

APPELLATE UPDATE

PUBLISHED BY THE
ADMINISTRATIVE OFFICE OF THE COURTS

APRIL 2016
VOLUME 23, NO. 8

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 or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On April 14th, the Supreme Court published for comment proposed changes to the Affidavit of Financial Means that is provided for in Administrative Order Number 10. The comment period ends May 20th.

CRIMINAL

Thomas v. State, 2016 Ark. App. 195 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**discovery**] Because any prejudice appellant may have suffered would have been cured by requesting a continuance, the trial court did not abuse its discretion in admitting certain testimony, when the substance of the testimony was not disclosed until four days before trial. (Culpepper, D.; CR-15-537; 4-6-16; Whiteaker, P.)

Austin v. State, 2016 Ark. App. 194 [**Ark. R. Evid. 609; impeachment**] The trial court abused its discretion when it allowed the State to introduce appellant's two misdemeanor convictions that did not involve dishonesty or false statement for impeachment purposes. The evidence was not admissible pursuant to Rule 609 of the Rules of Evidence and appellant did not "open the

door” for impeachment by contradiction through the use of extrinsic evidence during his direct examination testimony. (Henry, D.; CR-15-907; 4-6-16; Glover, D.)

Millsap v. State, 2016 Ark. App. 192 [**motion to suppress; traffic stop**] Based upon information that law enforcement observed and heard during the controlled purchase of drugs from appellant immediately prior to the traffic stop, probable cause existed to justify the warrantless stop and arrest of appellant. [**motion to suppress; custodial statement; Ark. R. Crim. P. 4.7**] Rule 4.7 of the Arkansas Rules of Criminal Procedure does not require automatic exclusion of a custodial interrogation that is not electronically recorded. Additionally, subsection (b)(2)(F) of the Rule provides that the lack of a recording is not considered in determining the admissibility of a custodial statement if the person interviewed asked for the recording to be stopped. (Pearson, W.; CR-15-733; 4-6-16; Harrison, B.)

Carter v. State, 2016 Ark. 152 [**speedy trial**] The trial court’s docket notation, which stated: “Case continued over defendant’s objection based on congested docket. The case is set for July 22, the next available date on this docket. The time is excluded. The court finds there is no prejudice to the defendant who is out on bond” did not comply with Ark. R. Crim. P. 28.3(b)(1). To comply with the Rule, the court must explain with particularity in a contemporaneous written order or docket entry the reasons the trial docket does not permit trial on the date originally scheduled. (Philhours, R.; CR-14-5; 4-7-16; Wynne, R.)

Todd v. State, 2016 Ark. App. 204 [**sentencing; habitual offender**] A court may sentence a habitual offender to a suspended sentence as long as the suspended term is in addition to a sentence that includes the statutory minimum term of imprisonment. [**sentencing; revocation**] Upon revocation, the circuit court was permitted to modify appellant’s original sentence and run the sentences consecutively rather than concurrently as originally ordered. (Culpepper, D.; CR-15-916; 4-13-16; Gruber, R.)

Johnson v. State, 2016 Ark. 156 [**jury instructions; extreme-emotional-disturbance manslaughter**] A defendant is not entitled to an instruction on extreme-emotional-disturbance manslaughter unless there is a factual basis showing that the defendant killed the victim in the moment following provocation in the form of physical fighting, a threat, or a brandished weapon. There was no factual basis for appellant to establish that his victim, who attempted to confiscate appellant’s contraband shoes, provoked appellant. [**Ark. R. Crim. P. 17.4**] Rule 17.4(a) of the Arkansas Rules of Criminal Procedure provides the court with discretion to require the prosecutor to disclose material to the defendant once the defendant shows that the material is relevant to the preparation of the defense. Because appellant failed to establish that the material that he requested from the prosecutor was relevant, the circuit court did not abuse its discretion when it denied the discovery requests. (Simes, L.T.; CR-15-68; 4-14-16; Danielson, P.)

Fukunaga v. State, 2016 Ark. 164 [**Rule 37**] The trial court correctly concluded that defense counsel's failure to object to certain testimony was based on trial strategy and that his performance was therefore not deficient. Accordingly, the denial of appellant's Rule 37 petition was proper. (Sims, B.; CR-15-857; 4-14-16; Wood, R.)

