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CRIMINAL

Clark v. State, 2019 Ark. App. 158 **[probation]** The uncorroborated testimony of an accomplice is a sufficient basis for a revocation of probation or a suspended sentence. (Wilson, R.; CR-18-489; 3-6-19; Brown, W.)

Britt v. State, 2019 Ark. App. 145 **[admission of evidence; *Daubert*]** The trial court did not abuse its discretion in determining that Y-STR testing is a valid science that could be properly applied to the facts in appellant's case. (Karren, B.; CR-18-483; 3-6-19; Virden, B.)

Williams v. State, 2019 Ark. App. 152 **[Ark. Code Ann. § 5-4-702]** When a statute provides that a defendant must know or have reason to know a fact, the defendant's knowledge may be inferred from the circumstances. Based upon the testimony presented at appellant's trial, the State established that appellant had reason to know that children under the age of sixteen were present and could see or hear the act of battery that appellant inflicted on his victim. Thus, the circuit court did not err when it denied appellant's request for a directed verdict on the enhancement for committing the offense in the presence of a child pursuant to Ark. Code Ann. § 5-4-702. (Sims, B.; CR-18-571; 3-6-19; Whiteaker, P.)

Brown v. State, 2019 Ark. App. 154 **[Ark. R. Evid. 901]** Authentication of electronic communications require more than mere confirmation that the telephone number belonged to a particular person; circumstantial evidence, which tends to corroborate the identity of the sender, is also required; there must also be some indicia of authorship. Because the State failed to provide sufficient circumstantial evidence to corroborate that appellant sent the alleged Instagram messages or to establish an indicia or appellant's authorship of the messages, the circuit court abused its discretion when it admitted the messages. (Sims, B.; CR-18-74; 3-6-19; Hixson, K.)

Mitchell v. State, 2019 Ark. 67 **[public trial]** The right to a public trial is not absolute. The following test should be used when determining whether the right of an accused to a public trial may give way to other rights or interests, i.e., when the closure of a courtroom is justified in a criminal trial: (1) the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) it must make findings adequate to support the closure. In appellant's case, the trial court failed to make the necessary findings to support closure of the courtroom. Thus, appellant's constitutional right to a public trial was violated when the circuit judge closed the courtroom during the testimony of the State's witness. (Laser, D.; CR-18-275; 3-7-19; Wynne, R.)

Harper v. State, 2019 Ark. App. 163 **[appellate procedure]** Appellant sought review of notes taken by the prosecutor during an interview with the victim. The trial court held a hearing to consider appellant's request and denied the motion. Thereafter, appellant requested that the notes be placed under seal, a request that was also denied. On appeal, the Court of Appeals noted that it was unable to consider the merits of this issue because the trial court did not conduct an in-camera review of the notes to determine whether they were discoverable and failed to place the notes in the record under seal. Thus, the appellate court remanded the matter to the trial court and instructed it to conduct an in-camera review of the challenged notes. (Haltom, B.; CR-18-556; 3-13-19; Abramson, R.)

Martinez v. State, 2019 Ark. 85 **[sentencing enhancement]** Appellant was convicted of capital murder, unlawful discharge of a firearm from a vehicle, and terroristic act. His sentence was enhanced by the provisions of Ark. Code Ann. § 16-90-120(a), which permit an enhanced sentence for employing a firearm in the commission of a felony. The jury was given an instruction on the enhancement and provided a verdict form for the enhancement. The verdict form was not completed, and the jury did not render a specific verdict on the enhancement in open court. However, appellant's sentence was enhanced pursuant to the statute. On appeal, appellant asserted that his sentence was illegal because the jury did make a finding on the enhancement. The Supreme Court concluded that based upon the facts of the case, the sentence

was not illegal. Specifically, the information alleged that appellant used a firearm in the commission of a felony, and the jury found appellant guilty beyond a reasonable doubt of unlawful discharge of a firearm, a Class Y felony. The jury also found that appellant shot a firearm from a vehicle and killed a person, which resulted in appellant being charged with and convicted of capital murder. The convictions for capital murder and unlawful discharge of a firearm required the jury to find beyond a reasonable doubt that appellant used a firearm in the commission of the capital murder. Additionally, the Court noted that because the enhancement was not a substantive offense, but rather a sentencing enhancement, the findings of guilt made by the jury were sufficient to trigger the application of Ark. Code Ann. § 16-90-120. Accordingly, the enhancement of appellant's sentence for capital murder was not illegal. (Lindsey, M.; CR-17-988; 3-28-19; Wynne, R.)

