement of Arkansas law on accomplice liability, it is not error to instruct the jury on the entirety of it. (Hearnsberger, M.; CR-14-1014; 8-26-15; Hixson, K.)

Luper v. State, 2015 Ark. App. 440 [**Rule 404 (b); pedophile exception**] There is no requirement that evidence admitted under the pedophile exception to Ark. R. Evid. 404 (b) be based upon a criminal charge or conviction. In fact, the pedophile exception does not require that the prior act be charged or substantiated. The pedophile exception makes no distinction between substantiated and unsubstantiated allegations. Thus, the trial court did not abuse its discretion when it admitted testimony regarding allegations of uncharged acts of sexual abuse committed by appellant against his former stepdaughters. (Green, R.; CR-14-1066; 9-2-15; Vaught, L.)

Moore v. State, 2015 Ark. App. 480 [**jury instruction; “dynamite” instruction**] There is no definitive time line that must be applied by the trial court in addressing jury deliberations. Thus, the trial court did not abuse its discretion when it gave the jury the “dynamite” instruction after it had been deliberating for approximately an hour and a half. (Philhours, R.; CR-14-989; 9-16-15; Glover, D.)

Thompson v. State, 2015 Ark. App. 486 [**motion for mistrial**] The trial court did not abuse its discretion when it denied appellant’s request for a mistrial, which was based upon a witness’s nonresponsive answer to a question posed by the prosecutor. (Fogleman, J.; CR-14-1065; 9-16-15; Hixson, K.)

Williams v. State, 2015 Ark. 316 [**sufficiency of the evidence; first-degree murder; abuse of a corpse**] There was substantial evidence to support appellant’s convictions. (Pope, S.; CR-14-1088; 9-17-15; Danielson, P.)

Holland v. State, 2015 Ark. 318 [**Batson challenge**] Because the State presented sufficiently race-neutral reasons for exercising its preemptory strikes to remove three African Americans from the petit jury, the trial court’s decision to deny appellant’s *Batson* claim was not clearly against the preponderance of the evidence. (Wyatt, R.; CR-14-833; 9-17-15; Wood, R.)

Szabo v. State, 2015 Ark. App. 512 [**motion to suppress**] Because the law enforcement official smelled alcohol when he opened appellant's car door during an investigation of a possible driving-while-intoxicated offense, Rule 3.1 of the Arkansas Rules of Criminal Procedure permitted the officer to detain appellant for further investigation. Thus, the trial court properly denied appellant's motion to suppress. (Storey, W.; CR-14-933; 9-23-15; Hoffman, C.)

Richardson v. State, 2015 Ark. App. 507 [**removal of a juror**] Although one of the jurors in appellant's case may have had some personal knowledge or opinion as to the validity of a piece of evidence introduced at trial, appellant failed to establish that the juror was actually biased. Thus, the trial court did not abuse its discretion when it denied appellant's request to remove the juror. (Sims, B.; CR-15-10; 9-23-15; Whiteaker, P.)

Delatorre v. State, 2015 Ark. App. 498 [**closing arguments**] When one party makes an improper remark during closing arguments, the other party is permitted to "fight fire with fire" by responding to the improper remark with statements that would otherwise not be permissible. (Storey, W.; CR-14-696; 9-23-15; Virden, B.)

Fink v. State, 2015 Ark. 331 [**sufficiency of the evidence; first-degree murder**] There was substantial evidence to support appellant's conviction. (Looney, J.W.; CR-14-992; 9-24-15; Wood, R.)

Whittier v. State, 2015 Ark. App. 536 [**sentencing**] Because there was no indication that appellant's sentence was an attempt to punish appellant for an offense for which he was not charged, because the record reflects that appellant's sentence was based upon the seriousness of the circumstances surrounding the offense for which appellant was convicted, and because the sentence imposed was within the statutory range, the trial court did not abuse its discretion when it sentenced appellant. (Herzfeld, R.; CR-14-560; 9-30-15; Hoofman, C.)

Whitt v. State, 2015 Ark. App. 529 [**double jeopardy**] At the trial court level, and again on appeal, appellant asserted that double jeopardy principles prevented him from being tried for the offense of jury tampering because he had previously been held in contempt for talking to jurors during his criminal trial, actions which provided the basis for the jury tampering charge. Because the record did not reflect: (1) that a hearing on the contempt issue was held; (2) that an order on the contempt matter was issued; or (3) that appellant was punished for contempt, it was not a violation of double jeopardy principles to charge and convict appellant for the offense of jury tampering. [**sufficiency of the evidence; jury tampering**] There was substantial evidence to support appellant's conviction. (Storey, W.; CR-15-61; 9-30-15; Vaught, L.)

Gutierrez v. State, 2015 Ark. App. 516 [**admission of evidence; Ark. R. Evid. 401**] Although the trial court abused its discretion when it admitted evidence that was not relevant to any specific offense with which appellant was charged, the error was harmless because the evidence of appellant's guilt was overwhelming and the error made by the trial judge was slight. (Yeargan, C.; CR-14-1036; 9-30-15; Gladwin, R.)

