APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

MARCH 2018
VOLUME 25, NO. 7

Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website:
https://opinions.arcourts.gov/ark/en/nav.do

CRIMINAL

Duncan v. State, 2018 Ark. 71 **[discovery]** Because: (1) the State disclosed the witness as soon as possible; (2) there was no evidence that the late disclosure was an effort to gain an unfair advantage; and (3) the defense was permitted to speak with the witness prior to her testimony, the Supreme Court concluded that the trial court did not abuse its discretion when it permitted a witness, who the State failed to disclose until the night before trial, to testify. (Henry, D.; CR-16-1132; 3-1-18; Womack, S.)

Ward v. State, 2018 Ark. 59 **[*Ake v. Oklahoma*]** The United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985), held that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, due process requires that a State provide access to a psychiatrist's assistance on this issue, if a defendant cannot otherwise afford one. The psychiatrist's assistance would include aiding in the evaluation, preparation, and presentation of the defense. Contrary to appellant's assertions, the Supreme Court did not alter or change the requirements of *Ake* in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017). (Plegge, J.; CR-98-657; 3-1-18; Baker, K.)

Davis v. State, 2018 Ark. 69 **[*Ake v. Oklahoma*]** The Arkansas Supreme Court has consistently held that the medical experts available at the Arkansas State Hospital meet the requirements of *Ake v. Oklahoma*, 470 U.S. 68 (1985). Additionally, our Supreme Court has explained that although the U.S. Constitution guarantees an indigent defendant the right to a competent psychiatrist under certain circumstances, it does not guarantee a psychiatrist who will reach the medical conclusions the defense team desires. (Green, R.; CR-92-1385; CR-00-528; 3-1-18; Womack, S.)

Watson v. State, 2018 Ark. App. 169 **[Admin. Order 4]** Administrative Order No. 4 provides that "[u]nless waived on the record by the parties, it shall be the duty of any circuit court to require that a verbatim record be made of all proceedings . . . pertaining to any contested matter before the court or the jury." Additionally, the Supreme Court has held that it was error for the circuit court to not make a verbatim record of an in-chambers conference. In appellant's case, although the issue of his request for a mental evaluation may have been discussed during a phone conference, a verbatim record of the discussion was not made. Thus, there was nothing in the record or supplemental record for the appellate court to review to determine upon what basis the circuit court made its decision to deny appellant's request for a mental evaluation or its finding that appellant was competent to proceed. Based upon the lack of a record, the appellate court concluded that the circuit court clearly erred in denying appellant's motion for a mental evaluation. (Proctor, R.; CR-16-777; 3-7-18; Gruber, R.)

Bynum v. State, 2018 Ark. App. 201 **[motion in limine]** Appellant was convicted of the offense of concealing a birth. At trial, the State, over appellant's objection, introduced evidence regarding the fact that appellant ingested pharmaceutical substances prior to her delivery of the stillborn fetus and evidence related to appellant's abortion history. On appeal, the appellate court concluded that the circuit court abused its discretion in admitting this evidence. Specifically, the Court of Appeals explained that whether appellant had taken pharmaceutical drugs prior to the delivery of the fetus or any evidence of abortions she had previously undergone was irrelevant to the charge that she had committed the offense of concealing a birth. Additionally, the appeals court noted that even if the evidence could be deemed relevant, its probative value was substantially outweighed by the danger of unfair prejudice. (Pope, S.; CR-16-879; 3-14-18; Glover, D.)

Burnett v. State, 2018 Ark. App. 220 **[probation revocation]** Appellant entered a guilty plea and was sentenced to probation on December 16, 2016. A sentencing order reflecting that plea and sentence was entered on December 22, 2016 at 4:07 p.m. At 10:00 a.m. on December 22, 2016, appellant failed to report for her probation intake appointment. Based upon appellant's action on the morning of December 22, 2016, the State filed a motion to revoke appellant's probation, which was granted. On appeal, the Court of Appeals explained: "[U]ntil a guilty plea and resulting sentence are memorialized as a sentencing order and entered into the record, there is not an effective judgment of conviction." Thus, the appellate court concluded that the trial court lacked jurisdiction to revoke appellant's probation for acts that she committed before being placed on probation. (McGowan, M.; CR-17-618; 3-28-18; Murphy, M.)