CIVIL

Ash v. First National Bank, 2019 Ark. App. 147 **[stock transfer]** Because Ash no longer holds legal title to the stock shares, he cannot recover on either a replevin or a conversion claim. Ash's indorsement and delivery of the stock certificate and stock power transferred all his 3,881 Bancshares shares to First National Bank in its capacity as trustee of the irrevocable testamentary trust that Ash's mother had created. Because Ash has failed to show that he owned or was entitled to possess the personal property (the stock) after he signed and delivered the stock certificate and stock power to First National Bank, the circuit court correctly dismissed with prejudice Ash's **conversion** claim. Ash's action for **replevin** fails as a matter of law too because replevin is available only to one with the right to recover the personal property in the first place. The circuit court correctly rejected Ash's argument that the stock transfer to First National Bank was void because some of the **corporate-transfer restrictions** were not properly applied. The stock power was a valid indorsement under Arkansas securities law. It unambiguously stated that he intended to transfer the stock shares to First National Bank. The law of corporations does not help Ash here because he has not shown that an unreasonable restraint upon alienation existed or why the stock power failed to comply with the specific corporate bylaw provisions at issue. More fundamentally, the issuer (Bancshares of Eastern Arkansas, Inc.) is not trying to impose a restriction on either Ash or First National. Bancshares (the issuer) is not even a party to this case. **[fiduciary duty]** There are genuine issues of material fact on Ash's claim of whether the bank breached a fiduciary duty owed to him. Ash contended before the circuit court that his transfer was by means of a gift. Ash said during his deposition that he believed he was placing his individually held Bancshares stock into a newly created revocable trust to protect his shares from creditors, including his ex-wife. He asked for help from an attorney who may have represented both Ash and the bank at times relevant to this case. It is not possible to conclude anything without making credibility determinations and weighing the proof in a manner that a summary-judgment review forbids. It is not shown whether Ash was fully informed about the implications

of the stock-transfer transaction, including the type of trust that was receiving the intended transfer. The point is that important facts (and reasonable inferences) support both Ash's and First National Bank's view on the claim. Summary judgment against the fiduciary-duty claim is unsustainable on this record. (Mitchell, C.; CV-18-643; 3-6-19; Harrison, B.)

Brennan v. White County, 2019 Ark. App. 146 **[local option challenge]** Brennan filed a declaratory judgment action to challenge the constitutionality of the White County ordinance prohibiting the manufacture and sale of alcohol and the "local-option" process. Court properly granted dismissal of action. Brennan failed to meet his burden of proving that the local-option framework is not rationally related to achieving a legitimate objective of state government under any reasonably conceivable state of facts. (Hannah, C.; CV-18-638; 3-6-19; Virden, B.)

Davis v. Van Buren School District, 2019 Ark. App. 157 **[FOIA]** According to appellant's complaint and the attached exhibits, she requested records that pertained to the investigations of two incidents involving her son. The records she requested fit within the definition of employee-evaluation and job-performance records. There was no evidence presented to suggest that the records at issue were not created by the employer regarding the employee's performance with regard to specific incidents as appellee affirmatively pleaded in its answer. Appellant's additional argument that the records fit within the narrow exception allowing disclosure as provided under section 25-19-105(c)(1) is equally unavailing. There was no evidence to suggest that there was a final administrative resolution of any suspension or termination proceeding at which the records at issue formed a basis for the decision to suspend or terminate the employee. It was undisputed that the employee was suspended or terminated because of the records at issue. The facts do not support an argument for constructive termination. Appellee explained at the hearing that the employee voluntarily resigned after the incident when the employee was told that the matter was under investigation. Appellee further explained that the resignation was not the result of any negotiation with the employee. Under these circumstances, the employee resigned before any administrative hearing, resolution, or appeal even took place. (Medlock, M.; CV-18-544; 3-6-19; Hixson, K.)

