

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

OCTOBER 2018
VOLUME 26, NO. 2

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ANNOUNCEMENTS

On October 11, 2018, the following per curiam orders were issued:

Adopt recommendations of the Automation Committee to amend Admin. Order 8, Admin. Order 19, and Admin. Order 21, effective January 1, 2019.

On October 18, 2018, the following per curiam orders were issued:

Adopt effective January 1, 2019, recommendations of the Civil Practice Committee. ARK. R. CIV. P. 72, ARK. R. APP. P. –5, ARKANSAS SUPREME COURT RULE 2-3, and PROBATE FORMS;

Adopt effective January 1, 2019, recommendations of the Criminal Practice Committee. ARK. R. CRIM. P. 33.6, ARK. SUP. CT. R. 3-4, and ARK. R. APP. P. –CRIM. 2.

CRIMINAL

Swan v. State, 2018 Ark. App. 468 [**closing arguments**] At trial, appellant asserted that the prosecutor made an improper rebuttal closing argument by misstating the State's burden of proof, to which the defense counsel objected and requested a curative instruction, which was denied. On appeal, appellant argued that the trial court abused its discretion in refusing to issue a curative jury instruction. Because the statements made by the prosecutor in closing arguments were in direct response to comments made by the defense attorney in his closing argument, and because the jury was advised of the proper burden of proof by the State, the defense, and the jury instructions, it was not an abuse of discretion for the court to refuse to issue the requested curative instruction. (Taylor, J.; CR-18-159; 10-3-18; Klappenbach, N.)

Hall v. State, 2018 Ark. App. 474 [**mistrial**] When the prosecution utilizes clear statements of fact amounting to testimony under the guise of cross-examination for the purpose of inducing a prejudicial response, this constitutes a flagrant violation that cannot be cured with an admonishment to the jury. Additionally, a prosecuting attorney should not be tempted to appeal to prejudices, pervert testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him or her to endeavor to obtain a conviction by arguments except those that are based on the evidence in the case. In appellant's case, the prosecutor uttered a deliberately misleading statement to the jury based on "facts" not in evidence. Specifically, the prosecutor informed the jury that appellant had fled from his jury trial. Factually, appellant did not flee but rather failed to appear at a previously scheduled jury trial resulting in a warrant for his arrest, with no formal failure-to-appear charge being filed. Although the circuit court gave a cautionary instruction to disregard the prosecutor's statement, that was not sufficient to cure the possible prejudice. Thus, the trial court erred in not granting the appellant's request for a mistrial. (Hearnsberger, M.; CR-18-112; 10-3-18; Whiteaker, P.)

Bynum v. State, 2018 Ark. App. 477 [**Rule 37**] Because the charges against appellant were time-barred by the applicable statute of limitations, appellant's trial counsel was ineffective for failing to file a motion to dismiss the charges. Additionally, appellant's attorney was ineffective when it failed to object to the testimony of two victims, or ask for a limiting instruction, with respect to their testimony about events that occurred outside the trial court's jurisdiction and with which appellant was not charged. (Ramey, J.; CR-18-205; 10-3-18; Hixson, K.)

Blanks v. State, 2018 Ark. App. 495 [**discovery violation; mistrial**] A mistrial is an extreme and drastic remedy that will be resorted to only when there has been an error so prejudicial that justice cannot be served by continuing with the trial or when fundamental fairness of the trial has been manifestly affected. Declaring a mistrial is proper only when the error is beyond repair and cannot be corrected by any curative relief. In appellant's case, he requested a mistrial based upon an alleged discovery violation. Because a lesser remedy, such as a continuance to locate and examine the undisclosed evidence, could have cured the alleged discovery violation, it was not

error for the circuit court to refuse to grant the requested mistrial. **[rebuke of counsel]** A circuit court's remarks do not amount to prejudicial error unless those remarks constitute an "unmerited rebuke" giving the jury the impression that defense counsel is being ridiculed. Prejudice is not shown, however, when the record reveals that the circuit court was merely irritated at defense counsel's trial tactics. In appellant's case, the court's frustrated comments to counsel did not amount to remarks that could be "construed as a reflection upon counsel's knowledge and skill as a lawyer." Thus, the trial court's denial of appellant's motions seeking a mistrial was not an abuse of discretion. (Gibson, B.; CR-17-665; 10-17-18; Whiteaker, P.)

Taff v. State, 2018 Ark. App. 488 **[motion to suppress]** The mere possession of a pistol in appellant's waistband did not constitute reasonable suspicion sufficient to seize him pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure. Thus, the seizure of appellant was illegal and unconstitutional, and all evidence obtained therefrom should have been suppressed. (Ryan, J.; CR-18-353; 10-17-18; Gladwin, R.)

Hoyle v. State, 2018 Ark. App. 498 **[discovery; rebuttal-witness exception]** The trial court excluded certain defense witnesses based upon appellant's failure to disclose them to the State until the day of trial. Thereafter, appellant attempted to use the same undisclosed witnesses as "rebuttal witnesses," thereby circumventing the need for their pretrial disclosure. The appellate court explained that appellant knew in advance of the need for the witnesses' testimony and had planned to use the witnesses in his case-in-chief until the trial court excluded their testimony as a discovery sanction. Thus, he should not have been given the benefit of the rebuttal-witness exception to the discovery rule. (Sims, B.; CR-18-38; 10-17-18; Hixson, K.)