England v. State, 2016 Ark. App. 211 [**admission of evidence**] The trial court did not abuse its discretion when it admitted testimony and evidence of appellant's alleged suicide attempt because the evidence was admitted during rebuttal testimony after appellant opened the door to the issue and after the State laid a proper foundation. (Wright, H.; CR-15-696; 4-20-16; Gladwin, R.)

Burgess v. State, 2016 Ark. 175 [**sentencing**] After appellant's probation was revoked and he was sentenced to the Department of Correction, he was not entitled to have his sentence reduced by jail-time credit for the time that he previously spent incarcerated as a condition of his probation. (Sims, B.; CR-15-613; 4-21-16; Danielson, P.)

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Bailey v. State, 2016 Ark. App. 209 (second-degree murder) CR-15-697; 4-13-16; Hoofman, C.

Wilson v. State, 2016 Ark. App. 218 (aggravated-residential burglary) CR-15-483; 4-20-16; Glover, D.

Draft v. State, 2016 Ark. App. 216 (second-degree murder) CR-15-708; 4-20-16; Kinard, M.

Suchey v. State, 2016 Ark. App. 225 (first-degree battery) CR-15-769; 4-27-16; Virden, B.

Lambert v. State, 2016 Ark. App. 229 (felon in possession of a firearm) CR-15-940; 4-27-16; Whiteaker, P.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

McClain v. State, 2016 Ark. App. 205 (probation) CR-15-687; 4-13-16; Glover, D.

CIVIL

Clark v. Southern Farm Bureau, Inc., 2016 Ark. App. 196 [**insurance**] The policy states that its insured must give notice of a tentative settlement with the underinsured motorist. However, the policy provision does not expressly state or necessarily imply that UIM coverage is conditioned on the insurer's receiving such notice. The policy language falls short of declaring that UIM coverage will be completely forfeited or excluded if such notice is not given. Clark's failure to provide prior notice of his settlement with Zender did not violate a condition precedent under the policy. When a notice provision does not contain language sufficient to make it a condition precedent, the insurer must show that it was prejudiced by any delay in notice in order to be relieved from liability. (Pierce, M.; CV-15-675; 4-6-16; Whiteaker, P.)

Smith v. Mountain Pine Timber, Inc., 2016 Ark. App. 193 [**warranty of title/damages**] The measure of damages for a breach-of-warranty-of-title claim is the value of the mineral rights at the time of conveyance. [**corporate liquidation**]. Arkansas Code Ann. section 4-27-1407(d)(2) pertains to enforcement of unknown claims against shareholders and is the statute by which the Smiths successfully sought to have personal liability imposed on the former shareholders of MPT. It applies only when "the assets [of the corporation] have been distributed in liquidation." When liquidation occurs, enforcement of claims against an individual shareholder is permitted "to the extent of . . . the corporate assets distributed to him in liquidation." While not specifically termed liquidation in the settlement agreement, there was substantial evidence that the settlement agreement liquidated MPT's assets and distributed them to its individual shareholders and/or their assignees. (Weaver, T.; CV-15-341; 4-6-16; Vaught, L.)

Mountain Pine Timber, Inc. v. Smith, 2016 Ark. App. 197 [**attorney's fees**] Party was the prevailing party and was entitled to an award of attorney's fees; amount awarded was not excessive in light of the *Chrisco* factors. [**prejudgment interest**] In a breach of the covenants of a deed, interest should run from the date of the breach. Here, interest should run from the date of the constructive eviction rather than the date of the conveyance. (Weaver, T.; CV-15-728; 4-6-16; Vaught, L.)

Blevins v. Hudson, 2016 Ark. 150 [**immunity**] County judge was entitled to absolute immunity because he was acting in his official capacity as county judge, as well as qualified immunity in his individual capacity. When a public officer is granted discretion and empowered to exercise his independent judgment, like a judge, he becomes a quasi-judicial officer and may enjoy judicial immunity when he is acting within the scope of his authority. Here, the county judge appointed members to the grievance committees; entered an order directing the circuit clerk to continue the employment of the deputy clerks; and made statements to the public regarding the findings of the grievance committees. Hudson is entitled to judicial immunity for any claims

arising from the entry of the order against Blevins. Hudson's order makes numerous conclusions of law regarding the jurisdiction of the county court over the matter and the power of the quorum court to control the employees of the circuit clerk. The order also incorporates the factual findings of the grievance committee, applies the applicable standards, and issues a directive for action. Finally, both Hudson's order as well as the order entered by the circuit court judges of Sebastian County note that Hudson was acting in his judicial capacity in entering the order. Additionally, the hearing before the grievance committee was an adversarial process, and any error in that process could have been corrected through an appeal. (Johnson, K.; CV-114; 4-7-16; Goodson, C.)