Cooper v. Discover Bank, 2019 Ark. App. 144 **[service/address/summary judgment]** Discover filed a motion for summary judgment stating that the requests were not answered and were therefore deemed admitted under Ark. R. Civ. P. 36. However, Cooper argues on appeal, as he did in his response to the motion for summary judgment, that he was never served with the requests for admission because they were delivered to an incorrect address, and he submitted an affidavit in support thereof. However, contrary to Discover's assertion, there is no finding by the trial court that Cooper was served with the requests for admission. The order merely states that the requests were "submitted" to Cooper. The court did not make a specific finding that Cooper had been served with the requests for admission that he specifically denied receiving in his

affidavit. A question of fact remains; therefore, summary judgment was improper. (Erwin, H.; CV-18-249; 3-6-19; Gruber, R.)

Washington County v. Presley, 2019 Ark. App. 150 **[summary judgment]** Presley applied for a conditional-use permit to operate a wedding and event center on property he owns in Washington County. The permit was denied by the Washington County Quorum Court. Presley appealed to the Circuit Court, which granted summary judgment to Presley. Here, neither the concerns voiced by the neighbors in writing and at the quorum court meeting nor the members' stated reasons for voting to deny the permit were submitted under oath or in the form of an affidavit. Presley presented proof in the form of Crouch's affidavit that all the criteria had been met for the conditional-use permit to be approved. Appellants presented no proof to rebut this proof in their response to the motion for summary judgment, and they point to no other proof that was properly before the circuit court for consideration pursuant to Rule 56. (Pierce, M.; CV-18-631; 3-6-19; Klappenbach, M.)

Davis v. Kelley, 2019 Ark. 64 **[service/strike under Ark. Code Ann. § 16-68-607]** Davis failed to perfect service on the Appellees within the time provided by Rule 4. Accordingly, the circuit court did not abuse its discretion in granting Appellees' motion to dismiss. However, dismissal should have been without prejudice. Arkansas Rule of Civil Procedure 4(i)(1) plainly states that "[i]f service of the summons and a copy of the complaint is not made upon a defendant within 120 days after the filing of the complaint . . . the action shall be dismissed as to that defendant without prejudice." Here, the circuit court's order granted the Appellees' motion to dismiss and designated the dismissal as a strike under Ark. Code Ann. § 16-68-607. For a dismissal to constitute a strike, the circuit court must have determined that Davis's cause of action was frivolous or malicious, or that Davis failed to state a claim upon which relief may be granted. See Ark. Code Ann. § 16-68-607(b). Either inquiry would have required the court to go beyond the threshold determination of whether Davis served Appellees with valid process. Upon determining that summons and service of process were insufficient in this case, the court lacked jurisdiction to designate the dismissal as a strike pursuant to Ark. Code Ann. § 16-68-607. (Dennis, J.; CV-18-371; 3-7-19; Wood, R.)

Eagle Bank v. Raynor Manufacturing Co., 2019 Ark. App. 168 **[garnishment]** Eagle Bank argues that it should not be liable for the amount transferred from Bid Central's account on August 4 because section 4-4-303 gives banks a reasonable time to comply with legal process. Garnishments are included in the "legal process" category, and the bank did not have a reasonable time to prevent the wire transfer. According to the bank, the circuit court erred when it deemed the section "not applicable" and declined to determine whether the bank had a reasonable time to comply with the writ. The circuit court ruled that Arkansas law has long required a bank to immediately impound. The circuit court properly ruled that the bank was required to hold nonexempt money belonging to Bid Central as soon as the writ was served on

the bank. Section 16-110-406 requires a bank to lien all money "at the time" the writ is "served." Although section 4-4-303 permits a "payor bank" a "reasonable time" to process a legal document after it is "received" or "served," the garnishment statute is the more specific one relative to the particular question at hand and is the controlling authority. The circuit court did not err in applying the garnishment statutes instead of Article 4. (Carnahan, C.; CV-17-677; 3-13-19; Harrison, B.)