Norton v. State, 2018 Ark. App. 507 **[sentencing]** The Supreme Court has interpreted Ark. Code Ann. § 5-4-307(b)(2) to provide that suspended sentences for one or more crimes must run concurrent with terms of imprisonment imposed for separate crimes. (Haltom, B.; CR-18-31; 10-24-18; Klappenbach, N.)

Hensley v. State, 2018 Ark. App. 513 **[hearsay; Ark. R. Evid. 803(2)]** The trial court admitted certain testimony during appellant's trial pursuant to the excited-utterance exception to the hearsay rule. Appellant challenged its admission on appeal. The appellate court reviewed the facts surrounding the statements. The challenged statements were made by the victim to a law enforcement official at the hospital after the crime occurred and after the victim had already spoken about the crime to another officer at the crime scene. There was a time lapse between the startling events and the time that the victim spoke with the officer at the hospital. The victim's statements were not spontaneous; rather, they were in response to questions in an interview by the officer. Finally, the statement itself was quite lengthy and could better be described as a narrative than an utterance. After reviewing the foregoing facts, the appellate court concluded

that the trial court abused its discretion in admitting the testimony pursuant to the excited-utterance exception to the hearsay rule. (Clawson, C.; CR-18-237; 10-24-18; Hixson, K.)

Taylor v. State, 2018 Ark. App. 506 [**Rule 37**] Appellant filed a 112-page petition for postconviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. The Rule provides that the petition shall not exceed ten pages unless the petitioner receives permission from the circuit court. Appellant did not receive permission for his over-length petition. Rule 37.1(b) allows a circuit court to dismiss an over-length petition. Accordingly, the circuit court did not abuse its discretion by denying relief on the appellant's ineffective-assistance claims in his over-length petition. (Wright, J.; CR-17-1046; 10-24-18; Gladwin, R.)

Krol v. State, 2018 Ark. App. 512 [**Ark. Code Ann. § 5-14-110(a)(2)(A)**] The offense of sexual indecency with a child does not require proof that the child victim consciously observed the indecent exposure of the defendant's genitals. The fact that appellant "laid his sex organs open to view" by children was sufficient. (Taylor, J.; CR-18-355; 10-24-18; Vaught, L.)

Wyly v. State, 2018 Ark. App. 505 [**sex-offender registration**] Pursuant to Ark. Code Ann. § 12-12-919 (a)(3), a sex offender who has pleaded guilty to a second sex offense under a separate case number must register with the sex-offender registry for his or her lifetime and is not eligible to petition to terminate the registration obligation. The statute does not require that the individual already be on the registry before the lifetime requirement applies. The appellate court explained that the General Assembly's intent when enacting the lifetime registration provision was to protect the public from sex offenders who have been deemed more likely to reoffend because they have committed more than one offense and were prosecuted under different case numbers. In appellant's case, he pleaded guilty to two separate sex offenses in two separate cases on the same day, received concurrent sentences, and was ordered to register with the sex-offender registry. The Court of Appeals concluded that appellant's case fits squarely within the statutory requirements for lifetime registration. [**due process**] "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law. The court must ask whether the new provision attaches new legal consequences to events completed before its enactment." When appellant pleaded guilty to his charges, there was no lifetime-registration requirement for offenders with subsequent convictions. The new lifetime-registration amendment may have upset appellant's expectation that he would be able to petition for removal from the registry, but it did not impose a new legal consequence that violated due process. The requirement that appellant must register as a sex offender was in effect when he was convicted, and removal of the requirement to register was never guaranteed. Additionally, the legislature did not "sweep away settled expectations suddenly and without individualized consideration." Instead, it removed the possibility that sex offenders it considers most likely to reoffend may petition to be removed

from the registry. The amended statute is not a tool for retribution against an unpopular group but a means of protecting the public. (Wright, H.; CR-18-382; 10-24-18; Virden, B.)

Rogers v. State, 2018 Ark. 309 [**Ark. R. Evid. 609**] Appellant sought to impeach one of the victims with her prior misdemeanor-theft conviction. The circuit court did not permit the testimony. On appeal, the Supreme Court explained that theft crimes involve dishonesty and are automatically admissible pursuant to Rule 609(a) and appellant was not required to proffer the conviction. It also explained that such convictions are particularly probative of a witness's credibility. The Court noted that "a person exhibits dishonesty when he or she knowingly takes unauthorized control of someone else's property or obtains that property through deception or threat with the purpose of depriving the owner of the property." Accordingly, the Court held that the circuit court abused its discretion by refusing to admit this evidence under Rule 609(a). [**harmless error**] The Supreme Court further concluded that because all of the victims' allegations were intertwined, the circuit court's error in excluding the impeachment evidence could not be considered slight. Thus, the Court refused to apply the harmless error analysis. (Wright, H.; CR-17-916; 10-25-18; Baker, K.)

Herren v. State, 2018 Ark. App. 528 [**rape-shield statute**] The "rape-shield statute is intended to protect victims of rape or sexual abuse from the humiliation of having their personal conduct, unrelated to the charges pending, paraded before the jury and the public when such conduct is irrelevant to the defendant's guilt." In appellant's case, evidence that the victim was asking appellant for sex, masturbating in front of him, offering him oral sex, attempting to undo his shorts, and touching his penis through his shorts, all within approximately ten minutes of the alleged rape, was conduct related to the pending charges, and therefore was relevant and probative to the issue of consent. Accordingly, the trial court abused its discretion when it excluded the testimony pursuant to the rape-shield statute. (Talley, D.; CR-18-215; 10-31-18; Murphy, M.)