Honey v. State, 2018 Ark. App. 217 **[mistrial]** The trial court abused its discretion in denying appellant's motion for a mistrial, which was based upon the State asking appellant an improper question that was deliberately intended to elicit an incriminating and prejudicial response. **[prosecutor's duty to disclose]** Prior to trial, appellant filed a motion specifically requesting disclosure of "all evidence the Prosecution anticipates will be used against Defendant pertaining to character and . . . that of other crimes, wrongful conduct, or acts, including, but not limited to, evidence allowed under Rule 404(b) of the Arkansas Rules of Evidence." The State did not respond to this motion. Thereafter, at the end of appellant's trial, the State improperly interjected new, uncharged, undisclosed allegations that appellant had engaged in sexual misconduct with another child. Arkansas Rule of Criminal Procedure 19.2 establishes that parties in a criminal proceeding have a continuing duty to disclose certain information and provides that "[i]f before trial, but subsequent to compliance with these rules, . . . a party discovers additional material or information comprehended by a previous request to disclose, he shall promptly notify opposing counsel . . . of the existence of such material or information." In appellant's case, the State failed to fulfill this obligation and the trial court failed to enforce the rule of discovery. (Ramey, J.; CR-17-46; 3-28-18; Whiteaker, P.)

Brigance v. State, 2018 Ark. App. 213 **[admission of evidence]** The trial court abused its discretion when it refused to allow appellant to cross-examine a witness with evidence that could have undercut the victim's identification of appellant. The appellate court concluded that the evidence was relevant and essential to appellant's defense in the case because it directly contradicted the State's primary evidence against appellant, which was the victim's identification of appellant. **[404(b)]** The trial court did not abuse its discretion when it admitted appellant's prior convictions for residential burglary because they were independently relevant to the issue of whether appellant intended to break into the victim's residence. The evidence gleaned from appellant's prior convictions was that he intended to break into the victim's residence with the purpose of committing an offense punishable by imprisonment. **[*ex post facto*]** When appellant committed residential burglary in March of 2016, he was on notice that residential burglary was then listed as a felony involving violence that would subject him to a more severe penalty than the previous residential-burglary statute. The 2015 amendment that added residential burglary to the list of felonies involving violence did not affect appellant's sentences for his previous residential burglaries but did enhance the sentence he could receive when he was convicted of residential burglary in 2016. Thus, the circuit court properly concluded that there was no *ex post facto* violation in appellant's case. (Clawson, C.; CR-17-559; 3-28-18; Gladwin, R.)

Taffner v. State, 2018 Ark. 99 **[Ark. R. Evid. 411]** Rule 411 of the Arkansas Rules of Evidence prohibits the defendant, not the State, from introducing evidence of a witness's prior sexual history. **[access to victim's DHS file]** The circuit court erred by failing to review the victim's DHS file to determine whether it contained information that was material to appellant's defense. **[mistrial]** The trial court did not abuse its discretion when it denied appellant's request for a

mistrial, which was based upon a juror concealing her position as a court-appointed child advocate during *voir dire*. (Lindsay, M.; CR-16-1024; 3-29-18; Goodson, C.)

CIVIL

Walther v. Flis Enterprises, Inc., 2018 Ark. 64 **[taxation]** At issue is whether the tax for the manager's meals should be assessed on the wholesale cost paid by Burger King to purchase the individual food ingredients or the retail sales price paid by customers to purchase identical meals. As the manager receives the meal, a produced good, section (D)(2) applies and the tax is assessed on the retail value of the meal. It is the prepared meal that is withdrawn from stock and given to the manager, not the individual ingredients. (Compton, C.; CV-17-240; March 1, 2018; Wood, R.)

