APPELLATE UPDATE

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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

REMINDER: Pursuant to Administrative Order No. 14, Circuits are to notify the Supreme Court by February 1, 2017 of the Administrative Judge selection.

Administrative Plans. 2017 is a year that all circuits are required to submit administrative plans to the Supreme Court. Plans are to be submitted by July 1st to be effective January 1, 2018.

On December 15th, the Supreme Court adopted amendments to the Arkansas Code of Judicial Conduct, and a copy of the per curiam order was included in the weekly mailout.

CRIMINAL

State v. Gray, 2016 Ark. 411 **[statute of limitations; theft by deception]** Theft by deception is generally not a continuing offense. Thus, for purposes of determining the statute of limitations, the alleged offense is committed when every element of the crime occurred. (Taylor, J.; CR-15-890; 12-1-16; Danielson, P.)

Newman v. State, 2016 Ark. 413 **[fitness to proceed]** The time that a defendant is undergoing an examination and a hearing on his competence and the period in which he is incompetent to stand trial shall be excluded when calculating speedy trial. It is only after the circuit court has found that a defendant has regained fitness that criminal proceedings may be resumed. (Cottrell, G.; CR-16-412; 12-1-16; Baker, K.)

Limbocker v. State, 2016 Ark. 415 **[sentencing]** If an original sentence is illegal, even though it has been partially executed, the court may correct it. A court should not dismiss a revocation proceeding simply because the sentencing order is facially invalid. The proper remedy for such a situation is to amend the order. (Cottrell, G.; CR-16-53; 12-1-16; Wood, R.)

Smith v. State, 2016 Ark. 417 **[Rule 37]** The trial court did not clearly err when it denied appellant's petition for postconviction relief in which he asserted that his counsel was ineffective for: (1) failing to object to multiple instances of inadmissible hearsay and uncharged allegations of sexual abuse; (2) failing to object and seek a mistrial when one of the jurors allegedly fell asleep during trial; and (3) failing to call into question the credibility of the alleged victims and to highlight inconsistencies in their stories. (Jones, C.; CR-16-87; 12-1-16; Wood, R.)

Kathy's Bail Bonds v. State, 2016 Ark. App. 586 **[bond forfeiture]** The surety of a bond is not released from forfeiture except where an act of God, the State, or of a public enemy, or actual duress prevents appearance by the accused at the time fixed in the bond. Absent one of those excuses the failure of an accused to appear at the time fixed is sufficient basis for forfeiture. The fact that appellant acquired a new passport and fled the country was a voluntary act on his part and not the result of any action or inaction by the State. The bail bond company did not offer any other reason for appellant not attending court. Accordingly, the trial court did not err when it forfeited appellant's bond after he failed to appear for his jury trial. (Arnold, G.; CV-16-462; 12-7-16; Abramson, R.)

Howard v. State, 2016 Ark. 434 **[sufficiency of the evidence; second-degree murder]** There was substantial evidence to support appellant's convictions. (Yeargan, C.; CR-16-7; 12-8-16; Goodson, C.)

Valley v. State, 2016 Ark. 443 **[contempt]** The failure to appear in one court due to a conflict in another court can constitute willful contempt. Because appellant failed to adequately address his conflict problem by asking for relief from either of the courts in which he was scheduled to appear but rather chose to not attend court in one location, there was substantial evidence to support the circuit court's finding of willful contempt. (Fowler, T.; CR-16-362; 12-8-16; Wood, R.)

Liggins v. State, 2016 Ark. 432 **[postconviction relief]** Appellant failed to establish that his appellate counsel was ineffective for not raising certain issues on appeal. Additionally, appellant

failed to establish that his appellate counsel's actions caused him to suffer prejudice. Accordingly, the circuit court correctly denied appellant's petition seeking postconviction relief. (Thyer, C.; CR-16-36; 12-8-16; Brill, H.)

