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CRIMINAL

Lohbauer v. State, 2018 Ark. 26 **[writ of *habeas corpus*]** Appellant was fifteen years old when he committed murder. He entered a negotiated plea of guilty to first-degree murder and was sentenced to life imprisonment. Thereafter, he challenged his sentence asserting that based upon the principles in *Miller v. Alabama*, 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), his sentence was unconstitutional. The trial court denied appellant's petition. On appeal, the Supreme Court held that pursuant to the Fair Sentencing of Minors Act of 2017, appellant's sentence of life imprisonment now carries with it the possibility of parole. Thus, appellant's sentence does not violate *Miller*. (Dennis, J.; CV-17-439; 2-1-18; Wynne, R.)

Small v. State, 2018 Ark. App. 80 **[sufficiency of the evidence; sentencing enhancement; Ark. Code Ann.§ 5-64-411]** The circuit court erred by concluding that Ark. Code Ann.§ 5-64-411, which provides that an additional 10-year term of imprisonment may be added to a sentence of an individual who possessed a controlled substance in violation of Ark. Code Ann. § 5-64-419 when the offense is a Class C felony or greater and the offense was committed on or within 1000 feet of the real property of a church, did not require a culpable mental state. (Cox, J.; CR-17-265; 2-7-18; Gruber, R.)

Dodds v. State, 2018 Ark. App. 86 **[sentencing]** Arkansas Code Annotated § 5-4-307(b)(2) provides that suspended sentences imposed with terms of imprisonment for different crimes must run concurrently, not consecutively. Appellant pleaded guilty to various offenses and was sentenced to a term of imprisonment followed by a suspended sentence. Thereafter, the State filed a motion to revoke appellant's suspended sentence. Although it was acknowledged that appellant's sentence was illegal at her revocation hearing, the sentence was not amended before the court revoked her suspended sentence. On appeal, the appellate court explained that the proper method for remedying the situation in appellant's case would have been for the circuit court to modify the original sentence before revoking the suspended sentence. (Cottrell, G.: CR-17-160; 2-7-18; Gladwin, R.)

Anderson v. State, 2018 Ark. App. 92 **[motion to suppress]** The trial court did not err when it denied appellant's motion to suppress because appellant, who was a mere acquaintance of the individuals who resided at the apartment and was not an overnight guest at the apartment on the night that the search was conducted, failed to establish that he had a reasonable expectation of privacy in the apartment or a backpack that were searched. Additionally, the State established that the search was proper because law enforcement officials received permission to search the apartment from an individual who resided at the apartment and had authority to consent to the search. (Pope, S.; CR-17-402; 2-7-18; Klappenbach, N.)

Shay v. State, 2018 Ark. App. 101 **[motion to suppress]** Although the law enforcement official had authority to conduct a pat-down search for weapons pursuant to Rule 3.4 of the Arkansas Rules of Criminal Procedure, the officer exceeded the scope of what is permissible under the Rule when he opened appellant's wallet and removed his identification because the officer was immediately able to identify the object in appellant's pocket as a wallet rather than a weapon and the officer's suspicion associated with opening the wallet related to locating drugs rather than weapons. Accordingly, the trial court clearly erred in denying appellant's motion to suppress the contraband found in his wallet. (Pearson, B.; CR-17-306; 2-7-18; Hixson, K.)

Antoniello v. State, 2018 Ark. App. 105 **[404 (b)]** Appellant was convicted of thirty counts of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. Although appellant was only charged with thirty counts, testimony was presented during his trial that established that his computer had over three thousand images or videos depicting child pornography. Because the testimony related to appellant's uncharged criminal acts was probative of the issues of appellant's intent, lack of mistake, and knowledge, the trial court did not abuse its discretion when it admitted the testimony pursuant to Ark. Crim. P. Rule 404 (b). **[Batson Challenge]** A *Batson* challenge is timely when the objection is made before the jury is sworn. (Haltom, B.; CR-17-85; 2-7-18; Murphy, M.)

Lee v. State, 2018 Ark. App. 116 **[withdraw of guilty plea]** Appellant's statement: "what if I ain't wanting to plea" coupled with the colloquy between the court and appellant failed to establish a clear expression of appellant's intent to withdraw his no-contest plea. (Porch, S.; CR-17-799; 2-14-18; Gladwin, R.)

Crayton v. State, 2018 Ark. App. 110 **[Ark. Code Ann. § 5-26-303]** Appellant was convicted of first-degree domestic battering under subsection (a) (5) of the first-degree domestic-battering

statute, which requires the State to prove that: (1) he committed second-or third-degree battering; and (2) he had two previous domestic-battering convictions for conduct within the ten years before the current domestic-battering offense. Thus, the previous offenses were elements of the first-degree domestic battering charge and the trial court did not err when it admitted evidence of appellant's prior domestic-battering convictions during the guilt phase of appellant's trial. **[jury instructions]** The model jury instruction, AMCI Crim. 2d 2610, accurately reflects the language of Ark. Code Ann. § 5-26-303 (a)(5). (Tabor, S.; CR-17-569; 2-14-18; Abramson, R.)

Bullock v. State, 2018 Ark. App. 118 **[mistrial]** The trial court did not err when it denied appellant's request for a mistrial, which was based upon an allegation that during a recess in jury selection the prospective jurors could have seen a witness for the State leaving the judge's chambers. Appellant failed to establish how he was prejudiced by the alleged issue because all jurors were polled and none acknowledged seeing the witness leave the judge's chambers and the judge gave a curative instruction. (Hughes, T.; CR-17-286; 2-14-18; Klappenbach, N.)

Duff v. State, 2018 Ark. App. 112 **[chain of custody]** Appellant challenged the admission of a firearm during his trial and asserted that there was a break in the chain of custody because the original packaging from the crime scene was missing. On appeal, the Court of Appeals explained that the challenged firearm had a serial number that could be tracked from the crime scene to the property room and then to the courtroom and held that the trial court did not clearly abuse its discretion in concluding that there was a reasonable probability that the evidence had not been tampered with or otherwise compromised. (Haltom, B.; CR-17-340; 2-14-18; Virden, B.)