Bud Anderson Heating v. Neil, 2018 Ark. App. 183 **[non-competition]** The circuit court found that BAHC had proved it maintains a protectable interest in its customer list. However, the circuit court denied any injunctive relief finding that there was no evidence that "Neil 'was able to use' information obtained from BAHC." BAHC argues that the court incorrectly applied the "able to use" standard by requiring it to prove that Neil had "actually used" BAHC's proprietary information to obtain an unfair competitive advantage. BAHC is correct that an "actual use" standard would be contrary to established law. Prior cases have never required proof that the former employee has actually used the employer's protected interest at the time of trial. The "able to use" standard focuses on the ability of the employee to use such information rather than proof of actual use. The court found that "even if Neil could potentially use this knowledge . . . there is no evidence showing that Neil has done so." The court was applying an "actual use" standard unsupported by our case law. (Schrantz, D.; CV-17-683; 3-7-18; Vaught, L.)

Farm Bureau Ins. v. Hopkins, 2018 Ark. App. 174 **[insurance]** Farm Bureau asserts that the circuit court erred in finding the language of the policy ambiguous because the policy is clear that it covers collapse of the structure only when the collapse is caused by a named peril -- the weight of the contents of the building, or the weight of precipitation on the roof. Hopkins did not show that his loss was caused by any of those things; thus, the loss is not covered. Hopkins failed to meet his burden of making a prima facie showing that the collapse of his hunting lodge was caused by a named peril. The UIM section of the policy includes provisions on coverage exclusions, limits of liability, and changes in conditions. The releases inform appellants of when they may "pursue a claim" under the specific policies listed. The policies must still be consulted for a determination of coverage. (McGowan, M.; CV-17-406; 3-7-18; Virden, B.)

R.E.C Enterprises v. Gaillard Business, Inc., 2018 Ark. App. 188 **[arbitration]** If the court orders arbitration, judicial proceedings are stayed. The circuit court erroneously dismissed the counterclaim while the proceedings were stayed. (Jones, C.; CV-17-305; 3-7-18; Murphy, M.)
Carroll v. Shelton, 2018 Ark. App. 181 **[easements]** The trial court erred in concluding the easement language was ambiguous and considering matters outside the four corners of the deed language to decide that the intent of the parties was to encompass parking, along with ingress and egress. The easement language encompasses only travel across the designated property and not parking. However, the trial court properly found use of the easement for parking was sufficiently continuous to establish prescriptive easement for parking. (Jackson, S.; CV-17-601; 3-7-18; Glover, D.)

Peregrine Trading, LLC v. Rowe, 2018 Ark. App. 176 **[prescriptive easement]** The court found a prescriptive easement for sewer field lines located on land owned by appellant Peregrine Trading. The record reflects that the Rowes openly and adversely possessed the easement for the septic line for the statutory period. The lines were not placed with permission from the property's owner. The system had been there since before 1993, including the field line at issue. The Rowes purchased their property in 2004. In 2005, the Rowes added a leg onto the field line without permission. The Rowes also kept the field lines cleaned out. The field line was visible from at least 2005 as the terminus is above ground and ends in what is essentially a gravel pit to catch any excess condensation. The exposed parts can be seen by a reasonable inspection of the property. (Haltom, B.; CV-17-778; 3-7-18; Gladwin, R.)