Gay v. State, 2016 Ark. 433 **[mental examination]** Where appellant refused to participate in a court-ordered mental examination and the results from the examination were not introduced at trial, appellant cannot demonstrate that he suffered prejudice by the circuit court having ordered such an examination. **[jury instructions]** The trial court is not required to instruct the jury that "lingering doubt" regarding guilt may be considered a mitigating circumstance. **[mitigation evidence]** Relevant mitigating evidence is limited to evidence that concerns the character or history of the offender or the circumstances of the offense. Because appellant failed to introduce evidence to support his proffered mitigating circumstance, the circuit court did not err when it refused to instruct the jury on the issue. (Wright, J.; CR-15-948; 12-8-16; Baker, K.)

Brown v. State, 2016 Ark. App. 616 **[admission of evidence; defenses; mental disease]** Lay-witness testimony of a defendant's mental disease or defect may be introduced where "purposeful intent" is a fact question for the jury on the essential element of the crime charged. In appellant's case, where the "failure of proof" defense was being raised, the trial court abused its discretion when it excluded testimony from appellant's mom and friends about appellant's mental disease. The excluded testimony was directly relevant to the issue of whether appellant had the kind of culpable mental state required for the commission of the offenses for which he had been charged. (Wyatt, R.; CR-16-386; 12-14-16; Vaught, L.)

Williams v. State, 2016 Ark. 459 **[Rule 37]** The circuit court correctly concluded that it was reasonable trial strategy for appellant's trial counsel to refuse to offer the testimony of individuals who would have undercut the theory of appellant's case. Because appellant failed to establish that his trial counsel's performance was deficient, the circuit court properly rejected appellant's request for postconviction relief. (Wright, H.; CR-16-245; 12-15-16; Wood, R.)

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

Duck v. State, 2016 Ark. App. 596 (rape) CR-16-379; 12-7-16; Brown, W.

Chawangkul v. State, 2016 Ark. App. 599 (second-degree sexual assault) CR-16-331; 12-14-16; Virden, B.

Armour v. State, 2016 Ark. App. 612 (aggravated residential burglary; terroristic threatening) CR-16-640; 12-14-16; Whiteaker, P.

CIVIL

Mann v. Pierce, 2016 Ark. 418 **[offensive collateral estoppel]** Offensive collateral estoppel may be applied to convictions other than ones for murder if the doctrine would otherwise be applicable. Collateral estoppel applies to the facts of this case. Here, in order to convict Mann, the federal jury was required to believe that he participated in a scheme whereby an explosive was secreted in a spare tire that was placed against Dr. Pierce's personal vehicle in a manner such that, when it was moved, it would explode. One is presumed to intend the natural and probable consequences of his actions. The natural and probable consequences of the actions that the jury was required to believe had either been taken or facilitated by Mann were that Dr. Pierce would be either seriously injured or killed. These facts prove the necessary elements of the tort claims made by the Pierces. (Laser, D.; CV-15-595; 12-1-16; Wynne, R.)

Gildehaus v. Ark. Alcoholic Beverage Control Bd., 2016 Ark. 414 **[admin. appeal]** There was substantial evidence to support the Board's decision to transfer the liquor permit. (Scott, J.; CV-16-257; 12-1-16; Goodson, C.)

Moore v. Ark. Alcoholic Beverage Control Bd., 2016 Ark. 422 **[admin. appeal]** So long as the spouses sufficiently divest themselves of any interest in the other's permit, there is nothing in the current language of Ark. Code Ann. section 3-4-205 that automatically prohibits both partners in a marriage from holding separate liquor permits. The Board's determination that Section 3-4-205 is not violated by virtue of Mrs. Gildehaus and her husband having independent interests in separate liquor permits is supported by substantial evidence and is affirmed. (Pierce, M.; CV-16-47; 12-1-16; Wynne, R.)

Stewart v. Michaelis, 2016 Ark. App. 588 **[dismissal/R.41]** The circuit court abused its discretion when it dismissed the case without prejudice under Arkansas Rule of Civil Procedure 41(b). Although no party seems to have requested a hearing on the pending motion for summary judgment, or prompted the court to rule on it without a hearing, the fact remains that the court did not decide it before the case was dismissed under Rule 41(b). Stewart responded to the circuit court's notice and asked that a trial be scheduled. For its part, the circuit court had not prompted or ordered the parties to act (in any manner the record reflects) during the past two years by its own account, and perhaps as many as four years. Given the record before us, the case should not have been dismissed. (Proctor, R.; CV-15-1028; 12-7-16; Harrison, B.)