Kellon v. State, 2018 Ark. 46 **[confession]** Appellant challenged the admission of his custodial confession by asserting that that law enforcement officials promised him leniency in exchange for his confession. The disputed comments from the law enforcement officials included statements about the desirability of telling the truth and a suggestion that they could "get help" appellant with any problems he was going through. Additionally, the officers said that they could "go and tell the judge, this man came in here. He was truthful. He was trying to be a provider for his family. He was trying to help someone that, you know, he considered as a [sic] family. I can get on the stand and say that versus saying, he came up in here and he flat out lied to me." Other comments indicated that the officials were "giv[ing appellant an] opportunity" and that coming clean might allow him to "start over again" and become a better person. The appellate court concluded that the foregoing statements were general promises and plausibly ambiguous. Thereafter, the Supreme Court proceeded to determine whether appellant was particularly vulnerable to having his will overborne and concluded that based upon the totality of the circumstances, the trial court did not err when it refused to suppress appellant's confession. **[jury instructions]** Appellant sought to modify AMI Crim. 2d 301 and 302 and to omit AMI Crim. 2d 8103. He argued that because the elements of the crimes for which he was charged, capital felony murder, and the lesser included crime of first-degree felony murder are identical, requiring that the charges be considered sequentially is incompatible with the law. He further asserted that the jury could never convict on the lesser included first-degree charge because the jurors would first have to acquit the defendant of the greater capital charge on the exact same elements. The Supreme Court rejected appellant's arguments and explained that the Court's precedent explicitly approves jury deliberations over multiple offenses with overlapping elements but divergent levels of severity. Accordingly, the Court concluded that the circuit court

did not abuse its discretion when it rejected the jury instructions that were submitted by appellant. (Jones, B.; CR-17-303; 2-15-18; Womack, S.)

Mosby v. State, 2018 Ark. App. 139 **[expert testimony]** Appellant sought to introduce expert testimony regarding the psychological characteristics that would make him prone to giving in to interrogation against his free and voluntary will and his tendency to make false confessions under such circumstances. The circuit court denied the admission of the testimony at the suppression hearing and at trial. The Court of Appeals affirmed the exclusion of the testimony and concluded that: (1) at the suppression hearing, the circuit court was in the best position to observe the appellant's demeanor and mental state by watching the interrogation video and observing appellant's behavior in court; and (2) at the trial, the issue of the voluntariness of the confession had previously been decided by the court at the suppression hearing and the jury was competent to address the remaining issues and draw its own conclusions without the expert testimony. (Glover, D.; CR-17-199; 2-21-18; Harrison, B.)

Johnson v. State, 2018 Ark. 42 **[writ of *habeas corpus*]** A writ of *habeas corpus* is proper when a judgment of conviction is invalid on its face or when a trial court lacks jurisdiction over the cause. A petitioner for the writ must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a showing by affidavit or other evidence of probable cause to believe that he is being illegally detained. Claims of an involuntary plea or of improper plea procedures do not raise a question of a void or illegal sentence that may be addressed in a *habeas* proceeding. A hearing is not required if the petition does not allege either of the bases of relief proper in a *habeas* proceeding, and even if a cognizable claim is made, the writ does not have to be issued unless probable cause is shown. Because appellant did not establish a ground for the issuance of a writ of *habeas corpus* in his petition, the circuit court was not obligated to conduct a hearing on the petition and the circuit court did not err when it denied appellant's petition. (Proctor, R.; CV-16-866; 2-22-18; Hart, J.)

Duvall v. State, 2018 Ark. App. 155 **[authentication]** The main thrust of the authentication requirement is to sufficiently ensure that the proposed evidence is, in fact, what the proponent claims it to be. To this end, our supreme court has required "sufficient circumstantial evidence" to "corroborate the identity of the sender" of the text messages; in other words, there must be some indicia of authorship. A proper foundation for the introduction of electronically recorded material should include who is communicating what to whom. A challenge to the identity of the authorship of a text messages goes to the weight of the evidence rather than admissibility of the messages. In appellant's case, the State presented sufficient corroborating evidence that the text messages were what the State claimed them to be: communicative exchanges between appellant and the victim on a legally relevant issue. Specifically, there was testimony that the telephone number that the victim sent the messages to, and from which messages were sent to her, was appellant's cellphone number. The victim testified that the texts were exchanged after she talked with the police and attempted to contact appellant. She also testified that appellant did not allow other people to use his phone. A law enforcement official testified that photos of the text messages were taken from the victim's phone with her permission. The detective also testified that text messages received by the victim came from a cellphone number assigned to appellant.

The same cellphone number was saved in the victim's phone under appellant's name. Moreover, the victim testified that she sent the messages to the appellant at that number. Finally, the content of the text messages suggested that appellant did or could have sent them. Based upon the foregoing evidence, the crux of appellant's challenge could only go to the weight the jury could have placed on the challenged text messages, not their admissibility. Thus, the circuit court did not abuse its discretion when it overruled appellant's authentication challenge and admitted the text messages into evidence. (Sims, B.; CR-17-604; 2-28-18; Harrison, B.)

Hayes v. State, 2018 Ark. App. 158 **[jury instruction; alternative-sentence instruction]** Arkansas Code Annotated § 16-97-101(4) provides that the trial court, in its discretion, may instruct the jury that counsel may argue as to alternative sentences for which the defendant may qualify. The jury, in its discretion, then may make a recommendation as to an alternative sentence; this recommendation, however, shall not be binding on the court. In appellant's case, the trial court considered the evidence, which included appellant admitting to slitting the victim's throat with a serrated knife, and concluded that the alternative-sentence jury instruction was not proper. The trial court did not abuse its discretion when it refused to give the instruction. (Hearnsberger, M.; 2-28-18; Klappenbach, N.)