Patterson v. Southern Farm Burau, Ins., 2018 Ark. App. 179 **[medical bills]** The circuit court did not err in finding that section 16-46-107 did not apply to the estimates. The statute states the patient shall be competent to identify bills "for expenses incurred." The documents showed only estimates for future expenses and that he had not incurred those expenses. They are also not admissible under Evidence Rule 803(6), exception to the hearsay rule for the admission of business records. The circuit court erred by refusing to award damages from the emergency room bill because plaintiff admitted that he had not paid the bill and the balance was zero. He argues that the collateral-source rule provides that the windfall should go to the plaintiff, not the defendant, and further claims that the court erred in awarding the damages to the hospital. The supreme court has held that a plaintiff's recovery from the tortfeasor is not limited or offset by the amounts the plaintiff receives from an insurance company for medical bills or by gratuitous medical services, even though in one sense a double recovery occurs. Thus, in this case, the fact that Dale did not pay the emergency room cannot offset his recovery from White. (Storey, B.; CV-17-368; 3-7-18; Klappenbach, M.)

Yancy v. Hunt, 2018 Ark. App. 195 **[summary judgment/damages]** Court erred in granting summary judgment as there is a genuine issue of material fact regarding the disposition and allocation of the payments made and whether and how the payments reduce the balance owed.

Without an evidentiary explanation of the allocation of the payments—for example, a ledger or affidavit of explanation—there is a factual question regarding the exact amount owed. (Wyatt, R.; CV-17-743; 3-14-18; Gruber, R.)

Motley v. Sifford, 2018 Ark. App. 203 **[revivor]** Curtis contends that the trial court erred in dismissing the current case with prejudice because the case had been properly revived. While the order specifically mentions Dr. Sifford's motions to dismiss and to strike, it says nothing about the motion to substitute filed by Curtis, Jr., and no appeal was taken from that order. An order of revivor must be entered within one year from the date of death of the decedent. In the absence of an order substituting him as the appropriate party, the original suit was never properly revived, the statute of limitations expired, and the savings statute did not apply under these circumstances to toll the limitations period. (Honeycutt, P.; CV-17-701; 3-14-18; Glover, D.)

Goldtrap v. Bold Dental Management, LLC, 2018 Ark. App. 209 **[arbitration]** Appellants contend that the court erred in refusing to vacate the award. According to appellants, the arbitrator's award was procured by undue means and the arbitrator refused to consider evidence material to the controversy. However, this court has no way of knowing what testimony was before the arbitrator because the parties decided against having the hearing transcribed. Thus, there is no justification for this court to vacate the award for the reasons suggested by appellants because mistakes of fact are insufficient to set aside an award, especially when the mistake or error is not apparent on the face of the award. (Tabor, S.; CV-17-786; 3-14-18; Brown, W.)

AT&T Corp. v. Clark County, 2018 Ark. App. 207 **[arbitration]** AT&T was required to produce specific evidence that appellee was subject to the contract and demonstrate that the arbitration clause was communicated to appellee and that it assented to that clause. AT&T failed in its burden. AT&T did not offer proof that it mailed any notification of the proposed modification to Clark County. Instead, AT&T only submitted an affidavit of an employee stating that "customers" were informed of the de-tariffing and application of the BSA, with an attached copy of a form letter addressed to "Valued AT&T Business Customer." However, this was insufficient to demonstrate that a copy of this letter was actually mailed to Clark County or that the appropriate official received it. Moreover, the form letter provided that if the customer did not agree to the terms of the BSA, it must contact AT&T no later than October 1, 2013. Because AT&T did not show that the letter was sent to Clark County at all, it certainly failed to demonstrate that Clark County received it in time to contemplate the alleged modification and opt out. Finally, even had there been proof that AT&T timely sent this notice to Clark County, the letter contained an ambiguous phrase. Based on the terms of the AT&T notice, Clark County did not agree to a modification of its agreements with AT&T. (Vardaman, G.; CV-17-735; 3-14-18; Hixson, K.)

Brookewood Ltd. Partnership v. Dequeen Physical Therapy, Inc., 2018 Ark. App. 204 **[contract damages]** Gross revenue was the only evidence presented to the jury on the issue of damages resulting from the breach of the contract. Arkansas law is clear that gross revenue alone is not substantial evidence of lost profits. Actual damages for early termination of a contract must take into account operating costs. (Cooper, T.; CV-17-779; 3-14-18; Glover, D.)