S. E. Arnold, Inc. v. Cincinnati Ins. Co., 2016 Ark. App. 587 **[ins/ duty to defend]** Arnold's Flooring was sued by the Griffiths in connection with alleged defective flooring that was supplied by Arnold and installed by a subcontractor hired by Arnold. Arnold filed a claim with its insurer, Cincinnati. Cincinnati denied coverage, citing an exclusion in Arnold's policy for "damage to your product." Arnold then sued Cincinnati, claiming that the insurer owed a duty to defend and

indemnify. Faulty workmanship is an "occurrence," and the insuring language in Arnold's CGL policy was triggered. Although the Griffiths complained about the installation of the flooring, which could be considered faulty workmanship, the only resulting damage alleged in the complaint was to the flooring itself, which was a product admittedly sold by Arnold. The policy excluded coverage for property damage to Arnold's product arising out of it or any part of it. The Griffiths alleged no damages beyond damage to Arnold's own product, which was the flooring itself. Cincinnati had no duty to defend or indemnify. (Piazza, C.; CV-16-73; 12-7-16; Virden, B.)

Baxter v. Wing, 2016 Ark. App. 589 **[oral contract/constructive trust]** This case involves a dispute about life-insurance proceeds received by Susannah Baxter upon the death of her stepfather, Bazel. Susannah's brother sued her, contending that the policy proceeds were intended to be split equally between Susannah, John, and their two siblings. The circuit court entered an order imposing a constructive trust on the proceeds after finding that Bazel and Susannah had entered into an oral contract requiring Susannah to divide the proceeds with her siblings. While it may very well be a clear expression of Bazel's intent, his instructions do not constitute an oral contract. The court did not find, and the evidence does not support a finding, that either Bazel or Susannah made any promise at all. John's witnesses testified that Bazel merely instructed Susannah to divide the proceeds evenly. No one testified that Bazel expressed any intention or desire to revoke his beneficiary designation if Susannah did not agree to these instructions. Moreover, no one testified that Susannah made any promise to Bazel to follow his instructions. The circuit court erred in finding that Bazel and Susannah entered into an oral contract regarding distribution of the life-insurance proceeds. (Schrantz, D.; CV-16-21; 12-7-16; Gruber, R.)

Black v. Duffie, 2016 Ark. App. 584 **[undue influence]** Appellants contend that the circuit court erred in declaring null and void transfers because of undue influence and that Annabelle was not incompetent. Testimony revealed that appellants were very close to Annabelle. The circuit court's order sets out the relevant findings, and, in weighing the evidence and the credibility of the witnesses, it concluded that appellants had taken undue advantage of their relationship with Jerome and Annabelle and that they had systematically taken control of manipulating the assets given to Annabelle. As a result, appellants had obtained the share in Grassy Lake without any consideration. The circuit court's decision that Annabelle "did not understand what she was signing when presented with the documents for transfer of [the] share" was not clearly erroneous. All the evidence supports the finding that Annabelle was underpaid for her interest in the land the fact that a grantor is old and in feeble health is a circumstance bearing on the question of mental capacity, as is gross inadequacy of price. (Wright, R.; CV-16-206; 12-7-16; Gladwin, R.)

Bajrektarevic v. Tri-State Truck Center, Inc., 2016 Ark. App. ____ **[discovery sanction]** Court did not abuse its discretion for discovery violation and excluding the testimony of three witnesses for failing to disclose witnesses. (Fox, T.; CV-16-466; 12-7-16; Hixson, K.)