McDaniel v. State, 2018 Ark. App. 151 **[404(b) pedophile exception]** Evidence of uncharged sexual acts between appellant and the minor victim that occurred the month before the crime for which he was convicted occurred, as well as texts messages and other social-media messages between appellant and the minor victim that took place in the weeks leading up to the two counts charged, fell squarely within the type of evidence that may be admitted pursuant to the pedophile exception to Rule 404(b). There was a sufficient degree of similarity between the uncharged sexual acts and the charged acts and the trial court did not abuse its discretion when it admitted the evidence. (Talley, D.; 2-28-18; Abramson, R.)

CIVIL

Riley v. Welcometolum, LLC, 2018 Ark. App. 91 **[contract]** According to Riley's own testimony, he was made aware of the assignment on October 28, yet he made no attempt to pay on that date. Contrary to Riley's repeated assertions, he did not attempt to make any payments on October 29 or October 30, and while Tankersley did agree to accept payment on October 31, Riley failed to deliver the payment at that time. At that point, Riley was in default, and WIP was within its rights to terminate the contract. (Williams, L.; CV-17-582; 2-7-18; Harrison, B.)

Phillips v. Denton, 2018 Ark. App. 90 **[unjust enrichment]** In bench trial, court erred in granting motion to dismiss at close of plaintiff's case. Substantial evidence was presented that permitting J.E. to keep the money that Phillips had paid and to also receive legal title to the property, without a partition, could unjustly enrich J.E. Substantial evidence also existed to put to

the factfinder the question whether a confidential relationship existed between J.E. and Phillips. (Karren, B.; CV-17-536; 2-7-18; Harrison, B.)

Holmes v. Potter, 2018 Ark. App. 93 **[dismissal]** The circuit court should have ruled on whether dismissal was with prejudice or without prejudice in the order of dismissal rather that leaving issue open until a subsequent lawsuit was filed. (McCormick, D.; CV-17-664; 2-7-18; Klappenbach, M.)

Hyman v. Sadler, 2018 Ark. App. 82 **[FOIA]** Hyman argues that the employee-evaluation/job-performance exemption is not applicable because there was no suspension or termination proceeding. Once records are deemed employee-evaluation or job-performance records, the statute provides that they are required to be disclosed "only upon final administrative resolution of any suspension or termination proceeding at which the records form a basis for the decision to suspend or terminate the employee." (Tabor, S.; CV-17-645; 2-7-18; Gruber, R.)

Buckley v. Summerville, 2018 Ark. App. 100 **[evidence/reopening record]** Buckley on appeal alleges that the court created an irregularity in the proceedings that prevented him from having a fair trial when it sua sponte convened a bench conference to alert Summerville's counsel to the fact that the mortality table had not been entered into evidence and then allowed Summerville to reopen her case and introduce the mortality table. Here, counsel had already requested and been granted judicial notice of the mortality table for the express purpose of using it in his closing argument. The court's act of clarifying (outside the hearing of the jury) that the table had not yet been introduced into evidence and then allowing counsel to reopen his case in order to do so did not have any practical effect on how it was ultimately used. Summerville's counsel was initially mistaken as to the meaning and effect of having the court take judicial notice of the table, and the sua sponte bench conference simply corrected that misunderstanding and allowed the trial to proceed as originally intended. (McCallum, R.; CV-17-180; 2-7-18; Vaught, L.)

Whisenant v. McKamie, 2018 Ark. App. 87 **[life insurance]** The circuit court correctly determined that, through his will, Sam effectively changed the beneficiary of his SFB life insurance policy from his ex-wife to his father. Sam described his policy in sufficient detail and with an undeniable intent to ensure that Kindell did not receive any life insurance proceeds. The will identifies the following characteristics of the life insurance policy at issue: (1) the policy insured Sam's life; (2) the policy named Kindell as beneficiary; and (3) the policy was purchased by John Odom. (Culpepper, D.; CV-17-568; 2-7-18; Gladwin, R.)

Cross v. State Farm, 2018 Ark. App. 98 **[uninsured motorist coverage]** Summary judgment should not have been granted as fact questions were raised on issue of whether injuries arose out of the operation of an uninsured vehicle. The application of the government-owned-vehicle exclusion violates Arkansas public policy. The purpose of UM coverage is to protect the insured

from financially irresponsible motorists, and this exclusion deprives Cross of that benefit. (Yeargan, C.; CV-17-169; 2-7-18; Vaught, L.)

Vera Angel Trust v. O'Bryant, 2018 Ark. 38 **[restrictive covenant]** The issue is whether using the property for short-term rentals violates the restriction on "any commercial purpose" of the property. The bill of assurance is silent with regard to rental of the property. Certainly, if the drafters of the bill of assurance intended to prohibit renting of property in the subdivision, they could have done so with an express provision. Under Arkansas law, any restriction on the use of land must be clearly apparent in the language of a restrictive covenant. The short-term rentals in the case did not transform the character of the subdivision. (Williams, L.; CV-16-1041; 2-8-18; Hart, J.)

Duran v. SW Arkansas Electric Coop., 2018 Ark. 33 **[negligence]** Southwest hired Glover to dig a trench to a pad-mounted electrical transformer (PMT), place PVC piping using a conduit in the trench, and install electrical wire the length of the conduit. Duran suffered an electrical shock injury while working near or inside the energized PMT. Glover used a key and special socket wrench provided by Southwest to open the protective casing covering the transformer so Duran could push the PVC conduit pipe underneath and up into the transformer. Southwest owed Duran no duty to warn him of obvious dangers, no duty to provide Duran with a reasonably safe work environment, and no duty to act with reasonable care in the delivery of services. Finally, there is no evidence that Duran was forced to encounter an energized transformer to do the work. The circuit court did not err in granting Southwest's motion for summary judgment. (Jones, C.; CV-16-458; 2-8-18; Kemp, J.)

