

# APPELLATE UPDATE

---

PUBLISHED BY THE  
ADMINISTRATIVE OFFICE OF THE COURTS

JANUARY 2018  
VOLUME 25, NO. 5

*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

*McKinney v. State*, 2018 Ark. App. 10 [**Ark. R. Crim. P.16.2**] Although Rule 16.2 of the Arkansas Rules of Criminal Procedure does not require a pretrial hearing on a motion to suppress, there is statutory authority and case law that mandate a hearing on a request to suppress a statement. (Talley, D.; CR-17-264; 1-10-18; Vaught, L.)

*Herren v. State*, 2018 Ark. App. 11 [**sentencing**] Because the statute on obtaining a presentence report is not mandatory, and because the court referenced the evidence it considered when it sentenced appellant, appellant failed to establish that the circuit judge abused its discretion by “mechanically” refusing to order a presentence report, which appellant requested. (Talley, D.: CR-17-413; 1-10-18; Murphy, M.)

*Reynolds v. State*, 2018 Ark. App. 8 [**jury instruction; domestic battery in the first degree**] A circuit court is not required to give a proffered jury instruction simply because it is a correct

statement of the law. A non-model instruction should only be given when the model instruction does not correctly state the law or when there is no model instruction on the subject. In appellant's case, the circuit court did not abuse its discretion when it rejected appellant's proffered version of AMCI Crim. 2d 2610, which added a definition for the phrase "circumstances manifesting extreme indifference to the value of human life" to the model instruction. (McCallum, R. CR-16-812; 1-10-18; Whiteaker, P.)

*Harrell v. State*, 2018 Ark. App. 6 [**admission of evidence**] The trial court did not abuse its discretion when it permitted a latent-print examiner to testify that she matched a print found at the crime scene to appellant's fingerprint by using the Automated Fingerprint Identification System [AFIS]. Although the latent-print examiner could not authenticate appellant's fingerprint in AFIS, the individual who put appellant's fingerprint into the system was able to provide that testimony and the latent-print examiner was able to offer extensive testimony about the process of fingerprint identification and the reliability of AFIS. Thus, there was no basis upon which to conclude that the challenged fingerprint evidence was anything other than what its proponents claimed it to be. (Ritchey, D.; CR-17-471; 1-10-18; Glover, D.)

*Turner v. State*, 2018 Ark. App. 5 [**Brady violation**] There are three elements of a true *Brady* violation: the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; the evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued. The prosecutor has a duty to learn of any favorable information known by others acting on the government's behalf, including the police and must disclose the information in sufficient time to permit the defense to make beneficial use of it. When the prosecutor fails to provide information, the burden is on the defendant to show that the omission was sufficient to undermine confidence in the outcome of the trial. A defendant, however, is not entitled to simply rely on the State's subpoena or witness list for his own defense; the accused is not entitled to rely on discovery as a substitute for his own investigation. In appellant's case, the State provided the challenged evidence to the defense as soon as it was made aware of its existence, which was five days before the trial. Additionally, the court allowed the defense to cross-examine the State's witnesses about the challenged evidence. Based upon the foregoing facts, the trial court did not err when it concluded that appellant was not entitled to a continuance or a mistrial due to the State's alleged mishandling of discovery. [404(b)] The trial court did not abuse its discretion when it admitted evidence from an individual who testified that she encountered appellant at the crime scene one day before the victim was attacked. The testimony was relevant to the issues of identification, preparation, and absence of mistake. The testimony also concerned an event that was close in time, the same general location, and involved a similar person. [**appointment of a special prosecutor**] Although a deputy in the prosecuting attorney's office was a potential witness in appellant's case, the court was not required to appoint a special prosecutor for appellant's case. The circuit court found that the witness, who had not investigated the case, participated in the charging decision, interviewed

witnesses, read the case file, or consulted on tactical decisions in the case, had not contaminated the entire prosecutor's office due to his status as a witness. The court also found that the prosecutor's office did not receive an unfair advantage based upon the possibility that the deputy would be a witness. The appellate court concluded that the trial court's findings were not an abuse of discretion. (Taylor, J.; CR-17-166; 1-10-18; Klappenbach, N.)