Smith v. Pavan, 2016 Ark. 437 **[same sex marriage/birth certificates]** The circuit court erred in concluding that *Obergefell* resolved issues relating to the issuance of birth certificates for the minor children of same-sex couples; in finding a due-process violation by the Arkansas Department of Health's refusal to issue birth certificates for minor children of married female couples showing the name of the spouse of the mother; in finding an equal-protection violation by ADH's refusal to issue birth certificates for minor children of married female couples showing the name of the spouse of the mother; and by not applying to the facts of this case Ark. Code Ann. section 9-10-201(a), which addresses children born to married women by means of artificial insemination. (Fox, T.; CV-15-988; 12-8-16; Hart, J.)

Seeco, Inc. v. Stewmon, 2016 Ark. 435 **[class action]** Class certification is affirmed. Among numerous issues raised, Supreme Court found no error in the class definition, and did not agree with contention that when class certification is pending on appeal and the class representatives dies, the certification must be vacated as moot. (Simes, L.; CV-15-198; 12-8-16; Hart, J.)

Seeco, Inc. v. Snow, 2016 Ark. 444 **[class action]** Seeco appeals from an order granting class certification for Snow to represent a class of Arkansas citizens who entered into lease agreements for the production of natural gas on their property in the Fayetteville Shale. These lease agreements allow Seeco to deduct "reasonable" costs of production from the royalty owners' payments, and that provision of the contract is at the heart of the class's claims. The circuit court did not err in its findings regarding the requirements for class certification, including the decision to limit the class to citizens of the State of Arkansas. (Sullivan, T.; CV-15-197; 12-8-16; Wynne, R.)

Cach, LLC v. Echols, 2016 Ark. 446 **[class action]** Circuit court did not err in granting class certification or in its analysis of the Rule 23 elements. (McCallum, R.; CV-16-248; 12-8-16; Wynne, R.)

Courtyard Gardens Health, LLC v. Davis, 2016 Ark. App. 608 **[arbitration]** Based on the language of the parties' arbitration agreement and the applicable law, the inability of the NAF to participate in the arbitration did not render performance of the arbitration agreement impossible. The agreement's reference to the NAF was ancillary to, rather than integral to, the parties' agreement to arbitrate. (McCallum, R.; CV-15-746; 12-14-16; Gruber, R.)

Courtyard Gardens Health, LLC v. Williamson, 2016 Ark. App. 606 **[arbitration]** The power of attorney document did not confer the authority to agree to arbitration on the principal's behalf. (McCallum, R.; CV-15-743; 12-14-16; Gruber, R.)

The Madison Companies, LLC v. Williams, 2016 Ark. App. 610 **[arbitration** There is not sufficient proof that an arbitration agreement was effectively communicated to Mr. Williams or that he assented to its terms. Screenshots obtained by the employee of a party unconnected with Front Gate ten months after Mr. Williams purchased his ticket are not sufficiently specific to

demonstrate effective communication of Front Gate's arbitration agreement to Mr. Williams. (Gray, A.; CV-16-517; 12-14-16; Gruber, R.)

Williams v. Double S Ranch, LLC, 2016 Ark. App. 609 **[property/road]** The circuit court specifically found that the evidence was not sufficient to support the creation of either a public or a private easement by prescription. The court recognized appellants' testimony regarding their use of the road but found that they had offered no evidence that was inconsistent with permissive use other than the acts that precipitated the litigation. The court noted that appellants offered no evidence at all of public or private maintenance of the road. The court concluded that the evidence presented of usage by appellants and the public was permissive and not such as would put the owners of unimproved and unenclosed land on notice of a claim of right. Proof did not sustain use of road by adverse possession or acquiescence. (Johnson, K.; CV-15-1019; 12-14-16; Gruber, R.)

Young v. Welch, 2016 Ark. App. 614 **[warning order/default]** The Youngs claim that the Welches failed to conduct a diligent inquiry into their whereabouts before serving them by warning order. The affidavit in the instant case is sufficient to demonstrate that the Welches conducted a diligent inquiry into the Youngs' whereabouts. The process servers provided affidavits setting out the numerous steps they had taken to find and serve the defendants at multiple addresses over the course of several months. (Fox, T.; CV-16-482; 12-14-16; Whiteaker, P.)