Freeman Holdings, LLC v. FNBC, 2019 Ark. App. 165 **[contract]** The unsigned offer-and-acceptance agreement that Freeman contends negated the existence of the contract merely supplied the terms and conditions to which Freeman agreed and included the exact monetary amounts Freeman offered to pay. It did not contain new terms, nor did it vary any terms previously agreed to by the parties. There is evidence to support a finding that both Freeman and FNBC manifested assent to the terms of the contract. It was not erroneous for the circuit court to find that there was a meeting of the minds on all terms. **[statute of frauds]** The offer and-acceptance agreement merely supplied the exact monetary amount that Freeman offered to pay FNBC for the property and restated the written terms and conditions. Because the offer-and-acceptance agreement did not introduce or vary any essential terms, its absence from the written contract does not result in a failure to satisfy the statute of frauds. Is FNBC's status as the seller an essential term that was absent from the contract? The terms and conditions provide that "the bank" must accept any offer. Although FNBC was not specifically identified in the terms and conditions, the property description on Wooley's website identifies FNBC as the seller and provided that keys to preview the property were available at FNBC. Additionally, Wooley was FNBC's agent for this auction. The contract between Wooley and FNBC provided that Wooley had the exclusive right to offer the property for sale, and Wooley was identified on both the terms and conditions and on Freeman's bids. Thus, this contract does not fail to satisfy the statute of frauds based on the failure to identify FNBC as the seller. The written terms and conditions of this auction were sufficient to put Freeman on notice as to how the auction would be conducted and to the obligations imposed on it by placing a bid. (Putman, J.; CV-18-238; 3-313-19; Abramson, R.)

Murphy v. Union Pacific, 2019 Ark. App. 169 **[FELA/release]** Widow argues that judgment should be reversed because the prior release is void under section 5 of the Federal Employers' Liability Act (FELA), which prohibits contracts that enable railroads "to exempt [themselves] from any liability[.]" 45 U.S.C § 55. According to her, the release is void under FELA because it goes beyond the injury and risk of future injury that were known to her and Mr. Murphy at the time they negotiated the release. The majority of state and federal courts that have held *Wicker* is the better standard. The known-risk approach in *Wicker* "provides a [more] realistic view of compromises and releases" because it "permits enforcement not only for the specific injuries already manifested at the time of its execution but also any risks of future injury which the parties specifically contemplated in its execution, so long as those risks are properly within the

ambit of the claim compromised." It is not evident from the record that the circuit court applied *Wicker* when it determined that the 2007 release was valid under section 5 of FELA. Accordingly, the circuit court's order granting summary judgment is reversed, and the case is remanded for a determination of whether the 2007 release is valid under *Wicker's* known-risk standard, applying it to the record that the parties have already developed. **[summary judgment/affidavits]** Irene contends the circuit court erred in refusing to consider Mr. Sammons's affidavit in deciding whether to grant summary judgment. On remand, the circuit court should reconsider the appropriateness of the Sammons affidavit in deciding Union Pacific's summary-judgment motion under *Wicker*. The circuit court set forth four bases for rejecting the Sammons affidavit, reasoning 1) it was comprised of Sammons's opinions on how the court should rule; 2) it did not comply with Rule 56(e) of the Arkansas Rules of Civil Procedure; 3) Sammons was not trustworthy; and 4) it contained statements that, absent a waiver of attorney-client privilege from Alton Murphy, violated the attorney-client privilege. Arkansas Rule of Civil Procedure 56(e) provides in part that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The circuit court found that the Sammons affidavit expressed opinions rather than facts. On review of the affidavit, the circuit court was mistaken in this conclusion. The affidavit contained statements of fact—not opinion—and they were based on Sammons's personal knowledge. With respect to "trustworthiness," the circuit court did not consider the affidavit because it found Sammons was "not trustworthy." Deciding matters of credibility is generally not appropriate when deciding a summary-judgment motion. Here, there has been no showing that Sammons's affidavit was contradicted by prior sworn testimony. Regarding "attorney-client privilege," without either party having raised an issue concerning attorney-client privilege, the circuit court interjected in its order granting summary judgment to Union Pacific that the affidavit "contains statements that, without a waiver from Alton Murphy, violate the attorney-client privilege." This privilege is for a proper party to raise; courts generally do not raise it for a party. Therefore, the circuit court's rejection of the affidavit based on the absence of a waiver of the attorney-client privilege from Alton Murphy was also misguided. (Dennis, J.; CV-17-784; 3-13-19; Glover, D.)