*Arnold v. State*, 2018 Ark. App. 22 [**Ark. R. Crim. P. 17.1; disclosure of discovery**] Although the State failed to provide certain information in discovery, the trial court did not err when it denied appellant's request for a continuance based upon the State's failure because: (1) appellant did not clearly demonstrate how the trial court's granting of a continuance would have altered the outcome of the revocation hearing; (2) any alleged discovery deficiency was cured prior to the hearing during a recess in which appellant was permitted to interview the undisclosed witness; and (3) there was no assertion that the State was attempting to conceal discoverable evidence. (Weaver, T.; CR-17-521; 1-24-18; Gladwin, R.)

*Rockins v. State*, 2018 Ark. App. 19 [**sufficiency of the evidence; aggravated robbery**] A person commits robbery if, with the purpose of committing a felony or misdemeanor theft, the person employs or threatens to immediately employ physical force upon another person. A person commits aggravated robbery if the person commits a robbery while armed with a deadly weapon. There is no requirement that a threat of physical harm be made directly or indirectly to a victim—only that it be immediately threatened, however that may be communicated. In appellant's case, when he informed the victim that "it was a robbery" while he was holding a gun he communicated a threat of imminent harm to the victim and when the victim saw appellant's hand on the gun and was informed that it was a robbery she perceived a threat. Accordingly, substantial evidence supported appellant's conviction for aggravated robbery. (Clawson, C.; CR-17-371; 1-24-18; Abramson, R.)

*Crift v. State*, 2018 Ark. App. 15 [**jury instructions**] Based on appellant's claim of innocence, there was no rational basis to instruct the jury on manslaughter as a lesser-included offense of capital murder or first-degree murder. Therefore, the circuit court did not err in declining to give the instruction. (Guynn, A.; CR-17-542; 1-24-18; Gruber, R.)

*Duren v. State*, 2018 Ark. App. 68 [**sufficiency of the evidence; internet stalking of a child**] A person commits the offense of internet stalking of a child if the person being twenty-one years of age or older knowingly uses an internet service to receive a picture of an individual that the person believes to be fifteen years of age or younger in furtherance of an effort to arrange a meeting with the individual for the purpose of engaging in sexual intercourse, sexually explicit conduct, or deviate sexual activity. The testimony at appellant's trial established that he solicited and received a photograph of his victim which was transmitted over the internet. Evidence was also introduced from text messages between appellant and the victim that demonstrated that

appellant believed that his victim was fourteen years old and that he arranged a meeting with her for the purpose of engaging in sex. Thus, substantial evidence supported appellant's internet-stalking-of-a-child conviction. (Clawson, C.; CR-17-600; 1-31-18; Vaught, L.)

*Lacy v. State*, 2018 Ark. App. 66 [**new trial**] The trial court did not abuse its discretion when it denied appellant's request for a new trial, which was based upon the fact that a juror failed to disclose that he was familiar with the victim. Although the juror did not advise the other members of the jury that he knew the victim, he did discuss his observations of the victim's neighborhood with the other jurors. The trial court's denial of appellant's motion was not an abuse of discretion because the alleged prejudicial information that the juror shared with the other jurors about the activities in the victim's neighbor was information that was from the juror's personal knowledge and life experiences, which jurors are not required to set aside when serving on a jury. Additionally, appellant, who received a sentence that was less than the statutory maximum, failed to establish that he suffered prejudice based upon the juror's actions. (McCallum, R.; CR-16-1092; 1-31-18; Whiteaker, P.)

## CIVIL

*Black, Inc. v. Dunklin*, 2018 Ark. App. 3 [**discovery**] The circuit court properly denied further discovery related to the appraisal. Tipton had received a draft of the appraisal via email, and that draft included the exact weighting of the third-party offer as was included in the final report. The parties stipulated that Dunklin and Tipton had agreed on an appraiser and that the contract (SRA) provided that the FMV would be determined by an appraiser selected jointly. That is what occurred. The circuit court analyzed the issues and concluded that there was no issue of fact. The appraisal issue was determined by the SRA and the stipulation, and there was no valid reason or basis for late discovery. The circuit court was correct in stating that granting the discovery would require the court eventually to determine the value of the stock and that the SRA was signed to avoid that circumstance. [**contract**]. Even though the SRA did not provide for the parties' disagreement over the FMV, it was not an abuse of discretion to disallow parol evidence. The circuit court interpreted the SRA to mean that the choice of appraisal method employed by the selling shareholder and the purchasing party was binding as to the appraised value. (Henry, D.; CV-17-274; January 10, 2018; Gladwin, R.)