Houston v. City of Hot Springs, 2018 Ark. App. 196 **[annexation]** The ordinance passed by the City of Hot Springs that annexed an unincorporated area of Garland County known as the Enclave Study Area B complied with the statutory requirements for the annexation. The annexation procedure did not violate the Equal Protection Clause. (Wright, J.; CV-17-807; 3-14-18; Abramson, R.)

3 Rivers Logistics, Inc. v. Brown-Wright Post of Am. Legion, 2018 Ark. 91 **[nuisance]** Arkansas Code Ann. section 16-105-502 clearly expresses the General Assembly's intent to give a shooting range immunity from noise-based lawsuits if it is not in violation of local noise ordinances at the time it was constructed and began operation. The circuit court also correctly found in this case that the immunity statute did not constitute a taking under the Arkansas Constitution. (Henry, D.; CV-17-435; 3-15-18; Goodson, C.)

City of Jacksonville v. Smith, 2018 Ark. 87 **[injunction/illegal exaction/public office]** The circuit court properly found that the office of chief of police constitutes an "office of trust" pursuant to article 5, section 9 of the Arkansas Constitution. Herweg pleaded guilty to, and was convicted of, the misdemeanor offense of giving a false report to a police officer in 2002. Herweg's conviction of giving a false report to a police officer is a crime of dishonesty committed with the intent to deceive and, as such, qualifies as an "infamous crime" under article 5, section 9 of the Arkansas Constitution. The circuit court properly found that the 2002 Texas conviction disqualifies Herweg from holding the office of the City's police chief. (Gray, A.; CV-17-634; 3-1518; Kemp, J.)

Burrow v. J.T. White Hardware Co., 2018 Ark. App. 212 **[contempt]** Burrow was held in contempt of court for hindering the execution of the writ by hiding property after he had been served, by having his attorney write two letters containing false information regarding the cars, and by lying in his deposition about his ownership of the cars and the location of the cars. When confronted with registration and lien information, Burrow denied ownership of the vehicles, and several witnesses testified about the measures Burrow had taken to avoid execution of the writ. Burrow's elaborate deception clearly constitutes resistance to the process of court, and Burrow's actions are punishable by the court through its contempt power. (Fogleman, J.; CV-17-417; 3-28-18; Virden, B.)

Shriners Hospital v. First United Methodist Church, 2018 Ark. App. 216 **[conveyance-sale/gift]** Where a deed, on its face, is an absolute conveyance, has been executed and delivered as the voluntary act of the grantor, the question of consideration, as between the parties and their privies, is immaterial. Mere inadequacy of consideration is not sufficient to set aside a deed, without accompanying acts of fraud or deception. Here, there were no acts of fraud or deception. Romo, under the power of attorney, had the authority to sell the real property on any terms and conditions he deemed appropriate. When donation was not possible, Foster decided his residence would be sold to FUMC for the sum of $10, which was, in fact, paid by FUMC. Not only was this sale within the letter of Romo's authority under the power of attorney to convey Foster's real property upon such terms as he deemed appropriate, it was also within the spirit of the power of attorney. (Sutterfield, D.; CV-17-795; 3-28-18; Glover, D.)