Cannady v. St. Vincent Hosp., 2018 Ark. 35 **[law of the case]** The law of the case doctrine does not preclude the arguments in the appeal regarding scope of employment. **[scope of employment]** Cannady argues that the improper actions of the employees in looking at medical records without reason could be expected, but St. Vincent trained its employees to not access records without legitimate reason, and federal law prohibits inappropriate access. Griffin and Miller were acting exclusively in their interests, and each pled guilty to a violation. St. Vincent did not ratify or endorse the improper actions in any way. In fact, Griffin and Miller were terminated for their misconduct. St. Vincent trained its employees to respect patients' privacy, and took appropriate action when they did not. St. Vincent is therefore entitled to expect St. Vincent employees to obey hospital policy, to remain faithful to their agreements, and to not violate federal law. Therefore, the employees' actions were unexpected. (Johnson, L.; CV-17-121; 2-8-18; Goodson, C.)

Pine Hills Health, LLC v. Talley, 2018 Ark. App. 131 **[arbitration agreement/third party beneficiary]** When a third party signs an arbitration agreement on behalf of another, the court must determine whether the third party was clothed with the authority to bind the other person to

arbitration. The evidence before the circuit court was that Glenda Sue, who could not sign for herself due to multiple mental conditions, executed a valid power of attorney prior to her mental incapacity granting Jesse Alan her power of attorney. Ms. Belt listed Glenda Sue as a party to the optional arbitration agreement and signed the same without the authority of Glenda Sue, who could not give such authority due to her mental incapacity, or the authority of Jesse Alan, the person to whom Glenda Sue had chosen to delegate such decision-making for her. Because Belt had no representative authority, she could not bind Glenda Sue to an arbitration agreement with appellants. The circuit court did not err in finding that Belt did not intend to sign in her individual capacity. Since she was not signing in her individual capacity, no valid arbitration agreement existed between the appellants and Belt. (Carroll, R.; CV-17-462; 2-14-18; Brown, W.)

Ahmad v. State Medical Board, 2018 Ark. App. 111 **[medical license revocation]** In this case, the Alaska Board definitively decided that Dr. Ahmad violated the Alaska statutes. The decision merely left the issue of a final disciplinary sanction unresolved, and Dr. Ahmad voluntarily surrendered his Alaska license before the Alaska Board issued the final sanction. Dr. Ahmad did not appeal the Alaska Board's decision to the Alaska courts. Thus, the Alaska Board found that Dr. Ahmad had violated Alaska statutes. Therefore, there was substantial evidence for the Arkansas Board to revoke Dr. Ahmad's Arkansas medical license for a violation of Arkansas Code Annotated section 17-95-409(a)(1). (Fox, T.; CV-17-655; 2-14-18; Abramson, R.)

TMG Cattle Co. v. Parker Commercial Spraying, LLC, 2018 Ark. App. 144 **[summary judgment]** Based on the depositions and the arguments of counsel, the circuit court granted Parker's motion for summary judgment. In its statements at the conclusion of the summary judgment hearing, the court expressed concern that a jury would not "be able to do anything but speculate" as to what happened to the cows. The court concluded that "something happened but I don't know what . . . [and therefore] I don't think the plaintiff has met his burden of proof." The circuit court appears to have considered that the question for its consideration, on summary judgment, was whether there was enough evidence to submit to a jury. This was error. The question in this case, as in all summary-judgment cases, is whether there are issues to be tried. If there is any doubt as to whether there are issues to be tried, a summary judgment motion should be denied. Here, Dr. Pittman's deposition testimony "reflected an acceptable degree of certainty" that presented a material question of fact as to cause of the cows' deaths. The testimony indicated that the cows were healthy before they died; the deaths were sudden; all eighteen cows died at the same time in the same area; urea fertilizer had been sprayed within 9 days of the deaths in the immediate vicinity of where the cows died; and urea ingestion could cause the death of a cow. Although this evidence does not prove to an absolutely certainty that the cows ate the urea, which led to their deaths, that is not the issue to be addressed at the summary-judgment stage of the proceedings. (Mitchell, C.; CV-17-763; 2-21-18; Whiteaker, P.)

Baker v. Trevathan, 2018 Ark. App. 135 **[evidence]** There is no evidence of Baker's intoxication or impairment at the time of the accident or immediately afterward; thus, any evidence regarding her prescription medication is irrelevant and should have been excluded. Although Baker has demonstrated error, the admitted evidence did not result in prejudice. Without any showing of prejudice, any judicial error as to the admissibility of evidence is harmless error and cannot be grounds for disturbing a circuit court's order. (Honeycutt, P.; CV-17-491; 2-21-18; Virden, B.)

Rodriguez v. Lopez, 2018 Ark. App. 133 **[quiet title]** Appellant argues that the trial court improperly quieted title in the estate because it erroneously found that she knew of her interest in the property when she signed the divorce decree. Appellant and Mr. Lopez, both of whom were represented by counsel, agreed to the divorce decree; Appellant sought no interest in the property at the time of the divorce; and both appellant and Mr. Lopez, as well as their lawyers, signed off on the decree. While appellant testified that she had no knowledge of the quitclaim deed at the time of her divorce, the trial court found her testimony regarding her understanding of the divorce decree and her assertion that she maintained an interest in the property after the divorce to lack credibility. Further, the trial court recognized the actions of Appellant and Mr. Lopez after the divorce. Mr. Lopez lived in the home and made all mortgage payments; he paid off the mortgage in 2007 and paid the taxes until his death in 2012. It was not until 2014 that Appellant paid any money toward the house since the divorce in 1998. The trial court further found that the time under the Arkansas Rules of Civil Procedure for a party to request the court to correct errors or mistakes in judgments had long expired. **[judicial disqualification]** Appellant contends that this court should reverse and remand for a new trial because the trial judge was disqualified from hearing the case because he was the attorney who apparently drafted the quitclaim deed at issue. Litigants can waive certain judicial disqualifications by failing to timely object. The fact that the judge prepared the quitclaim deed was apparent on the face of the deed. As such, appellant had an opportunity to raise the issue of disqualification to the trial court but failed to do so. (Medlock, M.; CV-17-756; 2-21-18; Gruber, R.)