*Helena Country Club v. Brocata*, 2018 Ark. 16 [**attorney disqualification**] The circuit court erred by disqualifying Halbert. As the Club asserts, even assuming that testimony by Halbert would be prejudicial to Brocato, Brocato did not demonstrate that Halbert's testimony was material or truly necessary to any of the issues being litigated or that the evidence sought to be admitted through Halbert was unobtainable elsewhere. In fact, Brocato failed not only to satisfy the three-part test set out in *Weigel*, but also to request that Halbert be disqualified as counsel.

Brocato admits in his brief that he never made an argument for or against Halbert's disqualification, and he indicates that he takes no position on this issue. Because there was no motion to disqualify counsel or any consideration of the *Weigel* factors, the circuit court's decision to impose the drastic measure of disqualifying Halbert constituted an abuse of discretion. (Morledge, C.; CV-16-697; January 18, 2018; Goodson, C.)

*Board of Trustees v. Andrews*, 2018 Ark. 12 [**sovereign immunity**] There is a clear incompatibility between Ark. Code Ann. section 11-4-218 and article 5, section 20 of the Arkansas Constitution. The legislative waiver of sovereign immunity in section 11-4-218(e) is repugnant to article 5, section 20 of the Arkansas Constitution. "The State of Arkansas shall never be made a defendant in any of her courts." The General Assembly does not have the power to override a constitutional provision. To the extent section 11-4-218(e) directly contradicts the constitution, it must fail. Plaintiffs like Andrews with these causes of actions have a "proper avenue for redress against State action, which is to file a claim with the Arkansas Claims Commission." (Ryan, J.; CV-17-168; January 18, 2018; Kemp, J.)

*Williams v. McCoy*, 2018 Ark. 17 [**sovereign immunity**] The circuit court erred in part in denying appellant's motion to dismiss. McCoy has failed to assert a due-process violation; therefore, no exception to sovereign immunity exists, and this suit is barred by the doctrine of sovereign immunity as set forth in article 5, section 20, of the Arkansas Constitution. (Piazza, C.; CV-17-22; January 18, 2018; Wood, R.)

*Harrelson v. King*, 2018 Ark. App. 42 [**deemed denied**] In the present case, King's posttrial motion was filed, pursuant to Rules 59 and 60, on February 21, 2017. King's posttrial motion was deemed denied on March 23, 2017. The trial court was without jurisdiction to hold the hearing on March 30, 2017, regarding King's posttrial motion, and was without jurisdiction to enter the order on April 11, 2017. Because the trial court had lost jurisdiction, the April 11, 2017 order is void. The posttrial motion was deemed denied by the trial court's inaction, so the original judgment entered on February 7, 2017, must stand without alteration. (Martin, D.; CV-17-523; January 24, 2018; Hixson, K.)

*Holland v. Cooper*, 2018 Ark. App. 24 [**landlord/tenant**] The Coopers had no duty to make repairs to the ground. Unless a landlord agrees with his tenant to repair the leased premises, he cannot, in the absence of statute, be held liable for repairs. The Coopers employed a lawn care service to mow the grass because Holland was unable to do so herself. They made no promises of repairs to the yard nor did Pennington make promises to repair the yard. There was not an oral agreement to make repairs, a contract to make repairs, or a duty of an assumption of an obligation. (Lineberger, J.; CV-17-657; January 24, 2018; Gladwin, R.)

*Park Plaza Mall, LLC v. Powell*, 2018 Ark. App. 48 [**invitee/tenant**] At the time of the murder, Hayes was present in the mall in his capacity as an assistant manager of Sbarro, a tenant of Park Plaza. It is important that courts look at the purpose of a visit and the possessor's invitation when determining the relationship between a possessor of land and a visitor. Here, the purpose of Hayes's presence on the premises was because of his employment at Sbarro. Any benefit Park Plaza and ERMC derived from Hayes's presence was merely incidental, and all tenants provide some incidental economic benefits to their landlords in that they lease the space and potentially bring in business that makes the space attractive to other lessees. When considering whether the incidental benefits Park Plaza and ERMC received from Hayes's presence in the mall were sufficient to make Hayes a business invitee, another important consideration is the public policy of our state. Arkansas courts have long recognized that it is unfair to impose such a high duty of protection on the landlord absent an agreement or statute. To hold that the incidental benefit Park Plaza and ERMC received from Hayes's presence in the mall was sufficient to make Hayes a business invitee would be contrary to the established law and also contrary to our state's public policy. Accordingly, the circuit court erred as a matter of law when it found that Hayes was a business invitee of Park Plaza and ERMC. (Reif, M.; CV-16-441; January 24, 2018; Gruber, R.)