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

Bishop v. State, 2015 Ark. App. 436 (distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child) CR-15-138; 9-2-15; Gruber, R.

Starling v. State, 2015 Ark. App. 429 (first-degree murder; committing a terroristic act) CR-14-1041; 9-2-15; Abramson, R.

Morris v. State, 2015 Ark. App. 454 (failure to comply with sex offender registration and reporting requirements) CR-14-832; 9-9-15; Gruber, R.

Europe v. State, 2015 Ark. App. 460 (second-degree sexual assault) CR-14-1047; 9-9-15; Vaught, L.

Molpus v. State, 2015 Ark. App. 452 (arson) CR-15-50; 9-9-15; Kinard, M.

Sullivan v. State, 2015 Ark. App. 514 (second-degree murder) CR-15-166; 9-23-15; Brown, W.

Rollf v. State, 2015 Ark. App. 520 (first-degree murder) CR-15-46; 9-30-15; Harrison, B.

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

Whitmore v. State, 2015 Ark. App. 445 (probation) CR-15-116; 9-2-15; Brown, W.

Egger v. State, 2015 Ark. App. 471 (probation) CR-14-1115; 9-16-15; Gladwin, R.

Cochran v. State, 2015 Ark. App. 511 (probation) CR-15-34; 9-23-15; Hixson, K.

McDonald v. State, 2015 Ark. App. 510 (suspended sentence) CR-15-26; 9-23-15; Hixson, K.

Jefferson v. State, 2015 Ark. App. 509 (probation) CR-15-28; 9-23-15; Vaught, L.

CIVIL

Thompson v. Tyson Foods, Inc., 2015 Ark. App. 424 [summary judgment] Trial court erred in granting summary judgment. (Dennis, J.; CV-14-930; 8-26-15; Glover, D.)

Greenlee v. Alexander, 2015 Ark. App. 430 [**limitations**] Even though Greenlee filed her first complaint within the statute of limitations, the action never commenced because she did not serve the defendant within 120 days. Accordingly, the savings statute did not apply, and the circuit court properly dismissed the complaint as time-barred. (Beaumont, C.; CV-15-127; 9-2-15; Abramson, R.)

Dyer v. Ark. Ins. Dept., 2015 Ark. App. 446 [**revocation of ins. license**] Department's administrative revocation of insurance license was affirmed. Department's hearing notice was adequate and put Dyer on notice of allegations. The revocation was based on findings of misappropriation; failure to report or disclose certain matters; failure to deliver or have proper information on certain documents; and problems with record-keeping and business practices. The rules of evidence are relaxed in an administrative hearing. Hearsay evidence may be considered but the party may always subpoena witnesses to appear. The findings constitute substantial evidence that Dyer engaged in serious violations of Arkansas's insurance law, which warranted the sanction of revocation. (Cottrell, G.; CV-14-342; 9-2-15; Brown, W.)

Kapach v. Carroll, 2015 Ark. App. 466 [**evidence**] Trial court properly refused to admit exhibit on grounds of hearsay. [**unjust enrichment**] The trial court determined that Ms. Carroll was entitled to retain Mr. Kapach's \$500,000 because these funds were given to her in exchange for valuable consideration. That consideration was evidenced in the terms of the contracts, which extended the time the buyer had to satisfy the terms of the agreement in exchange for additional earnest money. The trial court heard and evaluated this evidence and was not convinced that Ms. Carroll, in equity and good conscience, ought to return the \$500,000. (Putman, J.; CV-14-359; 9-9-15; Hoofman, C.)

Whittenburg v. Moody, 2015 Ark. App. 464 [**boundary line**] Ejectment was not barred by laches. Under the facts, there was no unreasonable delay in bringing the claim. Rule that natural or artificial monuments prevail over courses and distances not applicable as it could not be determined what fence was referenced in description. Adverse possession was not established. (Hughes, T.; CV-14-710; 9-9--15; Hixson, K.)

Odyssey Healthcare v. DHS, 2015 Ark. App. 459 [**medically necessary expenses**] DHS properly found that hospice services were not medically necessary. (Fox, T.; CV-14-1015; 9-9-15; Whiteaker, P.)

Cross v. Western Waste Industries, 2015 Ark. App. 476 [**alleged contaminants in watershed**] Summary judgment was properly entered on claims for nuisance, trespass and negligence. (Lineberger, J.; CV-14-679; 9-16-15; Kinard, M.)

Jones v. Douglas, 2015 Ark. App. 488 [**default judgment**] Default judgment was properly set aside because defendants were nonresidents and summons stated the wrong time in which they had to answer the complaint. Dismissal of complaint should have been without prejudice because appellants are entitled to the benefit of the savings statute. (Cook, V.; CV-14-1095; 9-16-15; Hixson, K.)