Trammel v. Wright, 2016 Ark. 147 [**false arrest**] Police officer did not commit intentional tort of false arrest after arresting a person based on information that was conveyed to the officer that a warrant was outstanding. In fact, the person was misidentified. The actual warrant was not for Wright, but for a different person with the same name. Officer Trammell was not in possession of the actual warrant at the time of the arrest, but followed the police department's practice and relied on the information provided by ACIC. When Wright stated that she was not the subject of the warrant, Officer Trammell sought verification of that information from dispatch in Washington County. All of the information that Officer Trammell had in his possession, which was verified by dispatch, indicated that Wright was the subject of the warrant. Wright has provided no facts to support her argument that Officer Trammell committed the intentional torts of false arrest or false imprisonment. (Scott, J.; CV-15-179; 4-7-16; Danielson, P.)

Metropolitan Ins. Co. v. B.J.L.Y. LLC, 2016 Ark. App. 201 [**structured settlement**] Circuit court erred in approving the transfer because the transfer violates the Arkansas Structured Settlement Protection Act's prohibition on dividing periodic payments between a payee and a transferee. The order required Metropolitan to divide the payments in violation of the statute. (Piazza, C.; CV-15-505; 4-13-16; Abramson, R.)

Union Pacific Railroad v. Skender, 2016 Ark. App. 206 [**summons**] Union Pacific was not correctly named in the summons. While it was listed as the sole defendant in the caption, the summons was not directed to it in the body of the document as required under the rules. To make matters even more confusing, its registered agent— which was inexplicably listed as a claimant in the caption— was listed as the defendant to whom the summons was directed in the body of the summons. The trial court's determination that the summons was fatally deficient was not in error. The Arkansas savings statute does not apply to this FELA action, but federal law allows the statute of limitations to be tolled under certain circumstances. Case is remanded for the trial court to make the requisite findings on whether equitable tolling is available to suspend the statute and whether dismissal with or without prejudice is appropriate. (Wyatt, R.; CV-15-1050; 4-13-16; Whiteaker, P.)

Jones v. Douglas, 2016 Ark. 166 [**summons**] Appellants argue that despite appellees' absence from Arkansas for six years, they always maintained their residence here and intended to return. The record reveals that appellees sold their home in Arkansas and purchased property in Costa Rica; that they lived in Costa Rica from 2006 until 2012; and that they acquired permanent-residency status from the Costa Rican government. There is no requirement that people sever all ties with Arkansas in order to become residents of another jurisdiction. At the time appellants attempted service on them, appellees had thirty days from the date of service to file an answer or otherwise respond to the complaint, but the summonses incorrectly stated that appellees had twenty days to respond. The summonses failed to strictly comply with the requirements of Rule 4(b), and the circuit court properly granted the motion to set aside the default judgment. However, appellants made a timely, completed attempt to serve appellees and should be afforded the benefit of the savings statute, and the dismissal should be without prejudice. (Cook, V.; CV-15-809; 4-14-16; Wynne, R.)

Hammerhead Contracting, LLC v. Ladd, 2016 Ark. 162 [**lien**] The "direct sale" exception that is found in section 18-44- 115(a)(8)(A) defines a direct sale: "A sale shall be a direct sale only if the owner orders materials or services from the lien claimant." Contrary to the findings of the circuit court, it is not "absurd" to construe section 18-44-115 just as written. Under the plain wording of the statute, to the extent that Ladd has ordered materials or services directly from Hammerhead, those transactions constitute direct sales, and Hammerhead is not required to give Ladd the statutory notice. In situations such as the case at bar, the homeowner is in direct privity of contract with the direct-sale contractor. There are no undisclosed suppliers or laborers. In Ladd's dealings with Hammerhead, Ladd had to expect that Hammerhead would want to be paid for the labor and materials that it provided directly to Ladd. (Weaver, T.; CV-15-894; 4-14-16; Hart, J.)

