# APPELLATE UPDATE

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## ANNOUNCEMENTS

On December 14th, the Supreme Court adopted rules changes to Rule of Crim. P. 8.1 and Rules 2 and 10 of the Rules of App. P.-Crim. The amendments are effective January 1, 2018.

Rules of Civil Procedure 11, 64, and 87 were amended effective immediately.

## CRIMINAL

*Wallace v. State*, 2017 Ark. App. 659 **[jury instructions; lesser-included offense]** Second-degree false imprisonment is not a lesser-included offense of kidnapping. (Johnson, L.; CR-17-88; 12-6-17; Gladwin, R.)

*Crews v. State*, 2017 Ark. App. 670 **[jury instructions; justification defense]** Because the evidence established that appellant did not use all reasonable means to avoid killing his victim, and in fact had retreated and then returned with a weapon to kill the alleged aggressor, there was no rational basis for instructing the jury on the justification defense. **[jury instruction; extreme-emotional-disturbance manslaughter]** A jury instruction on extreme-emotional-disturbance

manslaughter requires evidence that the defendant killed the victim following provocation such as physical fighting, a threat, or a brandished weapon. The passion that will reduce a homicide from murder to manslaughter may consist of anger or sudden resentment, or of fear or terror; but the passion springing from any of these causes will not alone reduce the grade of the homicide. There must also be a provocation which induced the passion, and which the law deems adequate to make the passion irresistible. An assault with violence upon another who acts under the influence thereof may be sufficient to arouse such passion. Mere threats or menaces, where the person killed was unarmed and neither committing nor attempting to commit violence on the defendant at the time of the killing, will not free him of the guilt of murder. In appellant's case, a weapon was not found on the alleged aggressor/victim or at the crime scene and the only evidence of alleged provocation was the uncorroborated, self-serving testimony of the appellant. Thus, there was no evidence of provocation that would have warranted an extreme-emotional-disturbance manslaughter instruction. (Williams, C.; CR-17-153; 12-6-17; Vaught, L.)

*Doby v. State*, 2017 Ark. App. 690 **[Ark. R. Evid. 615]** The circuit court abused its discretion when it applied Rule 615 of the Arkansas Rules of Evidence to an investigator, who was hired to assist the defense team and was not a witness, which resulted in the investigator being excluded from the courtroom during appellant's trial. (Proctor, R.; CR-17-115; 12-13-17; Harrison, B.)

*Pafford v. State*, 2017 Ark. App. 700 **[expert testimony]** It is error for a court to permit an expert to testify that the victim of a crime is telling the truth. In appellant's case, the trial court properly admitted testimony from an expert witness who testified about her evaluation of the victim in an objective and clinical manner and did not bolster the victim's credibility. **[admission of photographic evidence]** Because a photograph of appellant's penis corroborated the victim's testimony, the trial court did not abuse its discretion when it admitted the picture into evidence. (Culpepper, D.: CR-16-568; 12-13-17; Murphy, M.)

*Green v. State*, 2017 Ark. 361 **[illegal sentence]** Appellant's sentence, which exceeded the maximum statutory sentence for the offenses for which he was convicted, was illegal. (Elmore, B.; CR-17-167; 12-14-17; Hart, J.)

## CIVIL

*Ark. Center for Physical Medicine*, 2017 Ark. App. 657 **[medical bill/limitations]** Arkansas Code Annotated section 16- 56-106(b) provides that no action shall be brought to recover charges for medical services performed or provided by a physician or other medical service provider after the expiration of a period of two years from the date the services were performed or provided or from the date of the most recent partial payment for the services, whichever is later. An action barred by this statute can be continued or revived only by (1) an express promise

to pay the debt or an express acknowledgement of the debts from which the patient's promise to pay may be inferred and (2) an acknowledgement of the specific debts. A mere acknowledgment of the debt as having once existed is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgement of the debt as still subsisting as a personal obligation of the debtor. Here, the only evidence ACPMR offered is the August 2011 contract and the account ledgers. These documents do not show an express promise by Magee to pay her unpaid balance or an express acknowledgement of the balance from which her promise to pay may be inferred. The continuous-treatment doctrine does not apply to this case. The doctrine has been applied only in medical-malpractice cases when the patient received active, ongoing medical treatment. This case is not a medical-malpractice case, and Magee did not receive continuous treatment. (Fox.; CV-17-401; 12-6-17; Abramson, R.)