Neal v. Davis Nursing Assoc., 2015 Ark. App. 478 [**charitable immunity**] Summary judgment finding immunity was improper. Considered together, Davis's relationship to Davis Life Care Services, its failure to ever earn a profit, its questionable characterization of free care and lack of charitable donations, and its intentions as it relates to profitability could reasonably result in the conclusion that Davis was not truly operating as a charity and, therefore, not entitled to charitable immunity. (Dennis, J.; CV-14-985; 9-16-15; Gruber, R.)

Lloyd v. Pier West Property Owners Assoc., 2015 Ark. App. 487 [**fall liability**] Injured party was a licensee but summary judgment on issue of duty was in error. The undisputed facts show that Pier West POA contractually forbade a unit owner to do anything that could increase the liability or risk to any common area and unequivocally, exclusively reserved the right and duty in its bylaws to maintain and repair the common areas. It is clear that Pier West POA assumed such a duty, despite Pier West POA's arguments to the contrary. Pier West POA's undertaking of this duty triggers fact questions as to whether Pier West POA exercised reasonable care to perform its assumed duty. (Hearnberger, M.; CV-14-905; 9-16-15; Hixson, K.)

Mendoza v. WIS International, Inc., 2015 Ark. 321 [**certified question accepted**] Under the facts of this case, does Arkansas Code Annotated section 27-37-703, which restricts the admissibility of seatbelt-nonuse evidence in civil actions, violate the separation-of-powers doctrine found in article IV, section 2, of the Arkansas Constitution? (E.D. Ark.; CV 15-677; 9-17-15)

Farr v. American National Property, 2015 Ark. App. 534 [**insurance**] The trial court properly granted insurer's summary-judgment motion because a material misrepresentation made on the insurance application, relied on by the insurance company, voided the policy. (Hearnberger, M.; CV-14-1046; 9-30-15; Hixson, K.)

Bateman v. Heird, 2015 Ark. App. 524 [**attorney's fees**] Court did a *Chrisco* analysis and affirmed trial court's award. In case, defendant admitted liability, and case went to trial on property damages. The trial court found a lack of credibility to attorney's testimony that all of the claimed time for the attorney's fee was exclusively for the property damage aspect of the case. From the information before the court, it was unable to separate the fee for time spent exclusively on the property damage aspect of the trial. The attorney was unable to recall any specific case that he had turned down because of this one. The court found no evidence that this case precluded him from any other employment or from accepting new cases. The court also found no evidence of a legal basis or authority for enhancing the requested fee by five. (Gruber, R.; CV-15-11; 9-30-15; Gruber, R.)

DOMESTIC RELATIONS

Jones v. Jones, 2015 Ark. App. 468 [**child custody—relocation**] In this custody dispute that involved the appellant mother's intention to move the children out of state, the trial court found that the parties shared joint custody, not custody with the mother as primary custodian. As a result, the

court found that her proposed relocation was controlled by *Singletary v. Singletary*, 2013 Ark. 506, not *Hollandsworth v. Knyzewski*, 353 Ark. 470, and that she was not entitled to the *Hollandsworth* presumption. The court found there was no change in circumstances and that relocation was not in the best interest of the children. (Feland, W.; No. CV-15-39; 9-9-15; Brown, W.)

Ryan v. White, 2015 Ark. App. 494 [**joint custody**] This joint custody case arose from a paternity action. The appellant mother argued on appeal that the circuit court erred in giving a preference to joint custody in this case and in finding that the appellee father met his burden under Arkansas Code Annotated section 9-13-113 (Repl. 2009) for an award of custody. The Court of Appeals held that

[A]lthough the circuit court did not err in acknowledging the “favored” status of joint custody under section 9-13-101, it does not directly apply to these facts. We acknowledge that the “*favored*” status of joint custody specifically applies in divorce cases rather than custody cases involving children born to unmarried parents but note that section 9-10-109 expressly provides that, once paternity has been established, the court is ordered to follow “*the same guidelines, procedures, and requirements ... as if it were a case involving a child born of a marriage in awarding custody [and] visitation*” Ark. Code Ann. § 9-10-109 (emphasis added).

On the issue of whether the appellee father had met his burden under section 9-13-113, the Court said that because he filed his petition for custody before paternity was established and because the initial custody order was temporary in nature, he had only to meet the three requirements of section 9-10-113 in order to be awarded joint custody of the child. No material change in circumstances was required. The decision was affirmed. (Bell, K.; No. CV-15-92; 9-23-15; Gladwin, R.)