Erwin-Keith, Inc. v. Stewart, 2018 Ark. App. 147 **[arbitration agreement]** Appellant failed to satisfy its burden to prove that appellee was subject to page two of the alleged contracts and demonstrate that the arbitration clauses in those contracts were communicated to appellee or that it assented to those clauses. Instead, each alleged contract included copies of two separate pages. Although it is plausible, as counsel contends on appeal, that the first page was a copy of the front page and the second page was a copy of the reverse page, there was no affidavit or testimony presented to attest that was the case. Nor is there any other way that we can tell from the second page that those were, in fact, the terms and conditions referenced on the first page and that those specific terms and conditions were communicated to appellee. For example, another form of proof could have been provided by a signature, initials, or other acknowledgment by appellee on the second page. However, there was no signature, initials, or any other acknowledgment by appellee on the second page. (Wilson, D.; CV-17-722; 2-21-18; Hixson, K.)

Young v. Bird, 2018 Ark. App. 141 **[public road/abandon]** The evidence did not support the contention that the public use of the road had been abandon or that increased burdens had been placed to destroy the purpose for which the road was used. (Sullivan, T.; CV-17-432; 2-21-18; Glover, D.)

Eliasnik v. Y & S Pine Bluff, LLC, 2018 Ark. App. 138 **[default judgment]** The circuit court was not clearly erroneous in finding that appellee was not properly served and setting aside the default judgment. (Wyatt, R; CV-17-460; 2-21-18; Gladwin, R.)

Halfacre v. Kelley, 2018 Ark. 46 **[indigency/VAdisability benefits]** Prisoner contends that his Veterans' Administration disability benefits cannot be counted as income in determining his indigency status pursuant to federal law. The mere act of including VA disability benefits as available money in determining a litigant's indigency status does not constitute an involuntary relinquishment of the funds. In addition, the order directed the Department of Correction to collect funds from Halfacre's inmate trust account to pay the statutory filing fee in accordance with section 16-68-601. In this case, the application of section 16-68-601 violates 38 U.S.C. section 5301, as the order operates as a levy or seizure of Halfacre's disability benefits. The mechanism utilized in Arkansas Code Annotated section 16-68-601(b), whereby the ADC is required to withdraw an inmate's funds and remit them to the appropriate clerk is key because, while the benefits may be properly included in the determination of indigency without running afoul of the federal statute, Halfacre may not be obligated by court order to use his disability funds to pay the filing fee. Federal law prohibits the circuit court from ordering that the filing fee be paid from Halfacre's trust account, as the proceeds of the account are derived entirely from his disability benefits. (Raines, J.; CV-15-598; 2-22-18; Wynne, R.)

Mississippi County v. City of Blytheville, 2018 Ark. 40 **[fees for jail use]** The circuit court erred by defining the phrase "prisoners of municipalities," for whom the City would owe a daily fee for housing in the County jail pursuant to Arkansas Code Annotated section 12-41-506 as only those detainees charged with violation of a city ordinance. The term "prisoners of municipalities" as used in section 12-41-506 includes those offenders who are arrested by municipal law enforcement officers and delivered to the county jail for incarceration, from the point of intake until (a) charging on a felony offense; (b) sentencing on a misdemeanor offense; and (c) release on a municipal- ordinance violation. **[setoff]** The circuit court's finding that the City can be given credit for a countywide jail tax paid by its residents, who are also residents of the County itself, is not authorized by the provisions in section 12-41-506. (Fogleman, J.; CV-17-472; 2-22-18; Goodson, C.)

Johnson v. Windstream, Inc., 2018 Ark. App. 150 **[employment-termination-ADA]** Even if it is assumed that Johnson has presented sufficient evidence to establish a prima facie case for retaliation, her claim must fail because Windstream has presented a legitimate, nondiscriminatory reason for terminating Johnson—that is, her continued poor performance, including an outside audit's finding that there was a control deficiency in Johnson's area of management that required the entire year of 2008 to be re-reviewed for control deficiencies. Johnson's evidence simply does not support a reasonable inference that Windstream's stated reason for terminating Johnson is a pretext. **[Disparate treatment/comparing employees]** The two employees raised by Johnson to show disparate treatment were both analysts, not staff managers; thus they had no supervisory duties, which duties comprised the majority of Johnson's deficiencies. The circuit court did not abuse its discretion in excluding the evidence regarding the two employees. **[jury instruction]** The instruction at issue is contained in the Eighth Circuit's Model Civil Jury Instructions. It provides as follows: "You may not return a verdict for the plaintiff just because you might disagree with the defendant's decision or believe it to be harsh or unreasonable." 8th Cir. Civ. Jury Instr. § 5.11 (2014). The instruction is a correct statement of the law relating to Johnson's wrongful-termination claim. (Fox, T.; CV-17-480; 2-28-18; Gruber, R.)

Glover v. Main Street Wholesale, LLC., 2018 Ark. App. 152 **[expert testimony-secondary gain]** The trial court abused its discretion in permitting testimony suggesting that plaintiff was motivated by secondary gain. Dr. Peeples testified that he was not expressing an opinion that Glover was malingering or had a personality disorder and that he was only quoting science when saying that the most common cause of chronic pain is the eligibility for compensation. As such, his testimony in that regard was irrelevant. To the extent the testimony had any relevance, it should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury. Here, the jury may well have believed that Glover was motivated by an eligibility for compensation after all the testimony on the subject by an expert and the references to treatises and otherwise authoritative writings. (Dennis, J.; CV-17-345; 2-28-18; Virden, B.)