*Davis v. Shelter Ins.*, 2017 Ark. App. 656 **[summons]** In this case, the name of the corporate officer was listed but not the corporation. Neither Shelter Mutual Insurance Company nor Shelter General Insurance Company was listed in the "directed to" portion of the summons and the circuit court properly found the summons to be defective. The summons was not directed to a proper party and includes a nonparty, and the plaintiff failed to obtain proper or valid service. **[dismissal with prejudice]** The final finding in the circuit court's order was that Mr. Davis's complaint should be dismissed with prejudice because the time for obtaining valid service on Shelter Mutual Insurance Company or Shelter General Insurance Company had expired, and an action based on the same claim for underinsured-motorist benefits had previously been dismissed. Mr. Davis filed his complaint on November 12, 2015, meaning that the 120 days in which to obtain valid service on appellees expired on March 11, 2016. It is undisputed that no summons was ever directed to Shelter Mutual Insurance Company or Shelter General Insurance Company. Pursuant to Rule 41(b), the second dismissal was an adjudication on the merits. (Threet, J.; CV-17-287; 12-6-17; Gruber, R.)

*JMAC Farms, LLC v. G & C Generator, LLC*, 2017 Ark. App. 658 **[lien]** The plain language of section 18-44-101(a) provides for a lien "upon the improvement and on up to one (1) acre of land upon which the improvement is situated." Here, G & C cannot have a lien against property on which no improvements were made. (Scott, J.; CV-17-79; 12-6-17; Virden, B.)

*Shook v. Love's Travel Stops*, 2017 Ark. App. 666 **[summary judgment/negligence]** The record presents an issue of fact not properly resolved by summary judgment because it was not shown as a matter of law that the danger was open and obvious. **[work product/privilege]** The trial court abused its discretion in refusing to compel Loves to produce the incident report filled out by the store manager on the night that Shook fell. The trial court found that it was work product that was prepared in anticipation of litigation, providing a privilege not to disclose that information. This was not work product but was rather a document prepared in the ordinary course of business. (Mitchell, M.; CV-17-398; 12-6-17; Klappenbach, M.)

*Marks v. Saville*, 2017 Ark. App. 668 **[discovery sanction]** In dismissing the answer as a discovery sanction, the trial court did not act improvidently or without thoughtful consideration, and although the sanctions were harsh, there was no abuse of discretion. (McCain, M.; CV-16-216; 12-6-17; Glover, D.)

*Hill v. Hartness*, 2017 Ark. App. 664 **[realtor/negligence]** Tort claim against real estate agent was subject to three-year limitations period which was triggered by occurrence that occurred prior to closing; time did not begin to run on date of closing. Agent could not be sued for breach of contract as she was not a party to contract between the buyer and seller. (Honeycutt, P.; CV-17-283; 12-6-17; Klappenbach, M.)

*Tilley v. Malvern National Bank*, 2017 Ark. 343 **[right to jury trial]** A foreclosure proceeding is an equitable proceeding. The constitutional right to a jury trial does not extend to a foreclosure proceeding. After the enactment of amendment 80, the clean-up doctrine was abolished in Arkansas. In deciding whether a claim should be submitted to a judge as an equitable matter or to a jury as a legal matter, a circuit court must review the historical nature of the claim. Opinions since 2001 have affirmed this historical test by looking to the remedies sought in the complaint. Tilley raised in his counterclaim and third-party complaint: (1) breach of contract/breach of the duty of good faith and fair dealing; (2) promissory estoppel; (3) violation of the Arkansas Deceptive Trade Practices Act; (4) tortious interference with a business relationship or expectancy; (5) negligence; and (6) deceit/fraud in the inducement. These claims historically have been submitted to a jury as legal matters. Further, the sole remedy sought in these claims was money damages. In cases such as the one before us, a circuit court must review the historical nature of the claims to determine whether they should be submitted to a judge as equitable matters or to a jury as legal matters. Based on the historical nature of Tilley's claims and the remedy sought, these legal claims should have been submitted to the jury. The circuit court erred in granting MNB and Moore's motion to strike Tilley's jury-trial demand. Predispute contractual jury waivers are unenforceable under the Arkansas Constitution. As stated by the plain language of Rule 39, waivers of the right to a jury trial may take place only after a jury demand has been made. Rule 39(a)(1) applies only after a jury-trial demand has been made and does not contemplate predispute jury waivers. In other words, a jury trial cannot be waived before litigation begins. The right to a jury trial is a fundamental, constitutional right that is protected by the Constitution of Arkansas, and procedural rules will not be applied to diminish that right. **[damages/new business]** There is not a per se new-business rule preventing lost profits unless the business is an old business. (Wright, J.; CV-17-220; 12-7-17; Baker, K.)