Mendoza v. WIS Intl., Inc., 2016 Ark. 157 [**certified question-answered**] Under the facts of this case, does Arkansas Code Annotated section 27-37-703, which restricts the admissibility of seat belt-nonuse evidence in civil actions, violate the separation-of-powers doctrine found in article IV, section 2, of the Arkansas Constitution? Yes. The seat-belt statute is procedural. Arkansas Code Annotated section 27-37-703 violates separation of powers under article 4, § 2 and amendment 80, § 3 of the Arkansas Constitution and is therefore unconstitutional. (E.D. Ark.; CV-15-677; 4-14-16; Danielson, P.)

Weisker v. Harvest Management, LLC, 2016 Ark. App. 220 [**duty to determine if resident can live independently**] Appellant argues on appeal that Apple Blossom owed a duty to Randolph to perform an evaluation to determine Randolph's capacity to live safely in his apartment at Apple Blossom, and if he were not deemed able, to have him execute waivers of liability. Appellant points to no statutory or regulatory law that imposes on a retirement community such as Apple Blossom a duty to screen or monitor potential residents for the ability to live

independently. There is no such statutory duty imposed by the legislature in this circumstance. The contract between Randolph and Apple Blossom explicitly provides that Apple Blossom is not a medical provider, it is not qualified as such, and it does not provide for medical assistance. There is simply no contractual undertaking of a duty to prescreen residential applicants to determine suitability to live independently or a duty to monitor those residents after they have moved onto the property. As prudent as such a screening process might be, there is no such duty as a matter of law in these circumstances. (Schrantz, D.; CV-15-564; 4-20-16; Hixson, K.)

Corbin v. Baptist Health Inc., 2016 Ark. 212 [**expert witness**] The trial court did not abuse its discretion by limiting Dr. Searcy to giving only factual testimony since he had not been timely disclosed as an expert, and he expressly testified under oath that he did not intend to come to trial and give expert opinions. (Welch, M.; CV-15-598; 4-20-16; Abramson, R.)

Patrick v. Tyson Foods, Inc., 2016 Ark. 221 [**malicious prosecution**] Appellant's contention that the video and the investigative report can be interpreted differently does not mean that appellant showed evidence of a lack of probable cause. Appellees internally were of the opinion, mistakenly or not, that appellant was involved in a nonaccidental ammonia leak. Appellees did not seek out law enforcement but instead complied with law enforcement's initiation of contact and requests for information. Appellees, the Springdale police, and the prosecutor could reasonably have believed that appellant was involved with purposely tampering with plant equipment, which caused substantial inconvenience and physical injury and that the appellant recklessly caused physical injury to the ten Tyson employees who were treated for ammonia-gas inhalation. This satisfied the requirement of probable cause to believe that appellant committed the crimes for which he was charged. Furthermore, appellant presented only conclusory allegations without any evidence or facts to support the existence of a genuine issue of material fact on the element of malice. Without meeting proof with proof on the element of malice, appellant's claim of malicious prosecution fails. [**defamation**] Applying the law related to defamation to this appeal, the trial court did not err in entering summary judgment on behalf of appellees. Assuming arguendo that all six elements of defamation were sufficiently supported by evidence in order to survive summary judgment, the trial court did not err in finding that Tyson was protected by the qualified privilege afforded to an employer. Tyson responded to a request by law enforcement by delivering material that was created as a confidential internal corporate investigative report to determine the root cause of the ammonia leak. The response to law enforcement was factual, necessary, and not excessive. Appellees demonstrated a prima facie case of entitlement to this qualified privilege, and appellant failed to meet proof with proof to demonstrate that there was any basis to bar appellees from the benefit of the qualified privilege. (Beaumont, C.; CV-15-592; 4-20-16; Hixson, K.)

Muccio v. Hunt, 2016 Ark. 178 [**summary judgment**] Appellees failed to present sufficient proof to raise a question of fact with regard to the claims. (Fox, T.; CV-15-636; 4-21-16; Wynne, R.)