Rorie v. Clay Maxie Ford, LLC, 2019 Ark. App. 172 **[Rule 60/new trial]** The March 1, 2018 order that purported to set aside the October 6, 2016 order was entered seventeen months after the original order was entered. Arkansas Rule of Civil Procedure 60(a) allows a court to "modify or vacate a judgment, order or decree . . . within ninety days of its having been filed with the clerk." After ninety days, the court's power to vacate or modify a judgment is limited by Rule 60(c) to reasons such as fraud. In its March 1, 2018 order, the trial court gave no reason why it had jurisdiction to set aside the October 6, 2016 order seventeen months after it was entered, and it subsequently concluded that it lacked jurisdiction. It is well established that it is within the discretion of the trial court to determine whether it has jurisdiction under Rule 60 to set aside a

judgment, and in this case, the trial court ultimately concluded that it lacked jurisdiction. (Inman-Campbell; CV-18-737; 3-13-19; Hixson, K.)

Nash v. Nash, 2019 Ark. App. 173 **[substitution]** The substitution issue has been waived. Appellant continued to seek relief from the court by amending his complaint and proceeding to trial on the complaint as amended. Appellant has waived the question of revivor by continuing to amend his complaint and going to trial without a proper party substituted for Norma in her individual capacity. **[new trial/Rule 59]** A contemporaneous objection is required when a new trial is sought on the basis of an irregularity or misconduct under Rule 59(a)(1) and (2). Here, appellant failed to object on the basis of Nash Jr.'s alleged theatrics and raised the issue for the first time in his motion for new trial. Appellant objected during Nash Jr.'s testimony solely on the basis that opposing counsel was leading the witness and testifying. Later, appellant was questioning Nash Jr. when the witness gave a somewhat long, narrative answer, and appellant asked the court to control the witness, stating "Will the judge control the witness? He can't just go on like that. I'd like to have direct answers to my questions. Do you think you can do that?" Nash Jr. replied, "Did I not answer you?" The court responded, "Let's keep it down. Just ask him a question." Appellant's request was not specific enough to alert the circuit court to the problem. It does not specifically call Nash Jr.'s behavior the perceived problem. The request could just as easily be interpreted as asking the court to direct the witness to be more responsive and answer appellant's questions. Moreover, appellant did not ask for an instruction to the jury, a mistrial, or any other relief. **[instruction/evidence]** The circuit court reached the correct result in refusing the second paragraph of appellant's proposed instruction because there was no evidence to support the alleged acts listed in that instruction. A party is entitled to a jury instruction when it is a correct statement of the law and there is some basis in the evidence to support giving the instruction. There was no evidence whatsoever concerning the eleven indicators of a fraudulent transfer of property into the trust. A circuit court can properly refuse to give a jury instruction unsupported by the evidence. (Piazza, C.; CV-17-827; 3-13-19; Murphy, M.)

Gore v. Ark. Teachers Federal Credit Union, 2019 Ark. 75 **[service]** The circuit court's use of "additional 120 days" in the first extension order means that the order extended the time 120 days from the expiration of the initial 120-day period permitted under Rule 4(i). Thus, the first order extended the time until November 9, 2016. The circuit court's use of the words "additional 120 days" in the second extension order means that the order extended the time 120 days from the expiration of the time permitted by the first extension order. Therefore, the second order extended the time until March 9, 2017. Gore was served by warning order on March 8, 2017, one day before the time for service expired. (Elmore, B.; CV-17-1055: 3-14-19; Kemp, J.)

Gifford v. McGee, 2019 Ark. App. 183 **[oral easement]** Here, in addition to finding that Gifford had constructive notice of the easement based on the conditions on and around the property, the court also found that Gifford had been specifically told of the easement, citing the testimony of

both McGee and Simpkins. The court noted that Gifford challenged McGee's credibility and acknowledged that his testimony was self-serving but found that it had been corroborated by Simpkins. The court specifically found Simpkins to be a credible witness. The circuit court properly found that Gifford had notice of the septic lines when he purchased his property. To the extent that Gifford also argues that the court erred in not finding that the oral easement was barred by the statute of frauds or that the nature of the easement changed significantly after he purchased the property, both his arguments hinge again on his contention that the septic lines were not apparent when he purchased the property. Because there was no reversible error in the circuit court's finding that Gifford had actual and constructive notice of the presence of the septic lines, these legal arguments are unavailing. (Lusby, R.; CV-18-735: 3-27-19; Vaught, L.)