Duvall v. Carr-Pool, 2016 Ark. App. 611 **[mineral rights]** Although the trial court's decision cannot be affirmed on the basis of adverse possession, its decision to quiet title to the minerals in Carr-Pool can be sustained based upon the reservation of mineral rights in the deed. The language in the 1974 deed from the Hawkinses to Duvall contained a valid reservation of the mineral rights in the Hawkinses, who are Carr-Pool's predecessors. Clearly, the language in the 1974 deed evidences the grantors' intentions to reserve the mineral rights, and not convey them to Duvall. Furthermore, Duvall did not think he owned the mineral rights due to the language in the deed, and he never questioned ownership of the mineral rights from 1974 until 2012. He acknowledged he knew of the 2005 oil-and-gas lease, which caused him no concern. It is clear from the language in the 1974 deed that the parties' intentions were to continue the reservation of mineral rights in the Hawkinses. (McCormick, D.; CV-16-267; 12-14-16; Glover, D.)

Hendrix v. Alcoa, Inc., 2016 Ark. 453 **[workers' comp]** The estate asserts that because the statute extinguished Hendrix's remedy under the Workers' Comp Act before it accrued, the exclusive-remedy provision no longer applies and that it is free to pursue its claims in the circuit court. Case law dictates that an employee may seek relief against an employer in the circuit court only if the Act provides no remedy for the employee's condition. Applying that logic here, the Act in general covers occupational diseases, and it specifically provides coverage, and thus a remedy, for asbestos-related claims. Thus, the claim falls within the coverage formula of the Act, even though Hendrix was ultimately denied recovery on the ground that the claim was time-barred. The

temporal limitation on recovery does not equate to the absence of a remedy under the Act. "In conclusion, the remedy afforded by the Act certainly rings hollow under the facts of this case. The result smacks of unfairness, particularly when it is well known that the disease of mesothelioma has a long latency period. However, our General Assembly has seen fit to create a statute of repose with only a three-year duration. ... [A]ny inequity must be addressed by the General Assembly and that this court cannot refuse to give effect to the statute of limitations merely because it seems to operate harshly.... " (Phillips, G.; CV-15-558; 12-15-16; Goodson, C.)

DOMESTIC RELATIONS

Branch v. Branch, 2016 Ark. App. 613 **[divorce—premarital agreement; division of marital property]** The parties entered into a premarital agreement before their marriage, and they divorced after eleven years of marriage. The circuit court invalidated the premarital agreement under the Arkansas Premarital Agreement Act; found that the appellant husband breached the agreement which rendered it unenforceable; and equally divided the equity in the home the parties acquired during their marriage. In the decree, the circuit court found that the appellant husband "had 'wholly failed to disclose his assets' and that, generally, his testimony was 'extremely wanting.'" The Court of Appeals concluded that the court clearly erred, and that "[a] fair and reasonable disclosure of assets is not necessarily a full and complete disclosure." The Court of Appeals found that Exhibits A and B to the premarital agreement constituted a fair and reasonable disclosure of the appellant's assets, making it unnecessary to consider the other statutory requirements for finding a premarital agreement invalid. It reversed the circuit court's order finding the premarital agreement invalid and remanded to the circuit court for entry of an order consistent with the opinion. On the issue of whether the appellant husband breached the parties' agreement, the Court of Appeals concluded that his failure to make annual contributions to an account on the appellee wife's behalf was a breach of the agreement, but held that it was not material because it had no adverse effect on the appellee. By a stipulation between the parties, the appellee received the benefit she anticipated--$74,585.65. The Court of Appeals reversed the circuit court's order rescinding the premarital agreement and remanded the issue to the court for issuance of a decree consistent with its opinion. Finally, The Court of Appeals found the appellant's argument without merit that the circuit court had erred when it equally divided the equity in the house to the parties. The house clearly was acquired during the parties' marriage and, thus, was marital property. The court's decision that the funds appellant applied to the debt on the house were marital was not clearly erroneous. The Court of Appeals affirmed on this issue. The decision was affirmed in part, and reversed and remanded in part. (McCallister, B.; No. CV-16-330; 12-14-16; Whiteaker, P.)