*Miracle Kids, Inc. v. Maurras*, 2018 Ark. App. 40 [**summary judgment/contract**] A material term of the parties' loan agreement was ambiguous. This created a fact question as to when, and on what condition, repayment was due. The court in this case had to interpret an oral contract and an ambiguous term of an oral contract by using the extrinsic evidence, which included the minutes of the shareholder meeting and the three affidavits submitted to the court. That is improper on summary judgment. (Gray, A.; CV-17-214; January 24, 2018; Hixson, K.)

## DOMESTIC RELATIONS

*Wilhelm v. Wilhelm*, 2018 Ark. App. 47 [**joint custody favored but not mandatory**] The appellate court found no error in the circuit court's award of custody. While Arkansas Code Annotated 9-13-101 states that an award of joint custody is favored in Arkansas, joint custody is by no means mandatory. A failure by the circuit court to award joint custody does not mean that the circuit court failed to consider awarding the same. The circuit court clearly considered awarding joint custody, but appellant's own unwillingness to consider the same was a contributing factor to the circuit court's decision not to award joint custody. A person cannot complain of an alleged erroneous action of the circuit court if she induced such action. (Lindsay, M.; CV-17-236; 1-24-18; Brown, W.)

*Glisson v. Glisson*, 2018 Ark. App. 21 [**joint custody- approximate and reasonable equal division; child support order must determine payor's income**] The appellate court found no error in the circuit court's award of joint custody. A joint custody arrangement does not

necessarily involve a precise 50/50 division of time, and the circuit court could use the language “joint custody” to describe the approximate and reasonable equal division of time. Because Appellant had 6 of every 14 days during the school year and 7 of every 14 days during the summer, the appellate court found this arrangement to fall within the range of approximate and reasonable equal division. The appellate court also found no error in the circuit court’s determination that joint custody was in the children’s best interest. The appellate court found error in the circuit court’s child support award because there was no determination of income in its order. It is reversible error for the circuit court to fail to determine the payor’s income in setting the amount of child support. (Williams, L.; CV-16-1051; 1-24-18; Virden, B.)

*Toney v. Burgess*, 2018 Ark. App. 54 [**retaining jurisdiction to modify decree after ninety days; parol evidence rule; reforming decree based upon mutual mistake**] The appellate court found no error in the circuit court modifying the parties’ decree of divorce after the ninety-day restriction in Arkansas Rule of Civil Procedure 60(a). A general reservation of jurisdiction will allow a circuit court to modify a decree after ninety days with respect to issues that the circuit court considered in the original action. In this matter, the circuit court reserved jurisdiction over the decree and was permitted to modify the decree with respect to the 2014 income tax debt, i.e. an issue that the circuit court properly considered in its original decree. The appellate court also found no error in the circuit court permitting introduction of the attorney’s testimony because the circuit court reformed the decree based upon a mutual mistake, and parol evidence is admissible in reformation cases based on mutual mistake. Lastly, the appellate court found no error in the circuit court’s finding a mutual mistake between the parties. The circuit court heard testimony from Appellee’s attorney regarding the intent of the parties, and the court determined that the attorney’s testimony was credible. The circuit court based its ruling on its knowledge of the proceedings between the parties and found that the parties’ intended the decree to read “2014 income tax debt” instead of “2014 personal property tax debt”. Upon finding a mutual mistake, the appropriate remedy was to reform the decree to reflect what the parties intended. (McCallister, B.; CV-17-192; 1-31-18; Abramson, R.)