Chavez v. State, 2018 Ark. App. 527 [**jury instructions**] During appellant's trial, evidence was presented to establish that at least forty gun shots were fired at a trailer that was believed to have people inside. The appellate court explained that such actions are considered to be beyond a gross deviation of the standard of care that a reasonable person would observe and would be considered deliberate actions and not reckless. Thus, there was no rational basis for giving an instruction for reckless manslaughter, and the trial court did not abuse its discretion in refusing to give the instruction. (Fitzhugh, M.; CR-18-233; 10-31-18; Hixson, K.)

CIVIL

Watkins v. Dept. of Agriculture, 2018 Ark. App. 460 [**motions to dismiss**] Plaintiffs, who are proceeding pro se, sued alleging that Hancock, several state agencies, three employees of those agencies, four members of a state board, and the state attorney who advised the agencies engaged in a conspiracy to conceal fraud perpetrated by Hancock. Those who were sued responded to the complaint with motions to dismiss on several grounds. The circuit court granted the motions to dismiss. There is no merit to issues raised on appeal, and the circuit court's order dismissing their complaint is affirmed. (Fox, T.; CV-16-903; 10-3-18; Abramson, R.)

Snyder v. DHS, 2018 Ark. App. 473 [**administrative appeal**] Snyder argues she was entitled to a default judgment because DHS failed to file the record within thirty days. First, agency actions governed by the APA are exempt from the Arkansas Rules of Civil Procedure, which do not apply to administrative proceedings. Therefore, default judgment is not an appropriate remedy for an appeal from an administrative proceeding. Additionally, the statute clearly provides that the circuit court may allow up to an aggregate of 90 days in which to transmit the entire record of the agency proceeding that is being reviewed. Snyder does not argue DHS failed to transmit the entire record within the 90-day limitation of the statute. The circuit court allowed more than 30 days but less than 90 days, which conforms with the statute. [**abuse**] There is substantial evidence to support the agency's finding of abuse. While it is true there was no physical injury, the evidence supports the finding that Snyder's actions inflicted pain on SM. While Snyder testified she did not intend to intentionally abuse SM, she did intend to pull SM's arm to reposition it, to the point that her actions moved SM's wheelchair when she pulled on her arm. Snyder told Webb she "snatched" SM's arm because SM was resisting her. Such an action was unnecessary since there were protocols in place to deal with dementia patients, including returning later to perform the medical treatment. Furthermore, the hearing officer found Snyder's testimony was not credible, while finding Porter, Rivers, and Webb's testimony to be credible. While this case was not the most egregious case of abuse that has been perpetrated in a long-term-care facility, there is substantial evidence to support the hearing officer's finding that the allegation of abuse was founded. (Piazza, C.; CV-18-34; 10-3-18; Glover, D.)

Martin v. Haas, 2018 Ark. 283 [**voter ID**] Act 633's constitutional amendment is germane to Amendment 51 and consistent with its policy and purpose – to ensure that all who cast ballots are legally qualified to do so. It is therefore constitutional. (Gray, A.; CV-18-375 10-11-18; Wynne, R.)

Washington Regional Medical Center v. Northwest Physicians, LLC, 2018 Ark. App. 497 [**physician-patient privilege-discovery**] WRMC argues on appeal that it is entitled to claim the Rule 503 physician-patient privilege on behalf of the nonparty patients, that the privilege prohibits the discovery of its nonparty patients' medical records, and that Northwest's discovery

requests in support of its case against Senter must yield to WRMC's patients' absolute privilege. Giving the words of Rule 503 their ordinary and usually accepted meaning in common language, the privilege does not apply in this circumstance because WRMC is not entitled to claim the privilege. Rule 503 expressly states that the privilege may be claimed by the patient or the patient's physician at the time of the communication. Ark. R. Evid. 503(c). The rule defines a "patient" as a person who consults or is examined or interviewed by a physician or psychotherapist, and it defines a "physician" as a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be. Ark. R. Evid. 503(a)(1), (2). These definitions do not include WRMC. Rather, WRMC concedes that the privilege belongs to the patient yet claims that it is the proper party to assert it on behalf of the patient. However, under Rule 503, it is not. The privilege belongs to patients and their physicians who are presumed to have the authority to claim the privilege. Because WRMC is not entitled to claim the privilege on behalf of the nonparty patients and because it is not a "physician" under the rule, the privilege does not apply. Accordingly, the circuit court's order granting Northwest's motion to compel is affirmed. (Threet, J.; CV-17-1007; 10-17-18; Vaught, L.)

McGraw v. Crowden, 2018 Ark. App. 510 [**land-locked property/easement**] McGraws' claims were not within the circuit court's jurisdiction. Article 7, section 28 of the Arkansas Constitution taken together with Arkansas Code Annotated sections 27-66-401 to -404 gives the county court the power of eminent domain to allow access to landlocked tracts. Pursuant to Arkansas Code Annotated section 27-66-401(a)(1), a landlocked property owner must seek relief in the county court. If the county court determines that the circuit court has jurisdiction over the matter, the county court may stay the proceedings or dismiss the case without prejudice to be refiled within one year of dismissal. Ark. Code Ann. § 27-66-402(a)(2). Here, the Crowdens sought relief in the county court. The county court, however, never ruled on their claim, nor did it issue a stay or dismiss the proceedings. Instead, the parties attempted to invoke the circuit court's appellate jurisdiction by filing a notice of appeal in the Newton County Circuit Court. Arkansas Code Annotated section 27-66-403(b)(1) states that "[e]ither party may appeal to the circuit court from the final order or judgment of the county court within thirty (30) days from the entry of the order and not thereafter." Upon proper appeal, the circuit court conducts a de novo review of the county court's action. Ark. Code Ann. § 27-66-403(b)(2). The circuit court's jurisdiction, however, is appellate, not original. Here, the county court never entered a final order or judgment. Because no action was ever taken by the county court, there was no final order or judgment from which an appeal could have been taken. Thus, the circuit court's assumption of appellate jurisdiction in this matter was clearly inappropriate. It is well settled that the parties to an action may not confer subject-matter jurisdiction on a court. Because the circuit court lacked jurisdiction to decide the matter, the underlying judgment of the circuit court is void. (Webb, G.; CV-17-1026; 10-24-18; Whiteaker, P.)