Farris v. Conger, 2016 Ark. App. 230 [**contract/negligence**] Farris's cause of action sounded in negligence, rather than in contract, and her complaint was barred by the three-year statute of limitations attendant to negligence actions. A promise to perform diligently cannot form the basis of a breach-of-contract claim. Supreme Court caselaw is clear that an allegation of a failure to perform diligently amounts to negligence. Farris alleged that CWM breached paragraph 5 of the agreement. The applicable portion of paragraph 5, however, promises nothing more than an attempt to perform diligently. As such, on its face, Farris's complaint does not raise a contract claim. (Compton, C.; CV-15-622; 4-27-16; Whiteaker, P.)

Cross v. Cross, 2016 Ark. App. 224 [**pleadings conform to proof**] The circuit court did not specifically grant appellees' motion to amend the pleadings to conform to the evidence. Although the court did not specifically say that it was granting the motion, it is clear that it did so. The appellants were not prejudiced by the amendment. [**boundary**] Specifically, appellants argue that there was no proof of an agreement to recognize the fence as the proper boundary. However, proof of an explicit agreement is unnecessary because a boundary line by acquiescence is inferred from the landowners' conduct over many years so as to imply the existence of an agreement about the location of the boundary line. (Capeheart, T.; CV-15-881; 4-27-16; Abramson, R.)

Stone v. Washington Regional Medical Center, 2016 Ark. App. 236 [**quiet title**] The first issue is whether the Stones' heirs have any interest, reversionary or otherwise, in the FCH property. The circuit court correctly found that the Stones' heirs do not have any interest in the FCH property. The appellants also contend that WRMC did not satisfy its burden of proving that it was entitled to quiet title in the FCH property. WRMC showed that it had both legal title to the FCH property and was in possession. It also showed that there was compliance with the provisions of the 1909 Deed requiring approval of both the city council and the FCH board, as the successor to the Stone Hospital Board of Control, to convey the property from the City to WRMC for relocation of the hospital to another location. (Beaumont, C.; CV-15-503; 4-27-16; Hixson, K.)

Columbia Ins. Group v. Cenark Project Management Services, Inc., 2016 Ark. 185 [**certified question -- insurance**] (1) Whether faulty workmanship resulting in property damage to the work or work product of a third party (as opposed to the work or work product of the insured) constitutes an "occurrence?" (2) If such faulty workmanship constitutes an "occurrence," and an action is brought in contract for property damage to the work or work product of a third person, does any exclusion in the policy bar coverage for this property damage? A CGL (commercial

general liability) policy does not extend basic coverage for a claim of breach of contract. Because there is no coverage, the certified questions are moot. (E.D. Ark.; CV-15-804; 4-28-16; Goodson, C.)

Ark. State Police v. Wren, 2016 Ark. 188 [**FOIA-accident reports**] The ASP argues that the circuit court erred in holding that its policy of redacting personal information from accident reports is a violation of FOIA. The ASP contends that the redacted information is exempted from disclosure because its disclosure is prohibited by the federal Driver's Privacy Protection Act. The DPPA does not prohibit information contained in accident reports from being released under FOIA. (Welch, M.; CV-15-828; 4-28-16; Wynne, R.)

Stokes v. Stokes, 2016 Ark. 182 [**jury trial**] Traditionally, setting aside a deed has been an equitable remedy in Arkansas, and an accounting is an equitable remedy. The circuit court properly disposed of both issues. The right to a jury trial did not attach. [**deed**] The 1999 warranty deed was complete on its face, unambiguous, and conveyed the farmland to Mason. Parol evidence was not permitted. [**quitclaim deed**] The circuit court found the quitclaim deed "void and of no effect" because the power of attorney had been revoked, and ultimately, the circuit court denied George's counterclaim. Based on the evidence, George failed to provide proof with proof in demonstrating the existence of a material issue of fact. He did not offer evidence that (1) he held a valid power of attorney to execute the quitclaim deed, and (2) even if the power of attorney was valid, he did not breach his fiduciary duty by executing the 2009 quitclaim deed and by transferring the farmland back to himself. [**attorney's fees**] Mason asserted an unjust-enrichment claim. He is not entitled to attorney's fees in this case as his claims are not authorized by Ark. Code Ann. section 16-22-308. (Rogers, R.; CV-15-557; 4-28-16; Brill, H.)