Zimmerman v. Pope, 2015 Ark. App. 499 [**alimony; property – retirement funds; attorney’s fees; order of protection**] The appellant appealed from an amended divorce decree in which the trial court denied her request for alimony and awarded her former husband, the appellee, one-half of the money she had withdrawn from her nonvested Arkansas Public Employees Retirement System (APERS) account. She also appeals from the denial of attorney’s fees and her motion for an order of protection, and she requested the appellate court to allow her to supplement on the record in order to address this point on appeal. The Court of Appeals denied the motion to supplement the record and affirmed the court’s denial of alimony and attorney’s fees. On the issue of the retirement funds, the parties had entered into a property-settlement agreement which provided, among other things, that the appellee would receive one-half of appellant’s APERS account if it vested but, if it did not vest, the appellee would receive “zero.” A decree was entered to that effect, then amended after a subsequent hearing to provide that the funds should be divided equally between the parties. The Court of Appeals said that the parties’ agreement was binding on this issue, and that the circuit court had modified the specific contractual terms of the agreement that were incorporated into the divorce decree. The Court ordered that, on remand, the circuit court reinstate the original settlement agreement. On the issue of the order of protection, the Court said that the circuit court denied the request orally from the bench and did not file a written order of record. Arkansas Rule of Appellate Procedure—Civil 2(a)(1) provides that an appeal may be taken from a final judgment or decree entered by the circuit court. Without an order addressing the request for an order of protection, the court could not reach the issue. (Garrett, R.; No. CV-14-525; Virden, B.)

Erskin v. Stout, 2015 Ark. App. 533 [**custody, visitation, child support, contempt, attorney's fees**] In affirming this domestic relations case, the Court of Appeals found that the trial court did not clearly err in denying modifications to custody, visitation, and child support. The court also did not err in finding that the defendant was not in contempt, or in awarding attorney's fees to the appellee. (Zimmerman, S.; No. CV-15-262; 9-30-15; Vaught, L.)

Foster v. Foster, 2015 Ark. App. 530 [**rehabilitative alimony; attorney's fees and costs**] In an appeal from the parties' divorce decree, the appellant husband challenged the awards of rehabilitative alimony and attorney's fees and costs to the appellee wife. The circuit court ordered that the appellee be paid rehabilitative alimony pursuant to Arkansas Code Annotated section 9-12-312(b) in the amount of \$4500/month for the first three years, \$3500/month for the next three years, and \$2500/month for the final four years. The court also awarded the appellee \$14,190 in attorney's fees and \$648.18 in costs. The Court of Appeals affirmed, discussing the most recent change to the alimony statute to specifically include a provision for rehabilitative alimony. The Court said that our courts have recognized rehabilitative alimony since 1990, when it decided *Bolan v. Bolan*, 32 Ark. App 65, 796 S.W.2d 358 (1990), and defined the term as "alimony that is payable for a short, specified duration of time." The Court pointed out that in rehabilitative-alimony cases, the Court has used the same analysis to determine the appropriateness of the award, including a consideration of the factors that apply to permanent alimony. The Court held that the language added to the statute does not prevent a trial court from awarding rehabilitative alimony based upon consideration of the well-settled factors, in an amount it finds reasonable under the circumstances. The Court also found that the circuit court did not abuse its discretion in awarding attorney's fees and costs. (Hearnsberger, M.; No. CV-14-1100; 9-30-15; Vaught, L.)

Collins v. Collins, 2015 Ark. App. 525 [**property-settlement agreement—cohabitation provision**] The parties' divorce decree was entered October 28, 2011. They had executed a property-settlement agreement that was incorporated into the decree. It provided that the appellee husband's obligation to pay the appellant wife alimony would terminate immediately upon her remarriage or cohabitation. The question before the circuit court was whether the appellant was cohabitating with another man or not. The appellant maintained that "cohabitation" means that two people live together with joint furniture and shared expenses, which she claimed they did not do. The circuit judge found that it is clear what cohabitation is. The court found that the parties were living together in the same house, that the court "did not find the case to even be close; it was clearly cohabitation; it was clearly what was contemplated by the parties' agreement; and alimony would cease" as of the date of the hearing. The Court of Appeals affirmed that finding and the termination of alimony. The appellee cross-appealed, contending that the termination of alimony should have been as of the date the cohabitation began, because he contended that the property-settlement provision was automatic and self-executing. The Court of Appeals affirmed the circuit court on that point, as well. (Clark, D.; No. CV-14-730; 9-30-15; Glover, D.)

Collins v. Collins, 2015 Ark. App. 526 [**attorney's fees**] The appellant appealed the award of attorney's fees in a case involving the appellant's violating the cohabitation provision of the parties' separate property-settlement agreement and the court's termination of alimony. The circuit court

awarded the appellee \$25,332.50 in attorney's fees and \$1,522.35 in costs. The Court of Appeals found the award of fees was proper because a trial court has inherent power to award attorney's fees in domestic-relations cases and whether to award and the amount are matters within the trial court's discretion. The Court said that an analysis of the *Chrisco* factors is not required for an award of attorney's fees in domestic-relations cases, nor is an exhaustive hearing, because the trial court has presided over the proceedings and is familiar with the case and the services the attorney provided. The Court also held that the appellee did not abandon his claim for attorney's fees when he filed his notice of cross-appeal. Finally, the trial court did not abuse its discretion in awarding the amount that it did. The court awarded less than the appellee requested; and it had a billing statement with the motion for fees. The Court said that in addressing a trial court's award of attorney's fees, there is no fixed formula in determining what is reasonable. The decision was affirmed. (Clark, D.; No. CV-15-135; 9-30-15; Glover, D.)