Andreasen v. South Mountain Estates Association, 2018 Ark. App. 530 [**vacate a public road**]
The method described in Arkansas Code Annotated sections 14-18-101 through 110 is not the only process for vacating a dedicated roadway. The circuit court made sufficient findings of unique factors that show appellees met their burden of proving abandonment by a preponderance of the evidence -- the Subdivision's POA assesses its members for maintenance of the Drive, and the POA is the entity that maintains it; every property owner within the Subdivision wanted the Drive to be private; appellants do not need to access their property from the Drive, as evidenced by the substantial work they were performing on the "back side" of their property just a few months before the trial date; and by appellants' own testimony, they used the Drive only sporadically over the years to fix their fence, "inspect their property," "pick up souvenirs," and "just generally be nosy." The statute was not intended to overrule the common-law remedy of abandoning a dedicated roadway. Generally, when a public road is abandoned, it does not affect the private rights of occupants to ingress and egress. Here however, appellants tolerated the existence of the gate for more than seven years before they filed suit. Appellants testified that they had accessed their property by using the Drive "maybe five or six" times since 2005, which is when the construction of homes was mostly completed, and the gate was closed. Based on the facts in this case, appellants were on notice and failed to exercise their rights. The circuit court did not err in finding appellants had abandoned their rights to ingress and egress. (Scott, J.; CV-18-67; 10-31-18; Murphy, M.)

Commercial Fitness Concepts, LLC v. WGL, LLC, 2018 Ark. App. 522 [**conversion/damages**]
Consequential damages may be established in a conversion case where the conversion of personal property causes loss-of-use damages concerning real property. The market value of the converted property is not the only measure of the damages recoverable in an action for conversion; the circumstances of the case may require a different standard, including a measure of the expenses incurred as a result of the conversion. However, the trial court's finding that consequential damages were established in this case was in error. Consequential damages in a personal-property conversion case would be an exception to the rule, and the "as a result of" language reasonably equates to proximate cause. Proximate cause is defined as that which in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. Here, the building at issue was specifically built to house a huge gym. Charlton acknowledged at one point in his testimony it was Garner's bankruptcy that caused the loss of rent; Charlton testified he could not afford to fix the air-conditioning problem, which apparently would have cost about \$6,000, but he also stated he waited for some time thinking Commercial Fitness would return the computer interface module/panel; and when the equipment was not returned, he borrowed the money to fix it. There was also testimony the air-conditioning system was fixed in August 2015, but the property still did not lease or sell until late November 2015. The evidence presented at the hearing on remand did not establish that the lost rent awarded by the trial court was proximately caused by the conversion of the computer-interface module/panel. (Scott, J.; CV-18-108; 10-31-18; Glover, D.)

DOMESTIC RELATIONS

Bundy v. Womble, 2018 Ark. App. 462 [**award of custody based on best interest; denial of ARCP 59 motion for new trial**] The appellate court found no error in the circuit court's finding that it was in the child's best interest for Appellee to be awarded custody. There was conflicting testimony, and the circuit court made extensive findings regarding the evidence and witness credibility. The appellate court also found no error in the circuit court's denial of a motion for a new trial pursuant to Arkansas Rule of Civil Procedure 59(a)(7). The moving party must show that the newly discovered evidence would probably have changed the result of the trial, and the circuit court was well within its province to find the new evidence unpersuasive. Furthermore, the new evidence was received by the circuit court two weeks before the opinion was entered, and the circuit court may have considered it before making a decision. The fact that new information has been discovered that merely impeaches or otherwise tests the credibility of a witness is not sufficient to warrant a new trial. (Wilson, E.; CV-18-91; 10-3-18; Virden, B.)

Hargis v. Hargis, 2018 Ark. App. 469 [**military retirement division as of the date of the divorce**] The parties' divorce decree awarded Appellant 50% of Appellee's retirement account as of the date of divorce. The appellate court gave effect to the plain language used, as there was no other reasonable interpretation. Military pensions are generally divided proportionately to the number of years of marriage coinciding with the service. Therefore, the appellate court found no error in the circuit court's finding that the provision was unambiguous in setting the value of Appellant's portion at 50% on the day of the divorce, i.e. 37.5% of the total pension. (Williams, T.; CV-17-499; 10-3-18; Klappenbach, N.)