*Montez v. Montez*, 2018 Ark. App. 55 [**mandate rule; joint custody modification following parties’ failure to communicate**] A circuit court must implement both the letter and spirit of a mandate, taking into account the appellate court’s opinion and the circumstances it embraces. In the original opinion, the appellate court cited caselaw holding that, when the parties have fallen into such discord that they are unable to cooperate in sharing physical care of their children, this constitutes a material change in circumstances affecting the children’s best interest. The appellate court also cited caselaw in their first opinion that it is reversible error to order continuation of a joint-custody arrangement when there is evidence that demonstrates the parents can no longer cooperate in reaching decisions in matters affecting their children. The appellate court found overwhelming evidence that these parties could not communicate, as well as evidence of the effect of the turmoil on the children. On remand, the circuit court entered a

written order finding that a material change in circumstances had occurred, but nonetheless found it was not in the best interest of the children to change custody. The appellate court found this decision contrary to their first opinion and found that the circuit court failed to execute the mandate. (Taylor, J.; CV-17-549; 1-31-18; Abramson, R.)

*Williams v. Williams*, 2018 Ark. App. 79 [**alimony considerations and restriction on modification; oral stipulations are contractual and binding**] The appellate court found that the circuit court's permanent alimony award of \$1,100.00 per month was unreasonable under the circumstances, considering that it left Appellant with only \$100.00 after his monthly expenses. The appellate court also considered other factors pertinent: the parties lived a modest lifestyle; both parties were going to share equally in the RV's, motorhome's, and other jointly held property's sale proceeds; Appellant had a fixed income that is unlikely to change; Appellee was likely to begin receiving disability payments; neither party was able to earn income and have bad health; Appellant was responsible for Appellee's medical insurance until the marital property is sold; and the parties were only married for six years and this was their third marriage. The appellate court also found error in the circuit court's order preventing the parties from moving to modify the alimony for five years. Court ordered alimony is always subject to modification based on a material and significant material change in circumstances. Lastly, the appellate court found error in the circuit court's refusal to enforce the parties' agreement regarding the car and alimony. Oral stipulations made in open court that are taken down by the reporter and acted upon by the parties and court are valid and binding; such stipulations are in the nature of a contract. Here, the parties entered into a contractual stipulation that a portion of alimony was to be used to make the car payment; there was no agreement that Appellant was to pay Appellee alimony and pay for the car separately. Therefore, their agreement did not allow the circuit court to order Appellant to pay alimony and for the car when that is not what the parties agreed to. (Ryan, J.; CV-17-560; 1-31-18; Brown, W.)

## **PROBATE**

*Darr v. Billeaudeau*, 2018 Ark. App. 16 [**will contest burden of proof; exclusion of audiotape recording**] The appellate court found no error in the circuit court setting aside the will, removing Appellant as personal representative, and excluding an audiotape recording of the execution of the will. In a typical will contest, the party contesting the validity of the will has the burden of providing that the testator lacked mental capacity at the time the will was executed or that the testator acted under undue influence. However, when the proponent of a will is a beneficiary and drafted the will or "caused it to be drafted", the proponent bears the burden to prove beyond a reasonable doubt that it was not the result of undue influence and that the testator had the mental capacity to make the will. In addition, the existence of a confidential relationship between a primary beneficiary and a testator gives rise to a rebuttable presumption of under influence, and a

confidential relationship arises between a person who holds power of attorney and the grantor of that power. In this case, Appellant held power of attorney and was the sole beneficiary of the will, which created a rebuttable presumption of undue influence. The appellate court agreed that Appellant procured the will as she held a power of attorney for a testator who had been diagnosed with dementia, she contacted the attorney to draft the will, she met with the attorney without the testator's knowledge or presence, she provided the information for the will, she failed to discuss or disclose the will to the testator, and she retained the will in her personal safe. Consequently, the burden was on Appellant to prove beyond a reasonable doubt that the will was not the result of undue influence and that the decedent had the mental capacity to make the will. The appellate court found no error in the circuit court's determination that the legal and medical factors— together with the “questionable credibility” of the Appellant's testimony regarding the will, the unexplained selection of Appellant as the sole beneficiary, and the flurry of financial activity involving the decedent's funds and assets—were all consistent with, and supportive of, Appellee's allegations of undue influence and lack of testamentary capacity, and Appellant failed to rebut these presumptions beyond a reasonable doubt. Lastly, the appellate court found no error in the circuit's court exclusion of the audiotape recording of the execution of the will. The circuit court reviewed the evidence, found it was cumulative, found the hearsay exceptions inapplicable to the audiotape, and Appellant failed to show she was prejudiced by its exclusion. (Moore, R.; CV-16-917; 1-24-18; Gruber, R.)