Harrison v. APERS, 2019 Ark. App. 179 **[retirement benefits]** Arkansas Code Annotated section 24-4-608 does not require that the employee choose annuity Option B75 annuity. It clearly states that when an employee dies before retirement has begun, and there is a surviving spouse, then it is as though the employee had chosen Option B75. In other words, if a member dies before retirement begins, then the surviving spouse shall receive an annuity as if the following had occurred: (1) the member had retired on the date of death, (2) the member had chosen Option B75, and (3) the member had chosen his or her spouse as a joint beneficiary. Harrison contends that according to subsection (g), she is entitled to inherit all employer contributions that accumulated during Bright's career. The agency disagrees and argues that section 24-4-1102 does not apply to Bright because it applies only to "contributory members." Section 24-4-602 applies only to retirants who choose a straight-life annuity under section 24-4-601. (Gray, A.; CV-18-771: 3-27-19; Virden, B.)

Garrett v. Neece, 2019 Ark. App. 178 **[trust]** Eva manifested her intent to revoke in part the 1982 Revocable Trust when she executed the May 2009 quitclaim deed to Tract A of the trust property to George. She further manifested that intent to revoke in part by subsequently amending the 1982 Revocable Trust to except Tract A from the trust property in July 2009. Moreover, she expressly revoked the 1982 Revocable Trust when she created the 2010 Revocable Trust, which made no reference to Tract A. Here, not only was Eva the trustee of the 1982 Revocable Trust with the authority to deal with the property pursuant to the trust provisions, she was also the settlor with the individual power to revoke and amend. Given the above facts, George asserts that the 2009 quitclaim deed of Tract A to him was a valid conveyance. Even if the 2009 quitclaim deed conveying Tract A from Eva in her individual capacity to George were not valid, George would have nevertheless ended up with Tract A. In her will, Eva left the rest, residue, and remainder of her property to the trustee of the 2010 Revocable Trust, i.e., George, with instructions for him to add that property to the 2010 Revocable Trust and distribute it according to the terms of the 2010 Revocable Trust and any amendments thereto. In the amendment to the 2010 Revocable Trust, executed the same day as the will, Eva stated that the balance of the trust estate, which would have included Tract A, shall be distributed to George. The trial court

correctly determined that Eva intended through her trust documents to give Tract A to George and Tract B to Nancy. (Tabor, S.; CV-17-692: 3-27-19; Virden, B.)

Lawson v. Simmons Sporting Goods, Inc., 2019 Ark. 84 **[personal jurisdiction]** The five-factor test previously employed by the court for personal jurisdiction analysis is no longer applicable. Instead, the following criteria are necessary for personal specific jurisdiction: (1) the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state; (2) the cause of action must arise from or relate to the defendant's contacts with the forum state; and (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of personal jurisdiction over the defendant reasonable. Considering the foregoing, the circuit court could not exercise personal jurisdiction over Simmons in this matter. Certainly, Simmons advertised and conducted promotional activities in the state, but that alone is not sufficient for personal jurisdiction. The cause of action did not arise from or relate to Simmons's contact with Arkansas. Here, the controversy—Lawson's trip and fall—undisputedly occurred in Louisiana. Any alleged negligence related to this incident in Louisiana did not arise out of or relate to Simmons's contacts with Arkansas. "What is needed—and what is missing here—is a connection between the forum and the specific claims at issue." *Bristol-Myers Squibb Co.,* 137 S. Ct. at 1781. Without this fundamental connection, Arkansas cannot exercise specific personal jurisdiction over Simmons in this matter. (Glover, D.; CV-18-545; 3-28-19; Wood, R.)

DOMESTIC RELATIONS

Damron v. Damron, 2019 Ark. App. 160 **[right to jury trial in a prosecution for criminal contempt]** There is no right to a jury trial in a prosecution for criminal contempt under Arkansas law unless (1) the sentence actually imposed on the contemnor is greater than six months, (2) a sentence greater than six months is authorized by statute, or (3) the circuit court announces prior to trial that it is contemplating a sentence greater than six months. The appellate court found no error in the circuit court failing to grant appellant a jury trial because she was only sentenced to 60 days and the circuit court did not indicate how long of a sentence he was contemplating. The appellate court did acknowledge prior caselaw that stated that the better practice in cases of criminal contempt is for the circuit judge to announce at the outset whether punishment in excess of six months may be imposed. (Karren, B.; CV-18-587; 3-13-19; Gruber, R.)