Doss v. Doss, 2018 Ark. App. 487 [**factors when making inequitable distribution of property**] In accordance with Arkansas Code Annotated 9-12-315(a)(1), the circuit court shall equally distribute all marital property unless it is determined that such a distribution would be inequitable; if the property is not divided equally, then the circuit court must state the reasons and basis for not doing so, and the basis and reasons should be recited in the order entered in the matter. There are factors recited in the statute to be considered by the circuit court in the event that the marital property is not divided equally. While the circuit court must consider the factors set forth in the statute and state its reasons for dividing property unequally, it is not required to list each factor in its order or to weigh all the factors equally. The appellate court found that the circuit court correctly considered all relevant factors and explained its reasoning for the unequal division. (McSpadden, D.; CV-17-1082; 10-17-18; Abramson, R.)

Hargis v. Hargis, 2018 Ark. App. 490 [**opportunity to be heard in response to motion for attorney's fees**] This is a companion case to *Hargis v. Hargis* cited above. Here, the appellate court considered whether Appellant was denied a sufficient opportunity under the rules of civil procedure to oppose the fee request before the circuit court decided it. In response to Appellee's

motion for attorney's fees and expert witness fees, Appellant filed a timely response asking the circuit court to deny the motion outright or to set a hearing so she could develop the parties' respective financial pictures and abilities to pay fees. Following Appellant's response being filed, the circuit court ordered Appellant to pay the attorney's fees only. Arkansas Rule of Civil Procedure 54(e)(3) states that if a party asks, then a circuit court "shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(c) and Rule 78" after a request for attorney's fees. The appellate court found the circuit court, in their view, could order a hearing or written affidavits/deposition, assuming a party's evidentiary submission was not unduly limited or curtailed by the choice. The evidence parties should expect a circuit court to receive (in either written or oral form) will, naturally, depend on the complexity of the parties' case for fees, the particular points to be made, the amount and sort of relevant information already in the record (if any), what the applicable law requires the court to consider, and the circuit court's preferences given the circumstances and its calendar. Since Appellant requested a hearing, the appellate court found that she should have been permitted to pursue her preferred "oral testimony" option, unless the circuit court ordered her to present evidence in an acceptable written form like affidavits. Therefore, the appellate court found that Appellant should have received a more fulsome opportunity to be heard in opposition of Appellee's motion for attorney's fees and costs. (Williams, T.; CV-17-771; 10-17-18; Harrison, B.)

Fares v. Fares, 2018 Ark. App. 499 [**estopped from denying the validity of a marriage**] While Arkansas does not recognize common-law marriages or marriages created by estoppel, equity can require that parties be estopped from denying the validity of a marriage. The appellate court found no error in the circuit court's ruling that due to Appellant's conduct, he was estopped from denying the validity of the parties' marriage. The appellate court found that it was not necessary to prove that Appellant knew that marrying his cousin was illegal for the circuit court to find him estopped from denying the validity of the marriage. The circuit court found Appellee relied on the belief that she was married, performed the services of a spouse, and had four children with Appellant. This reliance was premised in part on the conduct of Appellant who obtained a marriage license with Appellee and acted as her husband for the next twenty-six years, and he was estopped from denying the validity of the marriage. (Welch, M.; CV-17-1021; 10-17-18; Hixson, B.)

Jackson v. Littleton, 2018 Ark. App. 511 [**custody considerations including child's preference**] The facts before the circuit court were that the older child was doing significantly better, both behaviorally and gradewise, in Appellee's custody, and there was evidence that Appellee would soon have a more appropriate home. The child testified that he was happier with Appellee, and the circuit court could take that desire into consideration. Therefore, the appellate court found that the circuit court did not err in finding that it was in the child's best interest for Appellee to be awarded primary physical custody. (Smith, V.; CV-18-222; 10-24-2018; Whiteaker, P.)

Newton v. Newton, 2018 Ark. App. 525 [**evidence of income prior to entry of last order was relevant to determine child support modification**] The circuit court was tasked with determining Appellant's expendable income from 2015 and 2016 to determine whether there had been a change in circumstances sufficient to warrant a modification of the child support amount awarded in the parties' Divorce Decree. The parties' Decree failed to contain the court's determination of Appellant's income at the time of entry of the Decree, and it does not recite whether the child support amount was a deviated or chart amount. Therefore, the appellate court found that the circuit court erred by excluding evidence of Appellant's 2015 income that was allegedly used by the circuit court in 2016 to calculate his base child-support obligation. In failing to admit the relevant evidence on his income at the time the child support was set, the circuit court was unable to consider Appellant's motion for modification using the guidelines set forth in Administrative Order No. 10 and Arkansas Code Annotated 9-12-312(a)(3). (Goodson, D.; CV-17-1042; 10-31-2018; Vaught, L.)

Fischer v. Fischer, 2018 Ark. App. 519 [**no requirement to average fluctuating income when setting child support**] The circuit court considered all the evidence, including Appellee's income-tax returns, his affidavit of financial means, and his testimony, and the circuit court determined Appellee's expendable income. There is no provision that requires an averaging method of calculating support when a payor's income fluctuates, and the circuit court did not have to average Appellee's income over the last four years as requested by Appellant. The appellate court found that the circuit court referred to and followed the family-support chart and ordered an amount of child support that is presumed reasonable. (Herzfeld, R.; CV-18-103; 10-31-18; Virden, B.)

Cordell v. Cordell, 2018 Ark. App. 521 [**immoral conduct, child's preference, and one child's best interest does not infer best interest on other children in custody matter**] Based on a review of the record, the circuit court considered evidence regarding a material change in circumstance and the best interest of the children. The Arkansas Supreme Court has considered immoral conduct to be a factor in determining whether circumstances have changed in cases that involve modification of custody. The circuit court's consideration of the children's wishes is not required, but permissive. Also, a party cannot use a finding that it is in one child's best interest that his custody be awarded to a parent to infer that it is in the sibling's best interest to be awarded to the same parent. With these considerations, the appellate court found that the circuit court was not clearly erroneous in changing custody to Appellee. (Putman, J.; CV-18-304; 10-31-2018; Gladwin, R.)