*Stovall v. Preston*, 2018 Ark. App. 64 [**trial court's extension of comity to foreign marriage**] The appellate court found no error in the circuit court's extension of comity in the 1994 Louisiana marriage license issued to Appellee and the Ward. It was undisputed that the marriage was valid in Louisiana, but Appellant argued that the parties must have resided in Louisiana to extend comity to their foreign marriage pursuant to Arkansas Code Annotated 9-11-107. A marriage valid where contracted is recognized as being valid everywhere. There is a longstanding presumption of law that a marriage entered in due form is valid, and the burden of proving a marriage invalid is upon the party attacking its validity. In addition, Arkansas cases have held that marriage-license statutes are directory rather than mandatory. The clear focus of A.C.A. 9-11-107 is to recognize as valid all marriages contracted outside of Arkansas that would be valid by the laws of the state in which the marriages were consummated. To read the additional statutory language regarding residency to invalidate the marriage would fly in the face of the statute's stated purpose and run counter to the rationale stated herein. (Culpepper, D.; CV-17-553; 1-31-18; Glover, D.)

*Morris v. Clark*, 2018 Ark. App. 73 [**termination of guardianship- burden shifting standard with fit-parent presumption**] Applying the supreme court's most recent holding in *Donley v. Donley*, 2016 Ark. 243, the Appellant, as a fit parent, was presumed to be acting in the child's best interest when she petitioned to terminate the guardianship and was informing the Court that the guardianship was no longer necessary. Per *Donley*, when Appellant, a fit parent, petitioned to

terminate the guardianship, she was entitled to the fit-parent presumption and the burden then shifted to Appellee, the guardian, to demonstrate that the guardianship was still necessary or that the guardianship was in the child's best interest. While the circuit court did not use the phrase "fit-parent presumption", it does appear the circuit court applied said presumption and the burden shifted to the guardian to prove that the guardianship was still necessary or in the best interest of the ward. The circuit court then found that the guardian met her burden of showing that the guardianship was in the child's best interest based upon the evidence that the child had little contact with Appellant, the child was well adjusted after being in guardian's care, and that the child wished to remain with the guardian. The circuit court effectively applied the burden-shifting standard announced in *Donley*, and the circuit court did not err in finding that Appellee met her burden of showing that the guardianship should continue. Note: the amended version of Arkansas Code Annotated 18-65-401(b)(3) is not applicable in this case, as the prior version was in effect when the circuit court entered the order being appealed. (Jamison, L.; CV-17-609; 1-31-18; Hixson, K.)

*Stegall v. Arkansas Department of Human Services*, 2018 Ark. App. 76 [**DHS long-term custody of adult and least restrictive alternative placement**] The circuit court may order long-term custody with DHS if the court determines that (1) the adult has a mental impairment, a physical impairment, or lacks the capacity to comprehend the nature and consequences of remaining in a situation that presents an imminent danger to her health or safety; (2) she is unable to prove for her own protection from maltreatment; and (3) the court finds clear and convincing evidence that the adult is in need of placement as provide in Arkansas Code Annotated 9-20-117(c). Adult maltreatment includes abuse, exploitation, neglect, physical abuse, or sexual abuse of an adult. In this matter, three physicians diagnosed Appellant with dementia and recommended long-term care with DHS; a DHS investigator testified regarding his interactions with Appellant and her scores on a mini mental-status exam; and Appellant testified that she wanted her son to come live with her when he was paroled, despite testifying that she did not remember that he was in jail for abusing her. Based on this evidence, the appellate court found no error in the circuit court's finding that Appellant needed long-term DHS care. The appellate court also found no error in the circuit court's placement in a nursing home. Arkansas Code Annotated 9-20-117(d)(1) provides that the circuit court shall make a finding in connection with the determination of the least restrictive alternative to be considered proper under the circumstances, including a finding for noninstitutional care if possible. The circuit court found that DHS should place Appellant in an appropriate facility in the least restrictive environment that best meets her needs, and two of three physicians averred that nursing-home care was a least-restrictive placement option for Appellant. (Martin, D.; CV-17-532; 1-31-18; Murphy, M.)