Public Employee Claims Division v. Clark, 2018 Ark. App. 215 **[workers' comp/subrogation]** Clark was seriously injured while working as a veterinary livestock inspector for the Arkansas Livestock and Poultry Commission. Clark was paid workers'-compensation benefits for his injuries. Clark filed a negligence suit against the entity responsible for the facility where he was working when injured. PECD subsequently moved to intervene in the lawsuit and filed a complaint in intervention. PECD alleged that, as the workers'-compensation-claims administrator for the Arkansas Livestock and Poultry Commission, it had paid workers'-compensation benefits to Clark and was entitled to an absolute lien against two-thirds of the net proceeds of any settlement or judgment in Clark's favor on his complaint. Clark had no objection to the motion to intervene, and intervention was granted. The court found that PECD was entitled to two-thirds of "the deposited funds" rather than two-thirds of "the net proceeds recovered in the action" as provided in section 11-9-410, Thus, the circuit court calculated PECD's award from $75,000 as opposed to the entire settlement amount of $325,000. Clark contends that when he reached a settlement on his negligence claim, his attorneys reached an agreement with PECD that $75,000 would be deposited into the registry of the court and that any recovery by PECD would be paid from this sum only. Although the $75,000 deposit was referenced by Clark at the hearing and in the circuit court's order, the record contains no reference to an agreement by which PECD agreed to limit its recovery to a portion of the $75,000. Although the parties and the court acknowledged that only $75,000 was deposited with the court, there is no reason on the record that PECD's recovery should be limited to an amount calculated from the deposited sum as opposed to the entire settlement of $325,000 as provided in section 11-9-410. (Jackson, S.; CV-17-874; 3-28-18; Klappenbach, M.)

Dept. of Corrections v. Shults, 2018 Ark. 94 **[executions/lethal drugs]** The identity of drug manufacturers is not protected under the confidentiality provisions of Ark. Code Ann. § 5–4–617. However, if package inserts and drug labels are made available to the public, any information that could be used to identify the seller or supplier must be redacted and maintained as confidential. (Griffen, W.; CV-17-544; 3-29-18; Baker, K.)

Desoto Gathering Co. v. Hill, 2018 Ark. 102 **[R. Civ. P. 12 (B)(8)]** DeSoto's refund suit was not required to be dismissed pursuant to Rule 12(b)(8). The valuation claim and the refund claim are governed by separate statutory procedures and encompass different issues. **[res judicata]** DeSoto's valuation appeal was dismissed by the circuit court for lack of subject-matter jurisdiction, and this court affirmed that dismissal. A court of "proper jurisdiction" for purposes of res judicata means that a court has "jurisdiction of the person and the subject matter." Res judicata does not bar the refund suit. (Carnahan, C.; CV-17-543; 3-29-18; Goodson, C.)

DOMESTIC RELATIONS

Wyatt v. Wyatt, 2018 Ark. App. 177 **[property division value date; piercing the corporate veil for support and property division; imputing income for child support]** By consent of the parties, the divorce decree specifically reserved the issues of property division; therefore, Appellant cannot complain of the ruling that the property was not distributed at the time of the divorce. Second, the appellate court found no error in the circuit court valuing the property as of the parties' separation date. The main purpose of the property division statute is to enable the circuit court to make a division of property that is fair and equitable under the circumstances. Because Appellant's unilateral action of disposing property before the date of the divorce was done specifically with Appellee's determent in mind, using the prior date was the only means to achieve a fair and equitable result. Third, the appellate court found no error in the circuit court piercing the corporate veil because there was sufficient evidence to support the finding that Appellant illegally abused the corporate form to Appellee's detriment. Appellant used corporate funds to pay for many personal expenses, and this was used to Appellee's detriment because it looked like he had limited personal funds available for support and property division, when Appellee had access to large amounts of money during their marriage. Fourth, by affirming the circuit court's decision to pierce the corporate veil, the appellate court found no error in the circuit court's awarding one-half of the value of all corporate entities to Appellee. These businesses operated as Appellant's alter ego throughout the duration of the marriage, and regardless of whether they were formed prior to the marriage, they are marital property subject to division. Fifth, because Appellant was living a lifestyle that did not comport to that of his reported wages, the circuit court imputed income for calculating child support. The appellate court found no error in the circuit court counting all personal benefits that were paid for by a corporation in the imputing calculation, including payments on a boat that Appellant used but did not own. (Foster, H.; CV-16-692; 3-7-18; Harrison, B.)