PROBATE

In the Matter of the Adoption of J.N., a Minor, 2018 Ark. App. 467 [**adoption by guardians of child; unjustifiable and significant failure to communicate; best interest discussion**] The appellate court found no error in the circuit court granting the adoption. The circuit court found that the mother's three or four visits over three years, and possibly a few phone calls, was a significant failure to communicate. The circuit court also found the failure unjustifiable since she had a vehicle and could have also sent letters/cards. The appellate court affirmed the circuit court's best interest finding because it allows certainty and permanency in the child's life-- she has been in the guardians' custody since she was one year old, she is happy and healthy, and her mother is a virtual stranger to her. By granting the adoption, the appellate court found that the circuit court has correctly and permanently placed the child with her "real family." (Hughes, T.; CV-17-1066; 10-3-18; Harrison, B.)

Ballard and Ballard v. Howard, 2018 Ark. App. 479 [**step-parent adoption denial based upon best interest**] The appellate court found no error in the circuit court's decision that the Appellants (mother and stepfather) failed to meet their burden by clear and convincing evidence that adoption was in the best interest of the child. Terminating parental rights bears a heavy burden on the party seeking to terminate the relationship, and there was significant evidence regarding the child's relationship with Appellee's family. Therefore, even though Appellee failed to support his child for a 12-month period, the appellate court found no error in the denial of the adoption petition based upon the child's best interest. Note: a Petition for Review was filed, and there is a four-judge-dissent which states that the child's relationship with Appellee's family was not a sufficient basis upon which to deny the adoption when compared with the evidence clearly demonstrating that the adoption is in the child's best interest and would promote stability in his life. (Hannah, C.; CV-17-798; 10-3-18; Murphy, M.)

Craig v. Craig et al, 2018 Ark. App. 489 [**prenuptial agreement's effect on last will and testament; condition precedent to inherit**] The decedent's last will and testament (LWT) stated that his stepchildren should receive the residue of his estate if his spouse failed to survive him by thirty days. The decedent and his spouse divorced after execution of the LWT. However, following execution of an antenuptial agreement (AA) wherein they waived interest in the other's estate, they remarried. Pursuant to Arkansas Code Annotated 28-25-109(b), if, after making a will, the testator is divorced, all provisions in the will in favor of the testator's spouse so divorced are revoked. The appellate court found that the circuit court correctly found that the AA had the operative effect on the LWT as did 28-25-109(b)—it revoked any right that spouse had to share in the decedent's estate and the spouse's residuary bequest was declared void. The AA did not cancel the entirety of the LWT because the statute controls the only methods to revoke a will. Therefore, the circuit court then had to construe the second residuary bequest to the decedent's stepchildren. Although the AA did not revoke the stepchildren's rights, the

condition precedent necessary for them to inherit was not met. The invalidity of the bequest to the spouse did not rid the LWT of the condition precedent that the stepchildren were only to recover if the spouse failed to survive the decedent by thirty days. Thus, the residue must pass by intestate succession, and the appellate court found error in the circuit court's determination that the stepchildren should inherit. (Hearnsberger, M.; CV-18-82; 10-17-18; Gladwin, R.)

Paschall v. Paschall et al, 2018 Ark. App. 514 [**waiver of notice in guardianship matter waived father's notice to all proceedings**] Appellant signed a notarized waiver which stated that he waived his time to answer and the formal statutory notice requirements for all proceedings, as well as his appearance therein, and that he consented to his parents obtaining a guardianship of his children. Appellant claims he did not intend to waive notice and consent to any other parties being appointed as guardians, and that he should have been notified before the appointment of a guardian other than his parents. Appellant could have limited his waiver to notice for specific hearings pursuant to Arkansas Code Annotated 28-1-113(c) and 28-65-2017(a)(2), but he failed to do so. The clear and unambiguous language stated that he waived notice to "all proceedings" without any limitations. Furthermore, although Appellant argues that he revoked his waiver and consent by filing pleadings in the circuit court, Appellant failed to either revoke or withdraw his written waiver of notice in his pleadings and he never requested written notice. Therefore, the appellate court found no error in the circuit court granting the guardianship (Bryan, B.; CV-18-188; 10-24-18; Hixson, K.)

In the Matter of the Guardianship of A.B., S.O., and R.O., Minors, 2018 Ark. App. 529 [**guardianship awarded to third party over blood-relative**] Appellants (grandparents) appeal the circuit court's denial of their petition for guardianship, and they appeal the award of guardianship to Appellee (third-party). The appellate court found that there was ample evidence before the circuit court that Appellee was qualified and suitable to serve as guardian. Appellee had served as guardian for the child on two prior occasions, and the circuit court heard evidence about Appellee's home environment as well as how Appellee interacted with and cared for the child. While the circuit court must give regard to the prospective guardians' blood relationship with the child, it must only be a consideration of the circuit court. The record demonstrates that the circuit court believed that Appellee would be the better person to parent the child, and the appellate court found the circuit court's best-interest findings are supported by the evidence. (Smith, P.; CV-18-35; 10-31-18; Murphy, M.)