DOMESTIC RELATIONS

Wilson v. Wilson, 2016 Ark. App. 191 [**modification of visitation**] The appellant appealed from the circuit court's denial of his petition to set aside a judgment denying his request to modify visitation with his minor child. The circuit court had terminated his visitation with his minor child based upon evidence that the appellant had been arrested for possession of a firearm, that he and his wife had been manufacturing methamphetamine, and that there was domestic abuse in their home. In his motion to reinstate his visitation, he argued changed circumstances and that it was in the child's best interest to have visitation with his father. He made various procedural arguments that the Court of Appeals found without merit. The decision terminating visitation was affirmed. (Bell, K., No. CV-15-366; 4-6-16; Virden, B.)

Davis v. Davis, 2016 Ark. App. 210 [**divorce—property, attorney’s fees**] The appellant husband argued on appeal that the circuit court erred in the division of the parties’ property and in failing to award him attorney’s fees. In affirming, the Court of Appeals concluded that the court’s overall division of marital property was equitable, “especially in light of the presumption in favor of equal distribution of marital assets.” Regarding the dispute over a large gun collection, the appellant asked that at least some of the guns be awarded to him as his separate property. The court ruled that all of the guns in evidence were marital property and that one gun safe belonged to the appellant alone. The Court of Appeals said the evidence about the guns was in complete conflict. Appellant had the burden to prove what guns were his separate property, and the conflicts in proof were for the court to resolve. Finally, the court found expressly that appellant’s testimony on this issue was not credible, and the appellate court defers to the trial court on issues of credibility. On the issue of attorney’s fees, the Court said the circuit court did not abuse its discretion. The issue of attorney’s fees is viewed in light of and in conjunction with property-distribution issues. A court does not abuse its discretion by failing to order the party having more income to pay the other party’s attorney’s fees. (Sutterfield, D.; No. CV-14-533; 4-13-16; Brown, W.)

Shinn v. Shinn, 2016 Ark. App. 217 [**divorce—separation agreement—contempt**] While the parties’ divorce case was pending, they entered into a separation agreement that was incorporated into the court’s order. It provided, in part, that the appellant wife would live in the marital residence, owned by a trust benefitting their adult, disabled daughter, so long as the daughter lived in the home. The wife could not have any roommates unless the parties approved in writing. The appellee husband filed a motion for contempt alleging that appellant had violated the agreement by having roommates and he requested that she be ordered to move from the residence. The court entered a decree of divorce and found from testimony presented that multiple people lived in the home without agreement of the parties, that the appellant had violated the agreement, and that she was in contempt. The court ordered her to vacate the residence within ninety days. She contended on appeal that the circuit court was without jurisdiction because neither party has an interest in the property, so ordering her to vacate the home was error. The property is not marital property; therefore, she argued, the court had no authority over it. In affirming, the Court of Appeals said the circuit court’s authority derives from the parties’ separation agreement, which was incorporated in the court order. The court had found that she had violated the language of the agreement and was thus in contempt, ordering her to vacate the home, a finding that was not clearly against the preponderance of the evidence. (Parker, A.; No. CV-15-701; 4-20-16; Gruber, R.)

Neal v. Neal, 2016 Ark. App. 223 [**child custody; witnesses**] The appellant mother appealed the circuit court’s decision finding that custody of the parties’ daughter should remain with the appellee father of the child pursuant to an agreed order entered in 2011. The Court of Appeals found that no material change in circumstances supported the modification of the custody

arrangement. The appellant also alleged that one witness permitted to testify was not revealed on discovery. The issue of whether the witness was or was not revealed in response to discovery was thoroughly and thoughtfully examined by the court. In addition, the appellant did not demonstrate that the trial court abused its discretion or that she was prejudiced by the witness's testimony. The Court of Appeals also considered the best interest of the child and found it in the child's best interest to remain with her father, subject to the appellant's reasonable visitation. The decision was affirmed. (Singleton, H.; No. CV-15-791; 4-27-16; Gladwin, R.)