Dare v. Frost, 2018 Ark. 83 **[material change in circumstances to modify visitation; increase in stock value not considered in calculation of child support; income not imputed]** The appellate court found no error in the circuit court's finding that Appellee proved a material change in circumstances sufficient to warrant a modification of the existing visitation order.

There was a change in the parties' interactions with each other which impacted the visitation schedule followed by the parties, and the circuit court could reasonably conclude this was not in the child's best interest. The appellate court also found no error in the circuit court refusing to include the increase in value of Appellee's stock portfolio in the calculation of his child support obligation. The record was insufficient to establish that the portfolio activity constituted income as defined in Administrative Order No. 10, as there is no evidence in the record to indicate what form the capital gains and dividends from the portfolio reflected on Appellee's tax returns had taken, nor is there any indication as to whether they could be accessed and used by him in the same manner as income. Lastly, the appellate court found no error in the circuit court declining to impute income based on Appellee's lifestyle. Appellee testified regarding his income and the fact that his wife's employment and savings contribute toward paying their expenses. The record contains no evidence that Appellee is working below his full earning capacity. (McCallister, B.; CV-17-473; 3-8-18; Wynne, R.)

PROBATE

Thompson v. Brunck, 2018 Ark. App. 198 [**adoption set aside -fraudulent misrepresentation when mother signed relinquishment of rights**] Adoption proceedings run against the natural rights of parents, and statutes permitting adoptions must be strictly construed in a light favoring natural parents' rights. Although a relinquishment affidavit was attached to the petition for adoption, the court must consider the surrounding circumstances. A consent to adoption or relinquishment of rights may be withdrawn upon a proper showing of fraud, duress, or misrepresentation. A false representation is fraud when another detrimentally relies on the representation. Moreover, a legal duty can arise when one person has placed a special confidence in another, and the latter person is bound to act in good faith and with due regard for the interests of the other. Appellant was owed full disclosure given the special and sensitive circumstances, i.e. having custody of her child. Appellant proved that she did not voluntarily execute the relinquishment affidavit because of fraud or misrepresentation, and the adoption should be set aside. The deadline to withdraw a relinquishment does not apply when it is signed under fraudulent circumstances. (Martin, D.; CV-17-666; 3-14-18; Harrison, B.)

Mays v. Mullins, 2018 Ark. App. 200 [**antenuptial agreement; involuntary and unconscionable**] The appellate court found no error in the probate court's ruling that Appellant failed to prove that she involuntarily executed the antenuptial agreement or that the agreement she signed before marriage with decedent was unconscionable. The circuit court clearly put the responsibility on Appellant, an adult college-educated person, for any alleged failure to read or comprehend the agreement as a choice made at her own peril. Furthermore, because the parties had equal bargaining power, the agreement was mutual, and since it disclosed the real estate in question with particularity, the antenuptial agreement did not in any way affront the sense of justice, decency, or reasonableness. (Reif, M.; CV-17-726; 3-14-18; Klappenbach, N.)

JUVENILE

Abdi v. Ark. Dep't of Human Servs., 2018 Ark. App. 173 **[TPR – aggravated circumstances; alcohol use]** Father appealed termination of rights based on statutory grounds of aggravated circumstances where the father's alcohol problem and his failure to address it convinced the court that there was little likelihood of successful reunification. The appellate court found no clear error and affirmed, finding that the father was in denial of his problem, lied about his alcohol use, delayed treatment, and caused potential harm to the child when he drank alcohol during his first unsupervised visit with the child. (James, P.; JV-16-1061; March 7, 2018; Abramson, R.)

Crouch v. Ark. Dep't of Human Servs., 2018 Ark. App. 191 **[TPR—ICWA]** Mother appealed termination of rights arguing that the trial court erred by failing to apply ICWA. The only evidence of Indian heritage was that the DHS caseworker included a statement in the affidavit filed in support of the emergency petition at the start of the case that the mother stated that "she may be part of the Cherokee Indian nation but she is not sure." There was no further mention of ICWA during the case. Relying on prior caselaw, the appellate court found that DHS had no duty to investigate potential Indian heritage. Moreover, the mother failed to raise the issue below and her argument was not preserved for appeal. (James, P.; JV-16-610; March 7, 2018; Murphy, M.)