*Vanmatre v. Davenport*, 2017 Ark. App. 703 **[easement]** Although the easement deed contained the words permanent and exclusive, it also contained a limited purpose of ingress-egress. Thus, based on the four corners of the instrument, it was not the parties' intent to create an easement to the exclusion of the servient estate. Therefore, appellants could use and enjoy the easement so

long as did not interfere with appellees' use of the easement. (Putman, J.; CV-17-453; 12-13-17; Brown, W.)

*Oldenberg v. State Medical Board*, 2017 Ark. App. 697 **[administrative appeal/medical license]** Arkansas State Medical Board's revocation of license to practice medicine affirmed. (Womack, S.; CV-17-369; 12-13-17; Hixson, K.)

*State Farm v. Esparza*, 2017 Ark. App. 696 **[attorney's fees/delayed payment medical expenses]** State Farm argues that, because Esparza and his children entered into a written attorney-client agreement in which Swindle agreed to represent them for a set percentage of what they recovered, and because the award of fees exceeded that percentage, the fee award violated the statute's authorization to award the "fees incurred" by the party. While this argument is persuasive, it fails for one very simple reason: the contingency-fee contract on which State Farm relies was applicable only to Swindle's representation of the Esparzas in their personal-injury case and did not apply to the Esparzas' claim for delayed medical payments. It was not an abuse of discretion for the circuit court to award attorney's fees based on an hourly fee calculation rather than a contingency-fee calculation. (Green, R.; CV-17-325; 12-13-17; Vaught, L.)

*Wynne-Ark, Inc. v. Richard Baughn Constr.*, 2017 Ark. App. 685 **[discovery]** Clearly, whether the document in question is relevant to RBC's defense must be based on the determination of whether the parties are joint tortfeasors, whether the right of contribution exists in this case and, if so, at what point in the trial the right of contribution attaches. The circuit court applied its discretion without due consideration by ordering disclosure of the document without first deciding the preliminary issues relating to contribution. (Proctor, R.; CV-17-184; 12-13-17; Virden, B.)

*Sarna v. Dept. Correction Sex Offender Ctte.*, 2017 Ark. App. 684 **[sex offender reassessment]** It is essential to judicial review under the Administrative Procedures Act that issues must be raised before the administrative agency appealed from or they will not be addressed by this court. Because Sarna failed to raise to the SOAC his argument regarding the deputy prosecutor's lack of authority to request reassessment, the court is barred from addressing the issue. (Fox, T.; CV-17-48; 12-13-17; Virden, B.)

*Air Evac EMS, Inc. v. USABLE Mutual Ins.* Co., 2017 Ark. 368 **[certified question- ADTPA]** Should the ADTPA's safe-harbor provision, Ark. Code Ann. § 4-88-101(3), be applied according to the specific-conduct rule or the general-activity rule? The ADTPA's safe-harbor provision should be applied according to the specific-conduct rule, meaning that it precludes claims only when the actions or transactions at issue have been specifically permitted or authorized under laws administered by a state or federal regulatory body or officer. (E. D. Ark.; CV-17-103; 12-14-17; Wynne, R.)