## JUVENILE

*Sills v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 9 [TPR—**sufficiency of the evidence; services to incarcerated parent**] Father who had been imprisoned throughout his child's life and during the events that led to the dependency-neglect case appealed the termination of his parental rights on the ground that he was incarcerated for a period of time that would constitute a substantial period of the child's life. Sills complained first that the only evidence of his incarceration was his own testimony and that this evidence was insufficient as grounds for termination. The appellate court affirmed, holding that Sills' testimony was sufficient evidence of his incarceration and that a five-year prison sentence, including parole time, is a substantial period of time in the life of a child who is less than two years of age. Sills also argued that his due process rights were violated because DHS did not provide services to him while he was incarcerated, but the court disagreed, finding that under the incarceration ground, DHS is not required to provide services to the imprisoned parent. The court noted, however, that the one issue that gave it pause was DHS' failure to engage Sills in the reunification process. The court acknowledged that Sills was guilty of failing to maintain contact with DHS by writing letters or making phone calls, but also reminded DHS of its duty to provide parents amply opportunity to reunite with their children, such as by insuring here that Sills was transported from prison to participate in the hearings. However, because Sills was provided an attorney prior to termination and because under the incarceration ground, DHS was not required to provide services, the court affirmed the termination order. (Richardson, M.; JV-16-71; January 10, 2018; Whiteaker, P.)

*Otis v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 28 [TPR—**sufficiency of the evidence; aggravated circumstances**] Mother appealed termination of her rights on the grounds of aggravated circumstances and factors that arose subsequent to the filing of the DN petition. Otis did not challenge grounds for the termination, but instead, argued that termination was not in the child's best interest. Evidence in support of grounds for termination was abundant, including Otis's significant mental health issues, drug use, and failure to complete most parts of the case plan. The court did not find merit in Otis's arguments that she should have been allowed more than ten months to work toward reunification, that her rights should not have been terminated when the rights of the legal father were not, and that relative placement should have been considered because that argument was not made below. (Branton, W.; JV-2016-925; January 24, 2018; Klappenbach, N.)

*Lazaravage v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 29 [TPR—**sufficiency of the evidence; ICWA**] Mother appealed order terminating her rights to her infant daughter, who testified positive for methamphetamine at birth. Proof at the termination hearing demonstrated that the mother was an illegal drug user, was homeless throughout much of the case, had serious mental health issues, and did not visit consistently with the child. The appellate court found no clear error under these facts. The mother also argued that the trial court should be reversed

because it did not order DHS to notify an Indian tribe of the proceedings under ICWA. However, the mother failed to identify any Indian tribe to which she or the child may be a member and failed to raise the issue during the trial court proceedings. The appellate court declined to allow ICWA issues to be raised for the first time on appeal, which the mother argued is allowed in some other jurisdictions. (Hendricks, A.; JV-16-17; January 24, 2018; Klappenbach, N.)

*Benson v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 65 [**TPR—sufficiency of the evidence**] Incarcerated mother appealed order terminating her parental rights. The appellate court found appellant's arguments without merit where the mother was incarcerated throughout the case, had her rights involuntarily terminated as to another child, and it appeared unlikely that further reunification services would result in successful reunification. The court disagreed that the mother should have been allowed fifteen months to work toward reunification and disagreed that there was insufficient evidence of potential harm. (Branton, W.; JV-16-963; January 31, 2018; Glover, D.)

*Blasingame v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 71 [**TPR—sufficiency of the evidence**] Appellate court found merit in none of appellant father's arguments for reversal of order terminating his parental rights. The trial court found three grounds for termination: (1) failure to remedy, (2) subsequent factors, and (3) aggravated circumstances and found that termination was in the child's best interest. The appellate court held that there was no clear error and that the filing of the termination order 127 days after the hearing did not require reversal, as the 30 day requirement for filing an order is best practice but is not jurisdictional. (Zuerker, L.; JV-15-442; January 31, 2018; Vaught, L.)

*Ewasiuk v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 59 [**TPR—sufficiency of the evidence**] Termination affirmed where father continued using illegal drugs and the trial court did not find credible the father's assurances that he had broken ties with the mother, who continued to use illegal drugs and whose rights had previously been terminated. Under these circumstances, the appellate court found no error and affirmed termination. (Coker, K.; JV-15-77; January 31, 2018; Gladwin, R.)