Villines v. Harrison Housing Authority., 2018 Ark. App. 154 **[employer identity /summary judgment]** City of Harrison failed to meet "proof with proof" that it was not appellants' employer. The circuit court granted the city's dismissal from the suit. There remain genuine issues of material fact as to whether the HHA was or is an "autonomous" and distinct entity, and whether Harrison was an actor in the termination of appellants' employment with the HHA. Because Harrison may be a viable party under Arkansas's recognized concept of "joint" employers, or pursuant to some other agency theory, dismissing the city from the lawsuit was error. **[charitable immunity]** Dismissal of the Housing Authority from the suit on the basis of charitable immunity was error. (Webb, G.; CV-17-754; 2-28-18; Gladwin, R.)

DOMESTIC RELATIONS

Martens v. Blasingame, 2018 Ark. App. 96 [**automatic-termination does not apply to periodic alimony agreement**] When the parties agree to alimony for a designated period of time, there has been an agreement as contemplated by Arkansas Code Annotated 9-12-312(a), such that the automatic-termination provision regarding remarriage or cohabitation is not applicable. Therefore, the appellate court found no error in the circuit court denying Appellant's request for automatic termination of alimony upon his ex-wife's remarriage because the parties agreed he would pay alimony for forty-eight months. (Hannah, C.; CV-17-694; 2-7-18; Whiteaker, P.)

Nauman v. Nauman, 2018 Ark. App. 114 [**alimony considerations; escalator clause; stock options division**] The appellate court found no error in the circuit court's award of alimony. The appellate court found that the circuit court engaged in a careful analysis weighing the relative financial positions of the parties, Appellee's role as primary caregiver, her improved ability to find employment or further her education when the children are in college, both parties' affidavits and testimony regarding household expenses, and the amount of child support awarded. The circuit court's detailed analysis of the alimony issue demonstrated its careful consideration of all evidence, and the circuit court thoughtfully employed its discretion. The appellate court also rejected Appellant's argument that the circuit court ordered an escalator clause. The circuit court did not order that alimony will automatically increase when child support payments cease. Instead, the circuit court explicitly stated that in four years, when child support abates, Appellee may petition the court to review the issue of alimony based on the facts at that time. It will be Appellee's burden to prove that an increase is justified when such circumstances arise, and the circuit court's order in no way eliminates that requirement. Lastly, the appellate court found no error in the circuit court's division of the stock options. The circuit court set forth its reasons for finding that Appellant had an enforceable right to the stock options, including the fact that it was acquired as part of an award-and-incentive plan offered to him upon his employment and he contracted for those rights. Whether a retirement interest is vested hinges on several factors, including whether the benefit cannot be diminished by the employer and is not dependent upon continued employment. Courts have also considered whether the interest was fully distributive upon the date of the divorce. Appellant contracted for the stock options during the marriage, Appellant expended time and effort during the marriage working for that employer, and the deferred compensation for the work he performed before the divorce are divisible, marital property. The fact that certain restrictions, such as the inability of the employee to transfer the stock, inhibit the control of the stock-option holder does not render the stock award agreement unenforceable. Because the stock award did not have an ascertainable value at the time of the divorce, the circuit court's percentage-based division of the property is appropriate and necessary. (Brantley, E.; CV-17-297; 2-14-18; Virden, B.)

Wakefield v. Bell, 2018 Ark. App. 120 [**expert witness testimony limitation; exclusion of stipulated evidence**] The appellate court found no error in the circuit court allowing expert witness testimony. There was no initial objection as to her qualification, but Appellant argued the expert could only offer expertise as an educator and not give an opinion about visitation in this case-- based upon her limited knowledge. However, the circuit court demonstrated a thorough understanding of the challenges to the expert's testimony, made it abundantly clear how to assess her testimony, and was not unduly influenced by it. The appellate court also found no error in the

circuit court excluding introduction of a zip drive with "hundreds" of photographs and medical records allegedly depicting abuse upon the child. The circuit court asked if they were all relevant, and Appellant's attorney provided no response. Although the parties stipulated to its admission, the stipulation did not include explanations putting the evidence into context. Without more explanation, the circuit court's exclusion was perfectly rational because it had sufficient evidence before it on the abuse issue and did not need the addition of "hundreds" of unexplained photographs and medical records. Because the appellate court determined there was no error in the exclusion of evidence, the appellate court rejects Appellant's argument that the court should be aware of all facts at the time of a custody decision and finds no error in the award of custody based upon the evidence. (Putman, J.; CV-17-275; 2-14-18; Glover, D.)

Walter v. Chism, 2018 Ark. App. 127 [**denial of petition for order of protection**] The appellate court found no error in the circuit court's denial of Appellant's Petition for Order of Protection. As the circuit court acknowledged, it was faced with resolving two diametrically opposed versions of events. The credibility of witnesses is within the province of the fact-finder, and the findings were not clearly erroneous in light of the evidence presented. (Smith, V.; CV-17-706; 2-14-18; Hixson, K.)

Garcia v. Garcia, 2018 Ark. App. 146 [**division of pension language; distribution of all property**] The appellate court found error in the circuit court's ruling that Appellant was entitled to "the marital fraction, if any there be" of Appellee's pension. The undisputed evidence required a finding that the pension was vested and that the pension was all marital property. The appellate court also found error in the circuit court's failure to designate the amount or percentage of the pension awarded to Appellant and failure to distribute/designate numerous items of personal property. Pursuant to Ark. Code Ann. 9-12-315, the circuit court was required to (1) divide all marital property evenly or state its reasons for unequal distribution; and (2) designate the property to which each party is entitled. Because the circuit court's written order does not designate and distribute all property, the appellate court found it impossible to determine whether the property was equally distributed. The matter was remanded for specific distribution of the pension and for a specific designation and allocation of assets. (Compton, C.; CV-17-881; 2-21-18; Vaught, L.)