Smith v. Smith, 2015 Ark. App. 539 [**divorce; corroborating testimony**] The appellant filed for divorce based upon general indignities, but amended the complaint at the divorce hearing to allege that the parties had lived separate and apart for eighteen months without cohabitation. In the decree, the circuit court set out the date of the parties' separation and that they had been separate and apart without cohabitation since that time. The decree stated that the grounds for divorce were proven by the plaintiff, and it stated that the plaintiff/appellant was granted a divorce on the grounds of "general indignities." The Court of Appeals said it was clear from the decree that the divorce was granted on eighteen-months' separation. It affirmed the decree, but modified it to conform to the Court's opinion. (Williams, L.; No. CV-15-71; 9-30-15; Brown, W.)

PROBATE

Hollis v. Hollis, 2015 Ark. App. 441 [**adoption**] This is a step-parent adoption case in which the trial court denied the stepmother's petition to adopt her stepson, finding that she and her husband failed to show by clear and convincing evidence that it was in the best interest of the child to grant the adoption. In affirming, the Court of Appeals said that the court's finding on best interest made it unnecessary to decide the issue of whether the mother's consent was or was not required. The Court also found that the trial court did not clearly err in finding that the adoption was not in the best interest of the child. (Wright, J.; No. CV-14-1006; 9-2-15; Vaught, L.)

Sanders v. Savage, 2015 Ark. App. 461 [**adoption**] The Court of Appeals affirmed the trial court's granting a step-parent's adoption based upon the biological father's unjustifiable failure to communicate with or to support his two children for more than one year. The Court also found that the trial court's finding that it was in the best interests of the children to grant the adoption was not against the preponderance of the evidence. (Isbell, G.; No. CV-15-66; 9-9-15; Vaught, L.)

Cotton v. Robinson, 2015 Ark. App. 451 [**affidavit for collection of small estate**] The appellant appealed from the circuit court's denial of her motion to vacate. The appellant filed an affidavit for collection of a small estate by distributes in the Pulaski County Circuit Court, claiming to be the

granddaughter and only heir of Arizona Robinson and requested that she be declared an heir to his estate. The appellee thereafter filed a motion for declaratory relief, asking the court to declare appellant's affidavit insufficient to meet the requirements of Arkansas Code Annotated section 28-41-101. She contended the affidavit failed to state names and addresses of anyone having possession of the personal property and a list of individuals entitled to receive the property as was required by the statute. She asserted that the appellant was not a proper recipient of the estate and that her claims that she was the decedent's grandchild and only heir were false. She requested return of the property of the estate as well as attorney's fees and costs. The circuit court granted appellee's motion for declaratory relief, found that appellant was not an heir to the decedent's estate, and that the affidavit was improperly executed and therefore void. The court found that she was not entitled to collect from decedent's estate. She was ordered to file an accounting of the estate's property that she possessed and to pay attorney's fees. The court denied the appellant's motion to vacate. In affirming, the Court of Appeals said that, through her motion to vacate, the appellant sought to reargue the merits of her case. The Court did not consider the issue of attorney fees because the appellant failed to appeal from the order either by a separate notice of appeal or by designating it in the notice of appeal that they filed. Therefore, the issue was not properly before the court and not preserved for review. (Kilgore, C.; No. CV-14-1064; 9-9-15; Virden, B.)

Roger Ferren, Special Administrator of the Estate of Karmel Ferren, Deceased v. USAA Insurance Co. et al., 2015 Ark. App. 477 [**recusal**] The appellant appealed from the circuit court's refusal to recuse or to grant an evidentiary hearing on his motion to recuse. The Court of Appeals held that the trial court erred in denying the motion without affording the appellant a hearing. The Court said that the appellant requested a hearing on his motion, and the motion clearly consisted of more than conclusory allegations of bias or prejudice. The Court of Appeals noted that "Were this not a probate case, the order would likely not be appealable because it does not constitute a final resolution of all the issues. However, with a few exceptions not applicable here, all orders in probate cases are immediately appealable. Ark.R.App.P.—Civ. 2(a)(12)." The Court declined to declare that the trial court erred in not recusing. It said that in light of the fact that a recusal is initially a matter within the trial court's discretion and the Court's conclusion that a hearing should have been held, it declined to address that question at this time. (Hughes, T.; No. CV-14-766; 9-16-15; Kinard, M.)

T.R. v. L.H., P.M., and S.M., 2015 Ark. App. 483 [**adoption**] The appellant appealed from adoptions granted to the separate appellees, P.M. and S.M, arguing that the circuit court clearly erred in finding that his consent was not required, that he was unreasonably withholding his consent, and that adoption was in the child's best interest. He also claimed that his constitutional rights to due process were violated, that the trial court abused its discretion in failing to recuse, and that his counsel was ineffective. In affirming the adoptions, the Court of Appeals found that the trial court did not clearly err or abuse its discretion on any of the issues raised by the appellant. (Duncan, X.; No. CV-14-495; 9-16-15; Virden, B.)