## DOMESTIC RELATIONS

*Buckingham v. Gochnauer*, 2017 Ark. App. 660 [**agreement to divide military retirement before vesting; deemed-denied issues not preserved; hearing is waived if not requested**] The appellate court found no error in the circuit court's order granting Appellee's motion for summary judgment and denying Defendant's motion for summary judgment. The circuit court found the parties' agreement unambiguously stated that Appellee should receive one-half of the military retirement that had accrued during the parties' marriage. The appellate court found that the common understanding of "accrued" is not "vested". The appellate court also agreed that the existence of the paragraph within the agreement regarding the specifics of the retirement division is proof that the parties were using "accrued" to clarify Appellee would receive only a *portion* of one-half of the retirement. The appellate court rejected Appellant's argument that there is no marital share because the pay was not yet vested. Also, because Appellant did not mention in his notice of appeal the deemed denial ruling of his post-judgment motion that included the arguments presented to the trial court regarding the attorney's-fees order, the only appealable matters were the original order and the deemed-denied arguments were not preserved for appellate review. Lastly, the appellate court found no error in the circuit court's entry of the Military Pension Division Order without having a hearing. The circuit court asked Appellee to prepare the MPDO, Appellant responded to the proposed MPDO with his objections, and Appellant did not include a request for a hearing. Unless a hearing is requested, a hearing will be deemed waived and the court may action on the matter without further notice after the time for reply has expired. (Pierce, M.; CV-17-36; 12-6-17; Gladwin, R.)

*Ellis v. Ellis*, 2017 Ark. App. 661 [**property division; child support credits and deviation; failure to award property without sufficient evidence; contempt for untruthfulness**] The appellate court considered multiple findings of the circuit court regarding division of the martial assets, support, and other divorce issues. First, the appellate court found no error in the circuit court's finding that Appellant failed to meet his burden of proving certain farmland was nonmarital property. It was acquired during the marriage, there is a presumption that it is martial, and it was Appellant's burden to prove by clear and convincing evidence that this property was nonmarital. Second, the appellate court found no error in the circuit court's decision to award an equal division of the martial property. The circuit court is not required to make findings of fact when an equal division of marital property is awarded, and the evidence supported an equal division of marital property. Third, the appellate court found no error in the circuit court's inclusion of the marital vehicle in the appraisal of marital assets, and the circuit court did not err in requiring Appellant to compensate Appellee for one-half of the vehicle. Fourth, the appellate court found no error in the circuit court' decision not to give child support credit to Appellant for voluntarily making one-half of Appellant's house payments. There was no order that required the parties to share the house payment, and the courts do not as a matter of law give credit for voluntary expenditures. Fifth, the appellate court found no error in the circuit court declining to divide Appellee's retirement because there was no evidence of its value or other details of the retirement plan. A court does not clearly err in declining to divide an asset if the complaining party fails to produce sufficient evidence at trial on the issue. Sixth, the appellate court found no error in the circuit court awarding each party the household goods and furnishing in each's possession. It is reasonable to conclude that each party had a significant amount of household goods and furnishings in their respective residences and that each party had

a roughly equal amount of the personal property that was marital. Seventh, the appellate court found no error in the circuit court's refusal to hold Appellee in contempt for her untruthfulness during her deposition. The making of a false statement may constitute contumacious conduct if it obstructs the judicial process, but the appellate court found the evidence did not show an obstruction to the judicial process. Eighth, the appellate court found error in the circuit court's child support calculation. Assuming the income was correct as stated, Administrative Order No. 10 requires an additional 21% on the income that exceeds the maximum chart figure and not 21% of the entire income. The appellate court also held that the circuit court's providing a child support deduction for payment of the cell phone was error, as there is no written justification for the deviation from the Chart which is required. Lastly, the appellate court found error in the division of the parties' second home, as the debt associated with it was counted twice and therefore was not appropriately appraised during the division of the marital assets. (Smith, P.; CV-17-139; 12-6-17; Gladwin, R.)