Goodwin v. Goodwin, 2016 Ark. App. 233 [**divorce; retirement benefits—property-settlement agreement**] The appellant husband appealed the order awarding the appellee, his former wife, \$42,000 as her half of his lump-sum retirement payment disbursed after the parties' divorce. He contends this portion of his retirement accrued before the parties' marriage and was nonmarital property. In affirming, the Court of Appeals pointed to the parties' written agreement that was recited into the record, signed by the trial court and filed of record. The Court said that the appellant entered into a binding contractual agreement that was approved by the trial court in the divorce decree, and "[t]hat he determined years later that this agreement appeared to be improvident to him is no ground for relief." (Keaton, E.; No. CV-15-949; 4-27-16; Hixson, K.)

PROBATE

Ashley v. Ashley, 2016 Ark. 161 [**decendent's estate—Rule 5(b), Rules of App. Pro.—Civil; Ark.CodeAnn. 28-50-112—settlement of claims; sanctions**] This appeal results from a circuit court's nunc pro tunc order addressing deficiencies in an earlier order granting an extension of time for lodging the record in the appellee/cross-appellant's appeal. Issues were raised on appeal and cross-appeal. The timeliness issue involved the appellee's motion to dismiss, and the appellant's raised Rule 5(b) of the Arkansas Rules of Appellate Procedure—Civil. The Supreme Court found the motion to dismiss was timely filed and denied the motion to dismiss. The parties had entered into a settlement agreement, which the circuit court had approved, finding that it was in the best interest of the estate. The question in the case is whether, as required by section 28-50-112, the compromise agreement was in the best interest of the estate, and the Supreme Court concluded that the circuit court did not err in finding that the settlement was in the best interest of the estate. Finally, the appellants filed a motion for sanctions against the appellee for filing a frivolous appeal for improper purposes. In denying the motion, the Supreme Court said that the appellee could properly appeal whether the settlement agreement was in the best interest of the estate. The case was affirmed on both direct appeal and cross-appeal. (Welch, M.; No. CV-15-362; 4-14-16; Hart, J.)

Howard v. Adams, 2016 Ark. App. 222 [**decendent's estate; partition; attorney-fee lien**] This is the fourth appeal in a long-running dispute between the appellant, acting individually and as

administrator of the estate of his late father, and the appellee attorney and her law firm. The appellant appeals from an order denying partition of the estate's real property and from a decree foreclosing the appellee's attorney-fee lien on the estate's property, forty-six acres. The decree ordered the property to be sold by the commissioner of the court, declared that the appellee would have first priority in one-third of the sales proceeds to satisfy her attorney-fee lien, and declared that appellee would have second priority in the proceeds to pay \$18,000 in fees to another attorney. The remaining balance of the proceeds was to be deposited in the registry of the court for further rulings. The appellant raised six points on appeal, none warranting reversal. The decision was affirmed. (Duncan, X.; No. CV-15-163; 4-27-16; Gladwin, R.)

JUVENILE

Ark. Dep't of Human Services v. Walker, 2016 Ark. App. 203 [**DN Adjudication - sufficiency**] DHS appealed the trial court's order denying its petition to adjudicate siblings dependent-neglected. DHS argued that the siblings were at substantial risk of harm as a result of the mother's abuse of their sibling and her physical abuse of them. The Court of Appeals found that the trial court's findings that the siblings were not dependent-neglected was clearly erroneous and reversed and remanded. Testimony at the adjudication hearing established that the children's mother hit the child that was adjudicated dependent-neglected with a cookie sheet and she admitted to whipping all her children with an extension cord on their backs. Pictures showed loop-shaped injuries on all the children's backs that the trial court recognized as being hit by an extension cord, but discounted as old injuries. However, the appellate court found their existence as proof that the whippings were beyond reasonable and moderate and caused more than temporary marks demonstrating that the children were at substantial risk of harm in the future. The appellate court also noted its prior holding in finding siblings dependent-neglected based on the evidence of abuse of a sibling. (Williams Warren, J.; CV-15-1032; 4-13-2016; Kinard, M., B.)

Basham v. Ark. Dep't of Human Services, 2016 Ark. App. 232 [**TPR – best interest/potential harm**] The appellate court found that a child remaining in DHS custody for up to three years waiting for Appellant to be released from incarceration and to complete case plan after her child had already been in DHS custody for two years, which constituted half of the child's life, was sufficient evidence of potential harm. Further, the appellate court noted that appellant failed to keep in contact with her child. (Haltom, B.; CV-16-15; 4-27-2016; Whiteaker, P.)