Foster v. Foster, 2016 Ark. 456 **[rehabilitative alimony]** This case presents an issue of first impression on rehabilitative alimony, and was before the Supreme Court on a petition for review from the Arkansas Court of Appeals. The appellant husband raised three issues on appeal: (1) that

the circuit court erred in interpreting the rehabilitative-alimony statute when it applied factors relevant to permanent alimony; (2) that it abused its discretion by deciding that the appellee wife's proffered plan of rehabilitation supported an award of $408,000 in alimony payable over ten years; and (3) that the court abused its discretion by awarding attorney's fees and costs in addition to rehabilitative alimony. The circuit court considered the alimony issue by applying the usual factors in an alimony cases, finding that there was an economic imbalance between the parties and that the appellant had been the main source of income for the family during the marriage. The court found that she had been the primary caregiver of the children, that the parties had enjoyed a good standard of living, and that the appellee wife had no other source of income, while the appellant husband had a large amount of income and a large amount of easily accessible funds. The court found that the appellee's proposed ten-year rehabilitative plan was reasonable in duration than that it allowed her to transition into working full time as the children became older and more independent. The court awarded her decreasing alimony over ten years, as her child support decreased and her income from work increased. She will be better able to support herself and her household while she establishes sufficient income as the children grow older and require less immediate care. The court also awarded her attorney's fees and expenses, finding that she was not in a financial position to pay and that appellant had liquid funds to do so. The Supreme Court said that Ark. Code Ann. Section 9-12-312(b) does not indicate that the legislature intended that different factors apply to rehabilitative alimony than to any other type of alimony. The Court noted that similar factors have been used in other states. On the issue of her rehabilitative plan, the Supreme Court said that the statute does not require that a plan have specific goals or requirements regarding education or training for the payee. The payor may petition the court for a review if the requirements of a rehabilitative plan are not being met, but the statute does not mandate that a plan be submitted. It does not require that any plan submitted include specific, measurable requirements. On the issue of the amount of alimony, the Court noted that it is a matter within the discretion of the circuit court. The Supreme Court found no abuse of discretion regarding the amount or the duration of the rehabilitative-alimony award. Finally, on the award of attorney's fees and costs, the Court said that a circuit court has inherent authority to award attorney's fees and costs in domestic-relations cases, and that the award will not be reversed absent an abuse of discretion. Here, the court did not abuse its discretion. The Supreme Court affirmed the circuit court' decision and vacated the decision of the Court of Appeals. (Hearnsberger, M., No. CV-15-850; 12-15-16; Goodson, C.)

PROBATE

Howard v. Adams, 2016 Ark. App. 597 **[attorney's fees]** This is the fifth appeal in a dispute between these parties over attorney's fees. The appellant raised three issues on this appeal. The first concerns three alleged errors in connection with the judicial sale of forty-six acres previously ordered sold, which order was affirmed in a previous appeal. The Court of Appeals found no error

in the sale process. The second issue is that the circuit court erred in awarding additional attorney's fees to the appellee for the work her lawyer did in this case. The Court of Appeals said that the appellant's argument was difficult to follow, interspersed with matters long ago resolved in prior appeals, and that it was unclear what newer matters he attempts to present. He argued res judicata after the second appeal in this case, seeming to say that the appellee's attorney was not entitled to any additional fees after that award of fees. The Court of Appeals disagreed, found much of the argument not developed well enough for the court to consider, and affirmed on this point, as well. Finally, the appellant argued that the circuit court erred in refusing to correct the amount paid to the decedent's widow for her dower interest in the property sold. He contends the court made a clerical error and improperly stated the amount as $110,500 rather than $127,000. The Court of Appeals addressed the records in this appeal and the four prior appeals and concluded that the history of the parties' dealings shows that the appellant paid the widow $110,500 for her dower interest pursuant to a 2007 settlement. Therefore, the circuit court used the proper amount and there is no ground for reversal. The Court of Appeals affirmed on this point, too. The decision was affirmed in its entirety. (Duncan, X.; No. CV-16-78; 12-14-16; Gladwin, R.)