Canerday-Banks v. Barton et al, 2018 Ark. App. 523 [**adoption consent; ability to waive waiting period to consent; unreasonably withholding consent**] Appellants appeal the circuit court's order dismissing their petition to adopt a minor child and granting the adoption petition filed by Appellees. Under Arkansas law, a party is required to prove two things to succeed with respect to his or her petition to adopt a child: (1) that all necessary consents to the adoption have been obtained or waived, and (2) that clear and convincing evidence proved that their adoption of

the child is in the child's best interest. The appellate court found no error in the circuit court dismissing Appellants' adoption petition because the consent was filed the day before the trial when it should have been filed 10 days before. Arkansas Code Annotated 9-9-209(b) states that the consenting party may elect to waive the ten-day waiting period in favor of a five-day period, and DHS never elected to waive the ten-day waiting period in this case. Therefore, at the time of the hearing, the Appellants' petition for adoption did not meet the statutory requirements and it was properly dismissed. There is one exception to the consent requirement, i.e. consent is not necessary if the legal guardian (DHS herein) has failed to respond in writing to a request for consent for a period of sixty days or who, after examination of his or her written reasons for withholding consent, is found by the court to be withholding his or her consent unreasonably. Arkansas Code Annotated 9-9-207(a)(8). The appellate court found that DHS unreasonably withheld their consent to Appellees adopting the child because DHS preferred that the child be adopted by Appellants because they are the biological grandparents. (Coker, K.; CV-17-992; 10-31-18; Vaught, L.)

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King v. Ark. Dep't of Human Servs., 2018 Ark. App. 464 [**TPR—sufficiency of the evidence**] Termination of father's rights affirmed where he had a history of abuse to the infant child, resulting in subdural hematoma and bone fracture, domestic violence, incarceration, and failing to comply with the case plan and court orders after the DN case was filed. There was clear and convincing evidence of the subsequent factors ground for TPR where the father failed to comply with the court orders and case plan throughout most of the case. Termination was in the children's best interest where the children were adoptable and the risk of potential harm if the children were returned to the father was high based on the father's history. (Zimmerman, S.; JV-16-820; October 3, 2018; Gladwin, R.)

Mitjans v. Ark. Dep't of Human Servs., 2018 Ark. App. 472 [**TPR—sufficiency of the evidence**] Court of Appeals affirmed order terminating father's rights based on subsequent factors ground although the ground was not specifically pled in the TPR petition. However, during the termination hearing evidence was presented in support of this ground and the father did not object nor did he raise the issue when the court announced its ruling from the bench. (Coker, K.; JV-16-38; October 3, 2018; Klappenbach, N.)

Phillips v. Ark. Dep't of Human Servs., 2018 Ark. App. 463 [**Adjudication—sufficiency of the evidence**] Child was found dependent neglected due to physical abuse based on bruising in various stages of healing on his legs, buttocks, and lower back and the father's admission that he spanked the child and could have caused at least some of the bruising. On appeal, the father argued that he is protected by the parent exception to the abuse definition, which allows reasonable and moderate physical discipline, but because he did not make the argument to the

trial court, it cannot be considered on appeal. Finding no clear error in the trial court's findings, the dependency neglect finding was affirmed. (Blatt, S.; JV-17-379; October 3, 2018; Virden, B.)

White v. Ark. Dep't of Human Servs., 2018 Ark. App. 459 [**TPR—termination of the rights of only one parent**] Mother argued on appeal that termination of her parental rights was unnecessary and improper where child was placed in the permanent custody of father. The appellate court affirmed, finding that the termination of the rights of only one parent may be proper and the trial court's findings were not clearly erroneous. The evidence was clear and convincing that the mother did not comply with the case plan and was volatile and unstable, whereas the father complied with the case plan and provided permanency for the child. (Sullivan, T.; JV-16-89; October 3, 2018; Gruber, R.)

Day v. Ark. Dep't of Human Servs., 2018 Ark. App. 492 [**TPR—ICWA**] After order terminating rights was entered, mother appealed, challenging the court's adoptability findings and the court's finding that the three children need not be adopted together, as is preferred under ICWA. Two of the three children, ages ten and five at removal, had special needs that were being addressed through treatment. The third child, age two, had no special needs and remained in one foster home and potential adoptive home throughout the case. A Cherokee nation child-welfare specialist testified in support of grounds for termination but testified that the preference of the tribe would be that the children be placed together. The trial court found that it would be permissible for the children to be adopted separately because of the special needs of the two older children, but specifically found that they were all three adoptable and that it was in the best interest of the youngest child to remain in her placement. The appellate court found that the trial court fully considered evidence of adoptability and the evidence will not be reweighed on appeal. Finding no clear error, the termination order was affirmed. (Zimmerman, S.; JV-16-836; October 17, 2018; Harrison, B.)

Hunter v. Ark. Dep't of Human Servs., 2018 Ark. App. 500 [**TPR-sufficiency of the evidence**] Father, who was level three sex offender and had a history with DHS involving sexual and physical abuse of his older children, appealed TPR order. The appellate court affirmed, rejecting the father's argument that the trial court erred by not appointing counsel prior to the TPR hearing. Arkansas law requires the court to appoint counsel to an indigent parent who requests counsel only when custody was removed from that parent. Given the father's history, the evidence was clear and convincing in support of termination based on aggravated circumstances and termination was in the child's best interest. (Talley, D.; JV-16-48; October 17, 2018; Murphy, M.)