Banks v. Banks, 2019 Ark. App. 166 **[debts can be considered when determining equitable distribution of property; alimony considerations]** The appellate court found no error in the circuit court considering both assets and debts when dividing martial property, as the circuit court has an obligation to consider debts in the context of the distribution of the parties' property. The parties received an equitable division of the net property, after deducting the debts. The

circuit court did not make an unequal division of property; therefore, a statement regarding the bases of the distribution is not required. The appellate court also found no error in the award of alimony, as the circuit court considered eleven factors including the financial circumstances and the financial needs of both parties. (Singleton, S.; CV-18-658; 3-13-19; Gladwin, R.)

PROBATE

In the Matter of the GNB III, Trust, 2019 Ark. App.171 [**cotrustees who are unable to achieve unanimity to act by majority rule; trust transaction that benefits trustee must be approved by court**] The appellate court found that the circuit court should have made a declaration that the cotrustees of the Trust could act by majority rule when unanimity could not be accomplished. Arkansas Code Annotated 28-73-703(a) allows cotrustees who are unable to achieve unanimity to act by majority rule. This is a change from common law. However, the appellate court found no error in the circuit court's refusal to approve the sale of the property to one of the trustees. Arkansas Code Annotated 28-73-802(b)(2) provides that a transaction involving the management of trust property entered into by the trust for the trustee's own personal account or which is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless, among other things, the transaction is approved by the circuit court. Therefore, the land sale required court approval and not just majority opinion. Because there were facts presented from which the circuit court could find that the transaction was not fair and that the sale should not be approved, the appellate court found no error on this point. (Culpepper, D.; CV-18-770; 3-13-19; Whiteaker, P.)

In the Matter of the Estate of Khyree Martin, a Minor, 2019 Ark. App. 180 [**determining the amount to award for past medical expenses when a tort settlement does not designate the amounts allocated to the various elements of damages**] The appellate court found no error in the circuit court awarding full reimbursement of the Medicaid lien filed by DHS in the tort case. DHS may not recover its past medical payments on the nonmedical-damages portion of a recipient's settlement; however, DHS is entitled to full repayment of its claim if the part of the settlement that a court allocates for medical expenses is sufficient to pay it. In this matter, the settlement is not subject to a stipulation regarding payment of medical expenses and does not otherwise allocate the recovery to the various elements of damage. Therefore, the question before the appellate court was how to ascertain the amount that constitutes the award for past medical expenses contained within a lump-sum settlement that did not designate the amounts allocated to the various elements of damages. When the circuit court awarded full repayment of the past medical bills paid by Medicaid, the circuit court essentially determined that 5.8% of the total $4,450,500 recovery represented the past-medical-expenses portion of the settlement. The circuit court noted that the Estate settled the claim knowing of the Medicaid lien and stipulating to the amount of the lien. It was the Estate's burden to prove the amount of the settlement that

constituted non-past medical expenses, and the circuit court found they failed to prove otherwise. (Pierce, M.; CV-18-650; 3-27-19; Gladwin, R.)

In the Matter of the Estate of Loy Gene Cunningham, Deceased, 2019 Ark. App. 177 [**lost will does not have to have physically existed at the time of the testator's death**] Arkansas Code Annotated 28-40-302(2)(A) states that no will of any testator shall be allowed to be proved as a lost or destroyed will unless the will is.... "*proved to have been in existence at the time of the death of the testator*". This subsection does not require the will to have physically existed at the time of the testator's death; it requires that the will only legally exists at the time of the testator's death. The appellate court has previously held (2)(A) means legal existence, not physical evidence. It is unnecessary for the circuit court to determine what became of the will; it is enough that the circuit court determine that the will was not revoked or canceled by the decedent. Therefore, the appellate court found no error in the circuit court finding that the lost will met the requirements of the statute. (Putman, J.; CV-18-779; 3-27-19; Abramson, R.)