Donley v. Donley, 2015 Ark. App. 496 [**guardianship—termination**] The appellant mother appealed from the court's granting a motion for a directed verdict to her sister and dismissal of her petition for termination of the guardianship of her child previously granted to her sister, the appellee

and the guardian of appellant's child. The Court of Appeals found that the circuit court did not err in placing the burden of proof on the appellant in granting the appellee's motion for directed verdict. The court had previously found the appellant was unfit, and in dismissing the appellant's petition to terminate the guardianship, the court found that she "remains unsuitable for the custody of [M.B.]" The Court also held that the circuit court did not abuse its discretion in admitting screenshots of comments and photos from Facebook because the appellant's testimony sufficiently tied her to the comments and photos. (Pierce, M.; No. CV-15-93; 9-23-15; Abramson, R.)

JUVENILE

In Re Adoption of K.M and K., 2015 Ark. App. 448 [**DN Adoption – DHS consent**] Appellants, the minor's paternal aunt and uncle, argued that DHS consent to their petition for adoption was unnecessary and/or unreasonably withheld. The appellate court held that DHS consent was necessary and appellants' failure to request consent in their adoption petition or receive a waiver by DHS was a fatal error. DHS, as custodian of the minor children, was given the authority to consent in the termination order, and has statutory authority to consent pursuant to Ark. Code Ann. § 9-27-206(a)(3). [**best interest**] The trial court's decision regarding best interest of the children to be adopted by the foster parents was not against the preponderance of the evidence. [**participation in foster parent adoption hearing**] Appellants argued that had they been allowed to explore the education history in foster home it would directly relate to the issue of best interest. Appellants were not prejudiced by not being allowed to fully participate in foster parent adoption hearing. The appellants' attorney participated in the cross examination of the expert witness called by the attorney ad litem and had the opportunity to offer their own expert testimony, but failed to do so. (Hendrix, A.; CV-15-160; 9-9-2015; Gladwin, R.)

Harris v. Ark. Dep't of Human Services, 2015 Ark. App. 508 [**DN Adjudication**] Appellant, maternal grandmother, had custody of her grandchild. There was sufficient evidence that appellant provided inadequate supervision in leaving her grandchild unsupervised with her daughter, knowing that her daughter had drug and mental health issues. The trial court was also concerned about appellant's fitness to adequately supervise her granddaughter based on her ability to communicate during the hearing and the amount of narcotics appellant admitted to taking at the adjudication hearing. (Hendrix, A.; CV-15-258; 9-23-2015; Whiteaker, P.)

Meritt v. Ark. Dep't of Human Services, 2015 Ark. App. 503 [**DN Adjudication**] Dr. Farst testified that the child's injury resulted in: (1) a scalp hematoma; (2) a comminuted skull fracture; and (3) an epidural hematoma. Appellant stipulated inadequate supervision and did not challenge the abuse finding. As a result, her challenge to the medical neglect finding is not necessary to address. The findings are not clearly erroneous and support the determination that the children were dependent-neglected. [**substantial risk of harm**] Appellant argued that the one time injury to one child did not put her other child at serious risk of harm because there was no evidence that she ever abused her other child. Substantial risk of harm addresses future harm. While the sibling had not yet been harmed, he was at substantial risk of harm due to the

unexplained abuse and neglect of his sibling. **[aggravated circumstances]** Appellant argued that her child's life was never in danger. Yet, Dr. Farst testified that the injury could lead to death and the trial court found her testimony very credible. The court's finding that the abuse endangered his life was not erroneous and was sufficient to support the finding of aggravated circumstances. (Cook, V.; CV-15-120; 9-23-2015; Kinard, M.)

Scott v. Ark. Dep't of Human Services, 2015 Ark. App. 431 **[DN Adjudication]**

In August 2014, appellants children were adjudicated dependent neglected due to inadequate supervision. In October 2014 custody was returned to appellants and a second adjudication hearing for inadequate supervision was held in November 2014. Both adjudications of inadequate supervision in the same case. Ark. Code Ann. § 9-27-327(a)(3) provides that if a juvenile has been adjudicated dependent-neglected in the same case in which a motion for a change of custody has been filed to remove a juvenile from the custody of a parent, a subsequent adjudication is required if the ground for removal is not the same as the ground previously adjudicated. Since this was the same case and both allegations for the adjudications resulted from inadequate supervision, the second adjudication was unnecessary and has no practical effect. Although not necessary, the court did not err in finding that appellant's use of medications impacted her ability to appropriately supervise her children. (Smith, T; CV-15-219; 9-2-2015; Virden, B.)