Swangel v. Ark. Dep't of Human Servs., 2018 Ark. App. 197 **[TPR—sufficiency of the evidence]** Termination upheld where mother failed to overcome drug addition, testing positive for methamphetamine in 28 out of 37 drug tests given throughout the case, evicted from her home due to drug use, and admittedly not ready to take custody of the children at the time of the termination hearing. The appellate court found no merit in the mother's argument that termination was not in the children's best interest and found that appellant's remaining arguments on appeal were not preserved for review. (Layton, D.; JV-15-11; March 14, 2018; Harrison, B.)

Bolden v. Ark. Dep't of Human Servs., 2018 Ark. App. 218 **[TPR—sufficiency of the evidence]** Termination order was affirmed where father was incarcerated twice during the case for different reasons, testified positive for illegal drugs multiple times, made only 15 of 41 possible visits with the children, failed to maintain stable housing, failed to maintain employment, and owed $20,000 in back child-support for older children. The appellant deferred to the trial court concerning issues of the father's credibility and found no clear error in the termination order. (Coker, K.; JV-15-251; March 28, 2018; Vaught, L.)

Johnson v. Ark. Dep't of Human Servs., 2018 Ark. App. 221 **[TPR—sufficiency of the evidence]** Termination of appellant father's rights affirmed on basis of other factors that arose

subsequent to the filing of the petition for dependency-neglect where newborn was removed from mother under Garrett's Law and it was later discovered that father had an illegal drug problem. The father's testimony was found to be not credible when he testified at the permanency planning hearing that he had not used illegal drugs for six months, yet his hair follicle test was positive for cocaine. The court found the father's continued drug use demonstrated an indifference to remedying the underlying problems. (James, P.; JV-15-251; March 28, 2018; Brown, W.)

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

Ward v. State, 2018 Ark. App 210 **[Transfer to juvenile court denied]** Denial of motion to transfer sixteen-year-old's criminal case to juvenile court was affirmed by appellate court where the trial made written findings concerning all the statutory factors and, on review, the appellate court was not left with a firm and definite conviction that the trial court made a mistake. The trial court has the discretion to determine the proper weight to be given each factor and giving the most weight to the serious and violent nature of the offense is not improper. (Sims B.; CR-16-2087; CR-16-2956; CR-16-2982; CR-16-3116; March 28, 2018; Gruber, R.)

DISTRICT COURT

Steffy v. City of Fort Smith, 2018 Ark. App. 170 **[Local Governments, Ordinances, & Regulations] [Police Power] [Legislation, Vagueness]** The city ordinances under which the appellant was convicted were not unconstitutional as they addressed issues identified in Ark. Code Ann. §14-54-901, and the testimony established that they were enacted to prevent conditions that might have become a breeding ground for mosquitos, snakes, vermin, and other things harmful to the community's health. The ordinances were not void for vagueness where they clearly prevented storing household appliances and furniture and required weeds and grasses not exceed six inches, and appellant had clearly violated the ordinances by openly storing household items and not maintaining the property. (Fitzhugh, M.; CR-17-578; 3-7-2018; Gruber, R.)

Jones v. State, 2018 Ark. App. 211 **[Right to Appeal] [Rules Application & Interpretation]** A circuit court properly dismissed defendant's appeal from the district court where the plain language of Ark. R. Crim. P. 36(c) was clear that the written request requirement was mandatory, the provisions were jurisdictional, and the defendant had failed to file a written request with the district court clerk to prepare a certified copy of the record, serve a written request on the prosecuting attorney, and file a certification of service of a written request with the district court. (Johnson, L.; CR-17-554; 3-28-18; Virden, B.)