*McLemore v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 57 [**TPR—sufficiency of the evidence**] Mother appealed termination of rights on multiple grounds, including aggravated circumstances. The two-month-old child was removed from custody after testing positive for methamphetamine and marijuana in addition to the mother testing positive for illegal drugs while working with DHS in a protective services case. The mother was later incarcerated due to drug use and remained incarcerated through the remainder of the case. She testified at the termination hearing that she did not believe her drug use affected her parenting. The appellate affirmed termination based on aggravated circumstances, agreeing that there was little likelihood that

further services would result in successful reunification. (Warren, J.; JV-16-839; January 31, 2018; Virden, B.)

*Turner v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 52 [**TPR—untimely order does not equal loss of jurisdiction**] Mother appealed order terminating her rights but did not challenge grounds for termination, instead, arguing that the trial court clearly erred by holding the adjudication hearing more than sixty days after removal and then filing the adjudication order more than eight months later. The appellate court found that the trial court erred in failing to follow the statutory timelines but that the error does not equal a loss of jurisdiction. Moreover, the adjudication order was a final appealable order, and the appellant should have appealed the adjudication order in order to preserve her challenges to the adjudication order. (Keaton, E.; JV-16-59; January 31, 2018; Gruber, R.)

*Whitaker v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 61 [**TPR—sufficiency of evidence**] Mother and father appeal order terminating their parental rights. After reviewing the trial court's consideration of adoptability and potential harm, the appellate court found no error in the trial court's determination that termination was in the child's best interest. Further, the evidence in support of statutory grounds for termination due to aggravated circumstances was clear and convincing where the finding was first made in the adjudication, which was not appealed. (Branton, W.; JV-16-60; January 31, 2018; Harrison, B.)

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

*Hall v. Ark. Dep't of Human Servs.*, 2018 Ark. App. 4 (Wilson, R.; JV-15-73; January 10, 2018; Harrison, B.)

*Byrd v. State*, 2018 Ark. App. 2 [**Transfer to juvenile court denied**] The defendant was alleged to have raped a child in 2009 and 2010, when the defendant was between the ages of twelve to fifteen, but the defendant was age twenty by the time charges were filed against him in circuit court in 2014. The defendant claimed that the case should be transferred to juvenile court because of his age at the time of the alleged crime. The trial court's denial of the motion to transfer was affirmed. The appellate court noted that the trial court properly considered the ten statutory factors and the defendant was essentially asking it to reweigh the evidence, which it declined to do. (Jones, C.; CR-14-534; January 10, 2018; Virden, B.)

*Despain v. State*, 2018 Ark. App. 32 [**Transfer to juvenile court denied**] The defendant, a sixteen-year-old, was charged with the capital murder of his neighbor after shooting the neighbor once in the back and once in the head before stealing from him. In his motion to transfer from circuit to juvenile court, the defendant offered expert testimony concerning adolescent brain

development and opportunities for rehabilitation in through EJJ. The appellate court affirmed the denial of the motion to transfer, finding no clear error in the trial court's decision to deny transfer after considering the ten statutory factors. (Talley, D.; CR-16-58; January 24, 2018; Whiteaker, P.)

*Harris v. State*, 2018 Ark. App. 72 [**Transfer to juvenile court denied**] The defendant, age fifteen, was charged with two counts of aggravated robbery involving a firearm. In denying the motion to transfer, the circuit court made detailed findings concerning each of the ten statutory factors. Because the trial court made detailed findings, considered each of the factors, and there was no clear error, the appellate court affirmed. (Wright, H.; CR-16-3485; January 31, 2018; Hixson, K.)

*Parks v. State*, 2018 Ark. App. 63 [**Transfer to juvenile court denied**] The defendant was charged in circuit court with first-degree murder, aggravated robbery, and kidnapping, and filed a motion to transfer to juvenile court. The defendant presented testimony from a psychologist that the defendant had learning deficiencies and problems in the home but was capable of rehabilitation. After considering the ten statutory factors and making detailed findings, the trial court denied the motion. The appellate court noted that while some factors may have weighed in favor of transfer, equal weight need not be given to each factor. Because the trial court considered all ten factors and made findings on each factor, it was affirmed. (Tabor, S.; CR-16-117; January 31, 2018; Glover, D.)