Lewis v. Lewis, 2018 Ark. App. 148 [**granting of petition for order of protection- abuse need not be corroborated]** The appellate court found no error in the circuit court's entering a final order of protection against Appellant. Appellee testified that Appellant hit her, shook her, and made her fearful for her safety and life. Her testimony need not be corroborated. Appellant argued that sufficient evidence does not support the order of protection; however, it is within the sole province of the circuit court to weigh credibility and resolve the disputed facts. (Jamison, L.; CV-17-467; 2-21-18; Murphy, M.)

Wyatt v. Wyatt, 2018 Ark. App. 149 **[civil contempt; lack of ability to pay as defense]** To establish civil contempt, there must be willful disobedience of a valid court order. In contempt proceedings where the object is to coerce the payment of money, the lack of ability to pay is a complete defense against enforcing payment from the defendant by imprisonment. In this matter, the circuit court stressed the significance that Appellant had maintained his lifestyle since the divorce. The circuit court found that Appellant lacked credibility, that his lifestyle did not

comport with his exhibited income and expenses, and that he gained access to significant amounts of money when he deemed it important. The appellate court found no error in the contempt ruling, and no error in the circuit court's finding that Appellant had the ability to make a credible attempt to pay the judgment owed. (Foster, H.; CV-16-733; 2-21-18; Brown, W.)

Tidwell v. Rosenbaum, 2018 Ark. App. 167 [***Cooper* and *Hollandsworth* relocation analysis; ambiguous custodial language considerations**] In *Cooper*, the supreme court clarified that the *Hollandworth* relocation presumption should be applied only when the parent seeking to relocate is not just labeled the "primary" custodian in the divorce decree but also spends significantly more time with the child that the other parent. *Cooper v. Kalkwarf*, 2017 Ark. 331. The agreed order in this matter granted joint custody with primary physical custody and custodial residence with Appellee. Because the agreed order in this matter was ambiguous as to the custody award, the appellate court found that the circuit court erred by not analyzing the other parts of the order as well as considering the parties' testimony regarding the intention and their conduct. The appellate court also found error in the circuit court's ruling that this was not a true joint custody case because the parties agreed Appellee would have primary physical custody and granted her the right to determine the child's residence. The matter was remanded for the circuit court to apply the *Singletary* and *Cooper* analyses. (Culpepper, D.; CV-17-110; 2-28-2018; Gruber, R.)

PROBATE

Teresa A. Griffith, as Executrix of the Estate of Dorothy J. Grable, Deceased v. Rick Griffith, 2018 Ark. App. 122 [**proving a lost will**] The circuit court correctly determined that it had to decide whether Appellant met her burden under the statute governing the proving of a lost will. Arkansas Code Annotated 28-40-302 requires that Appellant, as the proponent of a lost will, had to prove two things: (1) the will's execution and its contents by strong, cogent, and convincing evidence; and (2) that the will was still in existence at the time of the decedent's death or was fraudulently destroyed during her lifetime. The burden of proof to establish the execution and contents of a lost will is on the party who claims under it, and the statute is written in the conjunctive. In the absence of proof of one of the necessary elements to prove a lost will, the appellate court found no error in the circuit court's ruling that Appellant failed to prove both the execution and contents of the will. (Pierce, M.; CV-17-272; 2-14-18; Whitaker, P.)

JUVENILE

Allen-Grace v. Ark. Dep't of Human Servs., 2018 Ark. App. 83**[Adjudication—sufficiency of the evidence; abuse of siblings]** Mother appealed adjudication order finding all three of her children dependent-neglected. The case was opened after a domestic disturbance was reported involving the mother and the oldest, thirteen-year-old daughter. The mother claimed that the daughter engaged in self-harm behaviors that required her intervention. However, the daughter denied the mother's allegations and reported that the mother punched her in the face and hit her with a candle. The mother's ex-husband testified that when he was married to the mother, she physically and verbally abused the child. There was also evidence of poor environmental conditions in the home. On appeal, the court found sufficient evidence that the children were

dependent-neglected. Although most of the evidence pertained to the oldest child, the abuse or neglect of one sibling indicates that other siblings are at substantial risk of serious harm. (Zimmerman, S.; JV-17-482; February 7, 2018; Gruber, R.)

Brown v. Ark. Dep't of Human Servs., 2018 Ark. App. 104 **[TPR—status as legal parent; sufficiency of the evidence]** Appellant father challenged order terminating his parental rights on two grounds: (1) that his status as legal father had not been clearly established prior to entry of TRP order; and (2) that evidence in support of grounds for termination was insufficient. Termination was affirmed. The appellate court held that the appellant did not preserve the issue of his legal status because it was brought up at the start of the TRP hearing, his attorney discussed the issue on the record with the court, and no objection was made to the court's statement that the issue the father's legal status had been determined months earlier, thus appellant consented or acquiesced to the court's finding. The evidence was clear and convincing in support of termination where the father did not have adequate income or housing, continued his relationship with the mother after her rights were terminated, and did not regularly visit the child or comply with the case plan. (Halsey, B.; JV-14-40; February 7, 2018; Hixson, K.)

Nichols v. Ark. Dep't of Human Servs., 2018 Ark. App. 85 **[TPR—sufficiency of the evidence]** Mother and father appealed order terminating their rights on the grounds of aggravated circumstances, based on the trial court's finding that there was little likelihood that further services would result in successful reunification. The parents each demonstrated unresolved issues with anger and violence, did not exhibit appropriate interaction with and discipline of the children during visits, and failed to complete the case plan. The trial court noted in its findings that it observed extreme frustration and explosive anger by the parents. The appellate court deferred to the trial court's observation of the parties and credibility of the witnesses and, finding no clear error, affirmed termination. (Zuerker, L.; JV-15-440; February 7, 2018; Abramson, R.)