*Mason v. Mason*, 2017 Ark. App. 683 [**initial alimony award; alimony modification, proof required to determine nonmarital account**] The appellate court found no error in the circuit court's initial alimony award. The court considered Appellant's need for alimony, Appellee's ability to pay, the length of marriage, the incomes and expenses of both parties, the financial circumstances of the parties, the amount and nature of the income, and the extent and nature of the resources and assets of both parties. The appellate court found error in the circuit court's refusal to modify alimony. The evidence demonstrated that Appellee's income increased dramatically, his obligations to Appellant decreased because he no longer had to pay her house payment, and the parties did not get the anticipated payoff from the house sale which was an important factor considered during the original alimony award. Although both parties saw income increases after the divorce, there remained a substantial economic imbalance between the parties that the current alimony award did not suffice. The appellate court also found error in the circuit court's ruling that an investment account was nonmarital property. While the evidence demonstrated that it was funded with inheritance proceeds, there was a presumption that the funds were marital because the investment account was in both names. Clear and convincing evidence is required to overcome that presumption and that standard is high. Because Appellee failed to present distinct and detailed information about the account and how it was used, the appellate court found error that Appellee met the standard of proof required. (Compton, C.; CV-16-488; 12-13-17, Virden, B)

*Darcey v. Matthews*, 2017 Ark. App. 692 [**modification of property settlement agreement; contempt discretion; attorney's fee award**] The appellate court found that the circuit court impermissibly modified the parties' property settlement agreement by adding an alternative to the life insurance provision agreed upon by the parties. The appellate court also found that the circuit court's modification of the medical expenses provision was impermissible. The appellate court found that Appellee's obligation to pay the children's medical expenses is independent from his child support obligation and therefore could not be modified like child support. The appellate court found no error in the circuit court's failure to hold Appellee in contempt of certain issues. The circuit court heard testimony from both parties on these issues, and the circuit court determined Appellee did not willfully disobey on these issues. Lastly, the appellate court found no error in the circuit court's award of $750.00 in attorney's fees for failure to pay certain obligations, although Appellant argued it should have been more. The appellate court does not

require specific findings on attorney's fee awards in domestic relations cases, and Appellant failed to present evidence of what amount should have been awarded. (Smith, V.; CV-16-883, 12-13-17; Harrison, B.)

## PROBATE

*Baptist Health Medical Center v. First Community Bank of Batesville and Estate of William Scott Mueller*, 2017 Ark. App. 671 [**guardianship not vacated despite deficiencies in original petition**] It was undisputed in this matter that the original petition for guardianship failed to meet the statutory requirements for obtaining a guardianship. However, the appellate court found that a deficiency in the evidence presented to obtain the guardianship order does not strip the court of jurisdiction. The circuit court found that the amended guardianship petition sufficiently addressed the shortcomings of the original petition. The appellate court recognized that the amended petition and second order appointing guardian could not "cure", by means of relation back, the shortcomings of the first petition. However, the appellate court was tasked with reviewing the denial of a motion to vacate the original guardianship order, not an order purporting to retroactively amend the initial guardianship. Furthermore, the circuit court's order denying the motion to vacate was also based on Appellee's reliance on the previous guardianship order. Ark. Code Ann. 28-65-216 states that "the letters, when so issued, until revoked or cancelled by the court, shall protect persons who, in good faith, act in reliance thereon." The appellate court recognized that the circuit court could properly consider the statute's explicit intent to preserve and validate the actions taken by a guardian when deciding whether to vacate the original order. Given the fact that the original guardianship order was voidable but not void ab initio, and given the unique statutory preference for preserving the validity of actions taken by guardians in circumstances such as this, the appellate court found no error in the circuit court's denial of the motion to vacate based on its finding that the amended guardianship petition provided sufficient evidence to address the shortcomings of the original petition. (McCain, G.; CV-17-62; 12-6-17; Vaught, L.)

## JUVENILE

*Elliot v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 672 **[TPR; ICWA]** Appellant mother appealed order terminating parental rights. The case was governed by ICWA and required evidence beyond a reasonable doubt in support of termination. The court considered evidence that the mother had a history of prioritizing romantic relationships with inappropriate men over the health and well-being of her children, allowed her young daughter to sleep in the bed with the mother's boyfriend, exhibited a volatile temper, was dishonest with the DHS caseworker about the nature of her relationships, and demonstrated other evidence of poor judgment and decision making. The court found beyond a reasonable doubt that the mother failed to remedy the conditions that led to removal and that termination was in the children's best interest. (Zimmerman, S.; JV-15-757; December 6, 2017; Vaught, L.)