Chaffin v. Ark. Dep't of Human Services, 2015 Ark. App. 522 **[TPR - other factors]** Appellant failed to provide any convincing argument or authority to raise a point on appeal, resulting in this ground being unchallenged. **[best interest]** There was no error in the court's finding that it was in the children's best interest to terminate her parental rights where there was evidence that appellant, had only visited her children eight to ten times since 2012, failed to take any action to protect her children when her ex-husband was abusing methamphetamine, had lengthy housing instability, lacked employment and financial stability and children did not want to visit or live with her. **[parent counsel appointment]** Appellant argued that she should have been appointed counsel earlier in the dependency-neglect proceedings. The appellate court found that pursuant to Ark. Code Ann. § 9-27-316(h) appellant was not a parent from whom custody was removed. She was entitled to counsel, but she was not entitled to appointed counsel under the statute until the process moved to termination. She was appointed counsel at least one month prior to termination. Further, the record does not reflect that she requested counsel as the statute requires. The appellate court also cited previous case law for the proposition that failure to appoint counsel at early stages is harmless if the parent has an attorney prior the termination hearing. (Edwards, R.; CV-15-423; 9-30-2015; Kinard, M.)

Smithee v. Ark. Dep't of Human Services, 2015 Ark. App. 506 **[TPR – prior involuntary termination]** Appellant failed to preserve her argument for appeal that the child that was the subject of the current termination was not a sibling. She argued that her rights that had been terminated to her child in a prior case occurred before her child in the current case was born. **[aggravated circumstances]** This statutory ground requires a determination that has been or is made by a judge that there is little likelihood that services to the family will result in successful

reunification. There is no requirement that this finding has to be made prior to the TPR petition, only that such a finding is made. This ground was sufficient to terminate parental rights, it was pled and the court made the finding in compliance with the statute. (Thyer, C.; CV-15-169; 9-23-2015; Glover, D)

Oldom v. Ark. Dep't of Human Services, 2015 Ark. App. 490 [TPR – other factors]

Appellant argued that her mental illness was not a subsequent factor. Yet, there was evidence that subsequent to the filing of the original petition, appellant was diagnosed with bi-polar disorder, lacking insight and refusal to acknowledge her mental illness, and housing and income instability. [ADA] Appellant argued that DHS did not make reasonable accommodations or services to her despite her known mental disability. However, appellant failed to preserve this issue for appeal or challenge the court's finding throughout the case that appropriate services had been offered to her. [potential harm] Appellant concedes that her children would be subjected to potential harm if they were subjected to her untreated bipolar disorder and homelessness, but argued that is because she was not offered the right services and needs more time for treatment and services. The trial court found it would not make any appreciable difference to give her more time due to her lack of progress in managing her mental health, and it was best for the children not to languish in foster care. The court's finding was not clearly erroneous. (James, P.; CV-15-279; 9-16-2015; Hoofman, C.)

Wallace v. Ark. Dep't of Human Services, 2015 Ark. App.481 [TPR – aggravated

circumstances] Three grounds were pled in the TPR petition; however, the trial court did not state the ground that it based its findings on in the termination order. On de novo review an appellate court may hold that grounds were proven, even if not specifically stated in the circuit court's order. The appellate court found that the trial court was not clearly erroneous based on the aggravated circumstances ground and the trial court's finding that there was little likelihood that services would result in successful reunification. The trial court found credible the testimony of two witnesses who had stated that had been sexually abused by appellant's husband (which resulted in his arrest for rape and sexual assault) and that they told the appellant about this before appellant's younger children were returned home because of their concern. The trial court had further evidence to believe that the appellant ignored this information and continued to let her husband have access to her children because she did not want anything to disrupt her children returning home and having her case closed with DHS. [potential harm] Appellant demonstrated she was unable or unwilling to protect her children from sexual abuse even after learning of the risk to be left with her husband that resulted in their sexual abuse. (Smith, T; CV-15-338; 9-16-2015; Glover, D.)

McKinley v. Ark. Dep't of Human Services, 2015 Ark. App. 475 [TPR – aggravated

circumstances] Appellant argued that the circuit court erred as a matter of law in relying on a prior dependency-neglect proceeding to find aggravated circumstances in the current case. The appellate court has already found that a trial court can consider the parent's actions in prior dependency-neglect proceeding in determining the appropriateness of termination. DHS argued that this applies with regard to a court's finding on aggravated circumstances, specifically using

prior dependency-neglect proceedings as evidence for a court finding that there is little likelihood that services would result in successful reunification. The appellate court noted that it had previously held such and the trial court did not err in considering the previous case. Further, the court noted that it disagreed with appellant that the sole basis for the court's aggravated circumstances finding was evidence from the previous case. The trial court also heard testimony of abuse and neglect after the children returned home, ongoing drug use, and failure to comply with the court's orders. (Smith, T; CV-15-280; 9-16-2015; Harrison, B.)

Whittaker v. Ark. Dep't of Human Services, 2015 Ark. App. 467 [**TPR – potential harm**] Appellant had a long history with DHS, including three prior cases beginning in 2013. Her history, including her lack of progress in battling her drug addiction demonstrated potential harm if her children were returned to her custody. (Branton, W.; CV-15-269; 9-9-2015; Hoofman, C.)