Reagan v. Dodson, et al., 2016 Ark. App. 598 **[guardianship]** The appellant mother of three minor children appealed the circuit court's granting guardianship of the children to the appellees, appellant's mother and stepfather. The appellant argued two issues on appeal: (1) that the original guardianship petition was unsigned; and (2) that the petitioner grandparents never served or gave notice to Jeremy Pumphrey, the biological father of the three children who is listed on the birth certificates. An emergency ex-parte guardianship petition was granted on the same day it was filed, November 26, 2014. The temporary guardianship was extended several times, twice by agreement of the parties. Both parties obtained new counsel. New counsel for the appellee guardians filed an amended petition for guardianship on September 10, 2015 and a hearing was conducted on September 29, 2015. Before testimony was taken, the appellant's new attorney called to the court's attention that the original emergency petition for guardianship had not been signed before filing, although it had been verified by the petitioners. The attorney orally moved to dismiss the proceedings because the original emergency petition, although verified by the appellee grandmother, had not been signed by appellant's then-attorney, which the current counsel claimed resulted in the court's being without jurisdiction. The Court of Appeals discussed the applicability of Rule 11 of the Arkansas Rules of Civil Procedure, which provides, in part, that "if a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." The Court noted that a guardianship proceeding has been deemed a "Special Proceeding" within the meaning of Arkansas Rule of Civil Procedure 81. Therefore, the Rules of Civil Procedure do not apply when the statute governing the proceedings creates a different procedure. The appellant claims that the guardianship statutes do not have a provision excusing the signature of a litigant or his attorney from the original petition. The Court said that that Ark. Code Ann. Section 28-65-207 (Repl. 2012), likewise does not provide that an attorney must sign a petition, or what would happen if a pleading is not signed. It does not

address signature requirements at all. The Court discussed additional built-in protections above and beyond Rule 11 signature requirements. The Court noted that Rule 11 even provides steps to be taken if a party fails to sign a pleading, including giving an attorney the opportunity to sign the pleading once given notice of the omission. The Court of Appeals held that it was unnecessary for the trial court to follow the remedial procedure set out in Rule 11 in this case because, at the time of the hearing, the issues related to the facts pled in the unsigned pleading were properly before the trial court and were tried pursuant to the subsequently-signed amended petition. The second issue was based upon the appellees' failure to serve or to provide notice to the father of the children and the fact that the circuit court never found the children's father unfit. The Court of Appeals said that constitutional rights are personal in nature and may not be raised by a third party. Therefore, the Court declined to recognize standing by the appellant mother of the children on behalf of the father for the purposes of service, notice, or the fitness issue. The decision was affirmed. (Cooper, T.; No. CV-16-120; 12-14-16; Gladwin, R.)

Martini v. Price, 2016 Ark. 472 **[adoption]** The appellant appeals from a final decree granting adoption to his ex-wife's spouse of the appellant's daughter and former stepson without appellant's consent. According to the parties' divorce decree, the appellant stood in loco parentis to his stepson. The circuit court found the appellant's consent to the adoptions of both children unnecessary because he had failed for a period of at least one year without justifiable cause to communicate with the children. The appellant argued that the circuit court erred in finding that his consent was not necessary for the adoption of both children and by finding that it was in the best interest of his former stepson to be adopted by his ex-wife's current husband. The Supreme Court reviewed the facts of the case, including that the appellant was under an order of protection for one year that barred him from contact with his then-wife. A second order of protection barred him from contacting her for an additional period. Neither barred him from contact with the children. The Court noted that, in reality, the orders did prevent his contacting the children to avoid violating the order that he not have contact with his wife. After she divorced him, he continued to make attempts to have contact with the children, but his ex-wife obstructed those attempts. He had two supervised visits with the children pursuant to the divorce decree, and he attended three family-therapy sessions until the therapist reported that she did not believe them to be in the children's best interest because of the appellant's behavior. An email account was created for appellant's communication with the children. After three emails, the appellee mother had a heated exchange with appellant's probation office, which gave the appellant concerns that she was trying to set him up. She gave him an address to her at the Department of Human Services. Because he did not know that she worked there, he thought they were a go-between and he would not contact her there. He tried to set up visitation through Skype, but was told by both his attorney and his probation officer that he risked violating the no-contact order. The Supreme Court held that the circuit court's finding that appellant's consent was not required for the adoption of his daughter was clearly erroneous, and it reversed and dismissed the granting of that adoption. With regard to the adoption of his stepson, the Supreme Court said that he is not that child's parent. The