Housman v. Ark. Dep't of Human Services, 2016 Ark. App. 227 [**No Merit TPR**] Appellate counsel filed a no merit brief, but only addressed the failure to remedy ground that applied to only one of appellant's two children. The appellate court noted that despite appellate counsel's failure to follow Rule 6-9(i)(1), the court may affirm the trial court if the ruling would not constitute a meritorious ground on appeal. [**subsequent factors**] Through de novo review, the

appellate court considered the evidence as to the subsequent factors ground as to the other child and affirmed. The evidence included that subsequent to the petition, appellant had not obtained stable housing or employment and that she continued to test positive for illegal drugs or prescription medication for which she had no prescription. (Coker, K.; CV-16-8; 4-27-2016; Gruber, R.)

Mcelwee v. Ark. Dep't of Human Services, 2016 Ark. App. 214 [**TPR – best interest/relative placement**] Appellant's sole argument was that termination was not in his child's best interest because he was placed with a relative. The appellate court noted the statutory permanency preference for adoption over relative placement. The trial court's finding that appellant posed a likelihood of potential harm due to continued drug use, mental health issues and inability to conform his behavior to law as evidenced by chronic incarceration was affirmed. (Spears, J.; CV-15-950; 4-20-2016; Virden, B.)

Newman v. Ark. Dep't of Human, 2016 Ark. App. 207 [**TPR – jurisdiction**] Appellant's argument that DHS's failure to file the petition to terminate once the goal is termination no later than 15 month after the child's entry into foster care did not deprive the court of jurisdiction. [**grounds –ICWA sufficiency**] Appellant's continued pattern of drug abuse and domestic violence and their failure to accept responsibility for their child's injury supported the failure to remedy ground. There was evidence that the child was adoptable and the court found that the long standing pattern of physical and substance abuse created an environment that posed a serious and unreasonable risk of harm to the health and safety of their child and that continued custody would likely result in serious emotional and physical damage their child. [**motion to set aside Rule 59/new trial Rule 60**] Appellant's argument that the court's failure to have a written TPR order within 30 days of the termination hearing as required by statute constituted an irregularity in the proceeding that prevented them from receiving a fair trial was without merit. The appellate court found that there was no evidence that the trial court's failure to file a timely termination order had any effect on the TPR proceedings and found no such effect. The court found that appellant receive a fair opportunity to litigate their substantial rights and failed to present any evidence that in the five months following the termination while waiting on the TPR order that they improved their petition, In fact, appellants had another incident of domestic violence that resulted in the father being incarcerated and the mother was unemployed. (Hendrix, A.; CV-15-903; 4-13-2016; Vaught, L.)

Shaffer v. Ark. Dep't of Human Services, 2016 Ark. App. 208 [**TPR – aggravated circumstances**] Appellant argued that there was insufficient evidence as to the termination grounds of subsequent factors and aggravated circumstances. The appellate court affirmed based on the aggravated circumstances ground, noting one ground was sufficient to terminate parental rights. Appellant admitted to regular use of methamphetamine, but maintained he did not have a drug problem and did not need drug treatment. He failed to maintain contact with DHS, had pending felony charges, and lacked stable housing or employment. He had positive

drug tests, yet continued to deny he had a drug problem despite 18 months of DHS intervention and services designed to address his instability and drug addiction. The trial court did not err in finding that there was little likelihood that further service would result in successful reunification. (Clark, D.; CV-15-1031; 4-13-2016; Hixson, K.)

Robinson v. Ark. Dep't of Human Services, 2016 Ark. App. 202 [TPR – best interest]
Appellant argued that termination was not in his child's best interest and was unnecessary arguing that the children may be returned to their father and that she could assist. Although the court is considering placement with the children's father, there is no guarantee that permanency will be achieved by placement with him. The circuit court's finding that it was in her children's best interest to terminate her parental rights was affirmed where there was evidence the children were adoptable and evidence of potential harm from appellant despite counseling. (Sullivan, T.; CV-15-1018; 4-13-2016; Harrison, B.)