Wright v. Ark. Dep't of Human Servs., 2018 Ark. App. 503 [**TPR—sufficiency of the evidence**] After termination order was entered, mother appealed, arguing first that the trial court erred by denying her motion for continuance of the termination hearing but then waiting four months to

enter the TRP order. The appellate court was unpersuaded, holding that failing to enter an order within the statutory timeframe of thirty days does not constitute reversible error. Next, the mother argued that the court erred in finding that termination was in the child's best interest. Again, the appellate court was unpersuaded, finding no clear error in the trial court's finding. Although there was some evidence of compliance with the case plan by the mother, the mother's situation declined during the case, she was unstable, and her poor choices led her to being incarcerated at the time of the termination hearing. (Hendricks, A.; JV-16-387; October 24, 2018; Gruber, R.)

Arkansas Dep't of Human Servs. v. Dowdy, 2018 Ark. 307 [**Contempt—DHS attorney and caseworker**] In a dependency neglect proceeding, the trial court placed children with their grandparents over the objection of DHS, who objected on the basis that the grandfather is a registered sex offender. A few months later, DHS filed a motion for change of custody, again arguing that the children should not be placed with the grandparents due to the grandfather's status as a sex offender, but alleging no new facts. At a hearing on the motion, the attorney ad litem and the grandparents argued that the motion should be dismissed because there was no new evidence, the issue had been decided, and DHS was barred by res judicata from retrying the issue. Also at that hearing, the attorney ad litem took issue with the fact that the DHS caseworker, who had testified in every hearing throughout the history of the case, left the courthouse immediately prior to the hearing. The court questioned the DHS attorney concerning the reason for the caseworker leaving and the attorney admitted that he did not want the caseworker to be questioned. The court set a show-cause hearing for a later date for the DHS attorney and caseworker to show cause why they should not be held in contempt for hindering or interfering with the proceedings. At the show-cause hearing, the evidence revealed that the DHS attorney had been concerned that the caseworker was likely to support the placement of the children with the grandparents, and that the DHS attorney instructed the caseworker to leave the courthouse so that she would not be able to testify contrary to the agency's official position. On appeal, DHS argued that because the caseworker had not been under subpoena, the behavior of DHS personnel could not be considered contemptuous. In analyzing the facts of the case and applying the law of contempt to the facts, the Supreme Court found that a person may be found in direct criminal contempt when exhibiting disorderly, contemptuous, or insolent behavior directly in the presence of the court. The Court further discussed the obligation of the DHS attorney, as an officer of the court, to act with candor. The attorney's intent to prevent the court from hearing the testimony of the caseworker, who was known to be a relevant witness and was already present in the courtroom, was contemptuous whether the caseworker had been subpoenaed or not. Concerning the caseworker, her actions in being present during the courtroom the entire day, then leaving immediately prior to this hearing, then later returning, demonstrated her intent to deprive the court of relevant and material testimony and was also contemptuous. (Medlock, M.; JV-2015-287; October 25, 2018; Hart, J.)

Black v. Ark. Dep't of Human Servs., 2018 Ark. App. 518 [**TPR—sufficiency of the evidence**] Mother appealed order terminating her parental rights, arguing that there was no risk of potential harm in returning the child to her when a sibling of the child was allowed to remain in the mother's home. The child at issue, S.N., was the subject of the dependency neglect case and was in foster care from 2014 to 2016, and the second child, S.B., was born during the interim, in 2015. The appellate court held that the best interest of each child must be considered individually and it was not reversible error for the trial court to give no weight to the mother's relationship with S.B. when considering S.N.'s best interest. (Sullivan, T.; JV-16-45; October 31, 2018. Abramson, R.)

Elliot v. Ark. Dep't of Human Servs., 2018 Ark. App. 526 [**TPR—sufficiency of the evidence**] Fifteen-day-old infant was removed from parents after being bitten by a rat in 75-100 places all over her body, including numerous bites on her head and face. The parents waited over five hours after discovering the injuries to seek medical care. The father argued that because he was not legally declared the father until after the dependency neglect case was initiated, he was not legally the father at the time of the incident and the TPR ground applying to a parent did not apply to him. The court rejected this argument, finding that the ground applies to parents whether a legal parent at the time or not. The termination order was affirmed. (Talley, D.; JV-17-35; October 31, 2018; Vaught, L.)

Lopez v. Ark. Dep't of Human Servs., 2018 Ark. App. 532 [**TPR—sufficiency of the evidence; aggravated circumstances**] The department began working with the family due to concerns with the children's poor school attendance. In the initial filing, DHS did not seek to remove custody of the children from the mother; however, when the poor school attendance continued, DHS filed a petition for emergency custody. The mother failed to comply with the case plan and court orders throughout the sixteen months of the case, living in shelters rather than obtaining appropriate housing, failing to appear for a psychological evaluation, and generally failing to follow through with the assistance that was offered her. The appellate court affirmed the trial court's order terminating the mother's rights on the ground of aggravated circumstances. (Zuerker, L.; JV-16-467; October 31, 2018; Brown, W.)

Moore v. State, 2018 Ark. App. 516 [**Motion to transfer to juvenile court**] Appellant was seventeen-years-old when he reportedly stole a bag of money from a seventy-four-year-old woman and cut her hand with a knife while trying to rip the money bag from her possession. He was charged as an adult with aggravated robbery and aggravated assault and moved that the case be transferred to juvenile court. The trial court denied the motion and made written findings of the statutory factors listed in Ark. Code Ann. § 9-27-318. Not left with a firm and definite conviction that a mistake was made below, the appellate court affirmed. (Johnson, K.; CR-18-5; October 31, 2018; Gruber, R.)