consent of one acting in loco parentis to a child is not required under section 9-9-207. Therefore, the appellant has no statutory right to withhold consent to the adoption of his stepson. Although he complains that the children will have two different fathers with parental rights and obligations, the Court said he could have adopted his stepson while the parties were married. He did not, so he cannot now be heard to complain that his ex-wife's current spouse wants to adopt him. The circuit court's finding that adoption by the stepfather is in that child's best interest is not clearly erroneous and is affirmed. The decision was affirmed in part and reversed and dismissed in part. (Foster, H.G.; No. CV-15-1045; 12-22-16; Wynne, R.)

JUVENILE

Ellis v. Ark. Dep't of Human Services, 2016 Ark. 441 **[PPH – relative placement]**
Appellant appealed the trial court's permanency planning order changing the goal to adoption and denying appellant's motion to consider the home study of the paternal uncle. The Arkansas Supreme Court found that the circuit court erred by failing to conduct a mandatory Six Month Review Hearing and in failing to apply the statutory preference for placement with relatives found at A. C. A. § 9-27-355(b)(1). The Court also overturned prior appellate decisions interpreting this statute to only apply at the "initial placement." The Court reversed and remanded with directions for the circuit court to conduct a hearing and to apply the relative priority placement statutes below that directs a preference for placement with relatives, including consideration of the home study, and to determine the child's best interest. DHS was also directed to determine the accuracy of the 2015 relative home study. (Wilson, R.; CV-16-555; 12-8-2016; Hart, J.)

Barnes v. Ark. Dep't of Human Services, 2016 Ark. App. 618 **[TPR – best interest/adoption]**
There was sufficient evidence to support the court's finding of the likelihood of adoption where the adoption specialist acknowledged the children's medical, behavioral and developmental issues, but testified as to the likelihood of their adoptability as a sibling set of five and as to the three younger children together and the two older children together. **[best interest/potential harm]** There was sufficient evidence including appellant's prison sentence to support the best interest finding as to potential harm. The appellate court also noted that potential harm is not a ground, but an element in the best interest analysis. **[aggravated circumstances]** There was sufficient evidence to support the court's finding that there was little likelihood that continued services would result in successful reunification where services had been offered but there was still evidence that appellant was not capable of caring for her children. (James, P.; CV-16-750; 12-14-2016; Brown, W.)

Baine v. Ark. Dep't of Human Service, 2016 Ark. App. 617 **[No Merit TPR – service]**
Proper service is necessary to establish jurisdiction; however, service can be waived or cured by the appearance of the defendant and failure to object. Appellant was represented by counsel and

appeared at the adjudication hearing, review hearings, and termination hearing and failed to object to service. Therefore, this argument was deemed waived. (Sullivan, T.; CV-16-742; 12-14-2016; Hixson, K.)

Jones v. Ark. Dep't of Human Services, 2016 Ark. App. 615 **[TPR – [best interest/potential harm]** The appellate court found that appellant's continued drug use alone was contrary to the child's best interest and sufficient to support the trial court's finding of potential harm. **[aggravated circumstances]** There was sufficient evidence to support the court's finding that there was little likelihood that continued services would result in successful reunification where there was evidence of continued drug use, no evidence that the father had completed the treatment provided, and the mother had failed to follow up on out-patient treatment or regularly attend AA/NA meetings. (James, P.; CV-16-726- 12-14-2016; Whiteaker, P.)