Knuckles v. Ark. Dep't of Human Services, 2015 Ark. App. 463 [**TPR – failure to remedy and other factors**] Appellant had drug and mental health issues. Her two year-old-twins had been out of her care for a year and a half. She was provided at least five opportunities to receive inpatient drug treatment, but she left or was asked to leave each facility after only a few days. She disrupted her children's trial placement by testing positive for methamphetamine and cocaine and continued to test positive. Appellant admitted that she had been a drug addict for about five years, was not able to take custody of her children, and by appellant's calculation it would be another six months. [**best interest**] Appellant's two-year-old twins were in a pre-adoptive foster home. A child's need for permanency and stability may override a parent's request for more time. (Halsey, B.; CV-15-271; 9-9-2015; Hixson, K.)

Singleton v. Ark. Dep't of Human Services, 2015 Ark. App. 490 [**TPR – potential harm**] Appellant argued that there was insufficient evidence to support the trial court's best interest finding. The trial court was affirmed. Evidence as to potential harm included appellant's inability to communicate with her child or improve her sign language skills, her instability, unsafe male relationships, lack of transportation and lack of employment. [**adoptability**] There was testimony that the children were adoptable and the court specifically considered adoptability and made a finding at the hearing that the children were adoptable. There is no special language required only that the court considered the likelihood of adoption in making its best-interest determination. (Sullivan, T.; CV-15-251; 9-9-2015; Gruber, R.)

Holloway v. Ark. Dep't of Human Services, 2015 Ark. App. 458 [**TPR – aggravated circumstances**] Where a party fails to appeal an adjudication order in which an aggravated circumstances finding is made, appellant is precluded from asserting error on appeal from an order to terminate parental rights. (Cook, V.; CV-15-914; 9-9-2015; Whiteaker, P.)

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

Plascencia v. Ark. Dep't of Human Services, 2015 Ark. App. 422 [prior involuntary termination] (Branton, W.; CV-15-145; 8-26-2015; Kinard, M.)

Ramirez v. Ark. Dep't of Human Services, 2015 Ark. App. 423 [Memorandum Opinion] (Hendrix, A.; CV-15-190; 8-26-2015; Gruber, R.)

Brinkley v. Ark. Dep't of Human Services, 2015 Ark. App. 500 [failure to remedy & subsequent factors] (Edwards, R.; CV-15-201; 9-23-2015; Virden, B.)

Brown v. Ark. Dep't of Human Services, 2015 Ark. App. 513 [failure to remedy] (Hudson, A.; CV-15-144; 9-23-3-2015; Hoofman, C.)

O.M. v. Ark. Dep't of Human Services, 2015 Ark. App. 528 [Memorandum Opinion] (Branton, W.; CV-15-145; 8-30-2015; Whiteaker, P.)

Tribble v. Ark. Dep't of Human Services, 2015 Ark. App. 535 [failure to remedy, subsequent factors, aggravated circumstances, willful failure to support, abandonment, and sentence for substantial period] (Sullivan, T.; CV-15-459; 8-30-2015; Hixson, K.)

No-Merit Rebriefing ordered:

Brown v. Ark. Dep't of Human Services, 2015 Ark. App. 425 (Cook, V.; CV-15-52; 8-26-2015; Whiteaker, P.)

T.E. v. State, 2015 Ark. App. 438 [**Delinquency – evidence**]

Appellant, at age 17, was found delinquent on one count of second-degree sexual assault for touching his six-year-old cousin's vaginal area. He argued on appeal the trial court erred in failing to allow him to present evidence of the victim's prior sexual knowledge and prior allegations. The trial court considered appellant's motions in a pretrial hearing and found the evidence inadmissible based on Rule 403 of the Arkansas Rules of Evidence. In a sexual assault case based on age, the victim's prior sexual history is entirely collateral and generally inadmissible, except for the purpose of showing an alternative source of sexual knowledge on the part of the minor victim. The Supreme Court adopted the following five factor test for admissibility: (1) that the prior act clearly occurred; (2) that the acts closely resemble those of the present case; (3) that the prior act is clearly relevant to a material issue; (4) that the evidence is necessary to the defendant case; and (5) that the probative value of the evidence outweighs its prejudicial effect. *State v. Townsend*, 366 Ark. 152 (2006). There was no evidence that the prior acts clearly occurred, to comply with the first factor. The trial court did not abuse its discretion in denying the testimony into evidence. (Smith, T.; CV-14-438; 9-2-2015; Glover, D.)

Nichols v. State, 2015 Ark. App. 397 [**Transfer**]

Appellant, at age 15, was charged with kidnapping, aggravated robbery, theft of property and aggravated assault. The circuit court was affirmed in denying motion to transfer the kidnapping and aggravated robbery charges, but the appellate court dismissed without prejudice the theft of property and aggravated assault due to lack of jurisdiction. Ark. Code Ann. §9-27-318(c). (Johnson, L.; CV-14-944; 9-2-2015; Harrison, B.)