Parnell v. Ark. Dep't of Human Servs., 2018 Ark. App. 108 **[TPR—trial court does not lose jurisdiction by failing to hold timely hearing]** While a trial court's failure to adhere to the statutory timeframe for dependency-neglect hearings may be error, it does not equal a loss of jurisdiction. A trial court's failure to hold a timely adjudication hearing may be challenged via direct action in the trial court or an appeal of the adjudication order, but may not be challenged after rights are terminated. (Wilson, R.; JV-15-2; February 7, 2018; Virden, B.)

Cole v. Ark. Dep't of Human Servs., 2018 Ark. App. 121 **[TPR—sufficiency of the evidence; adoptability]** Mother appealed order terminating rights to her five children, including one with special needs. The mother's sole argument on appeal was that there was insufficient evidence that the five children were likely to be adopted, in particular the one with special needs. The appellate court disagreed, noting that the trial court is required to consider the likelihood of adoption but is not required to find that the children are adoptable by clear and convincing evidence. (Talley, D.; JV-16-7; February 14, 2018; Glover, D.)

Garlington v. Ark. Dep't of Human Servs., 2018 Ark. App. 124 **[TPR—sufficiency of the evidence]** Mother appealed order terminating her rights based on the ground that her children were out of her custody for more than twelve months and she failed to remedy the situation that led to removal. The mother's primary issue was lack of housing, and she failed to secure housing

despite the DN case being open more than two years. The mother argued that the department did not make meaningful efforts to assist her, but the court disagreed. Moreover, the mother's failure to appear at the termination hearing was evidence to be weighed by the trial court. Finding no clear error, the appellate court affirmed termination. (Clark, D.; JV-15-436; February 14, 2018; Whiteaker, P.)

Howell v. Ark. Dep't of Human Servs., 2018 Ark. App. 117 **[TPR—service requirements]** Insufficiency of service of petition for termination of parental rights required reversal of order terminating rights. Arkansas Code Ann. § 9-27-341(b)(2)(A) allows service of a TPR petition upon a parent's attorney pursuant to Rule 5 of the Arkansas Rules of Civil Procedure so long as the parent was served under Rule 4 at the start of the proceedings. Rule 5 allows service via email but service is not effective if it is sent but does not reach the person to be served, and the department has the burden of proving service. Here, the mother's attorney stated that she did not receive the TPR petition that DHS attempted to serve via email, and DHS could not prove service. (Bristow, M.; JV-16-7; February 14, 2018; Gladwin, R.)

Allen v. Ark. Dep't of Human Servs., 2018 Ark. App. 136 **[TPR—sufficiency of the evidence]** Evidence was sufficient for termination of rights on aggravated circumstances ground where child had special needs and the mother failed to address special needs, failed to take child to necessary medical appointments, failed to attend medical appointments with child, and neglected the child's dental needs, resulting in severe tooth decay. In addition, the mother had multiple health issues that made it difficult for her to get out of bed and care for the child. (Zuerker, L.; JV-15-357; February 21, 2018; Virden, B.)

Bonner v. Ark. Dep't of Human Servs., 2018 Ark. App. 117 **[TPR—sufficiency of the evidence]** There was no clear error in termination of rights based on aggravated circumstances where evidence demonstrated little likelihood that services to the family would result in successful reunification, where father physically abused children repeatedly and mother failed to prevent the abuse. (Zimmerman, S.; JV-16-378; February 21, 2018; Glover, D.)

McKinney v. Ark. Dep't of Human Servs., 2018 Ark. App. 140 **[TPR—sufficiency of the evidence]** Severe injuries to a three-month-old infant, including bone fractures and brain damage, prompted removal of the infant and siblings. At adjudication, the court specifically found that McKinney, the father, had abused the infant and ultimately a TPR order was entered. McKinney argued on appeal from the TPR order that the evidence of abuse was insufficient; however, the appellate court found that in order to challenge the trial court's finding of abuse, McKinney was required to appeal the adjudication order, which he did not do. The appellate court pointed to the trial court's findings that McKinney was not credible and found his remaining arguments unconvincing. (Spears, J.; JV-16-285; February 21, 2018; Harrison, B.)

Kohlman v. Ark. Dep't of Human Servs., 2018 Ark. App 164 **[TPR—sufficiency of the evidence]** Father appealed order terminating his rights, arguing that he was denied due process because he was not made a party or offered services until the TPR petition was filed. However, the appellate court did not consider this issue on appeal because it was not raised below. The evidence was clear and convincing in support of termination on the grounds of aggravated circumstances. Due to the father's incarceration during most of the case, his untreated alcohol

problem, and his history of violence, it appeared unlikely that services would result in successful reunification. (Blatt, S. JV-16-181; February 28, 2018; Hixson, K.)

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

Bentley v. Ark. Dep't of Human Servs., 2018 Ark. App. 125 (Zuerker, L.; February 14, 2018; Vaught, L.)

Drexler v. State, 2018 Ark. App. 95 **[Transfer to juvenile court denied]** The trial court properly considered the statutory factors and made written findings concerning each factor and its denial of the defendant's motion to transfer to juvenile court was affirmed. The defendant, two months from his eighteenth birthday on the date of the crime, was charged with two counts of capital murder, two counts of aggravated robbery, and abuse of a corpse, after he plotted with another juvenile, Staton, to murder Staton's grandparents and steal their car and money. Drexler and Staton waited for the grandparents to return home and then ambushed them and shot them a total of thirteen times. Dexler rolled the grandfather's body up in carpet and he and Staton used a tractor to dump the bodies. The seriousness of the capital murder charge alone is sufficient reason to deny transfer, but here, Drexler was also charged with two counts of aggravated robbery and abuse of a corpse. Considering the nature of the crime and Drexler's noncompliant history in juvenile probation, it appeared unlikely that juvenile court services would rehabilitate Drexler prior to his twenty-first birthday. (Braswell, T.; CR-15-569; February 14, 2018; Whiteaker, P.)