*Holloway v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 669 **[TPR—sufficiency of the evidence]** Mother and father separately appealed order terminating their rights. The appellate court found no clear error where evidence showed that father had a history of sexual offenses, including sexual contact with minors and carnal abuse of his sister, he failed to register as a sex offender, he had a history of domestic battery, and his probation was revoked for failure to pay fines and failure to register as a sex offender. Further, there was no dispute that the mother's rights to her five other children were terminated, which was grounds for termination in this subsequent case. Termination was affirmed where each parent was found to be unfit and termination was in the child's best interest. (Halsey, B.; JV-09-214; December 6, 2017; Glover, D.)

*Tatum v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 674 **[TPR—sufficiency of the evidence]** Evidence supported termination where mother prostituted herself while her children were present in the hotel room, was addicted to narcotics, and failed to maintain stable housing, employment, or transportation. Mother's argument that DHS failed to provide meaningful services to address her prescription-drug abuse problem was without merit where she failed to disclose the extent of her addiction. The evidence was overwhelming that the mother was unfit based on factors that arose subsequent to the filing of the petition, including the mother's failure to comply with the case plan, and termination was in best interest of the children. (Smith, T.; JV-15-567; December 6, 2017; Murphy, M.)

*Donham v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 698 **[PPH; permanent custody]** Mother appealed permanency planning order placing permanent custody of her fifteen-year-old daughter with a third party. The case was initiated as a FINS case filed by the mother requesting financial assistance for utilities and food. DHS provided supportive services but filed a petition for emergency custody after the mother failed to work with DHS in setting up a budget, failed to maintain food in the home, and failed to attend counseling. During the case, it was determined that the mother suffered from mental disorders but did not consistently attend counseling, and she had adequate income, but failed to properly budget for food and other necessities. Meanwhile, the child flourished in custodian's home and preferred to remain in that home, where she had adequate food, help with school, was able to participate in extracurricular activities, and was able to live as a typical teenager rather than worrying whether she would have food or running water. The appellate court affirmed the trial court's decision to award permanent custody under the permanency planning statute because return to the parent is warranted only when the child's health and safety can be adequately safeguarded and under the circumstances the custody placement was consistent with the best interest, health, and safety of the child. (Brown, E.; JV-16-43; December 13, 2017; Hixson, K.)

*Fisher v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 693 **[TPR—adoptability; sufficiency of the evidence]** Termination was affirmed even though brother and sister would not likely be adopted together as a sibling group due to the brother's behavioral and mental health issues. The mother argued on appeal that DHS reports on adoptions in the state indicate that the likelihood of a 13-year-old male being adopted is unlikely and that removing the child from his mother's custody aggravated his mental health condition and made his situation worse. The appellate court affirmed termination where the trial court found the mother unfit due to her drug addiction and found that termination was in the children's best interest, even considering that the adoptability of one of the siblings was uncertain. While the likelihood of adoption must be considered by the trial court, it is not an element that must be proven by clear and convincing evidence. Termination of the father's rights was also affirmed, where the evidence showed that the father made little effort and failed to follow court orders throughout the case. (Sullivan, T.; JV-16-06; December 13, 2017; Harrison, B.)

*Parnell v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 688 **[TPR –sufficiency of the evidence; untimely adjudication hearing does not equal a loss of jurisdiction]** Sibling and three newborn triplets were removed from parents' custody after father was suspected of sexually abusing the oldest child. Suspicions were later confirmed when the child was diagnosed with the same STD the father had. During the case, the caseworker found that the mother was romantically involved with two sex offenders: the father and another man. Additionally, the mother failed to maintain stable housing, had mental health issues including borderline intellectual functioning, and the mother allowed the oldest child to live with the father and an uncle, both whom she knew to be sex offenders. On appeal, the parents argued that the termination order should be reversed because the adjudication hearing was held seven months after removal and the adjudication order was not filed until ten months after removal, contrary to Ark. Code Ann. § 9-27-327, which requires the adjudication hearing to be held within sixty days of removal and the order to be entered within thirty days of the hearing. The appellate court rejected the parents' arguments, holding that while a trial court's failure to hold timely hearings may constitute reversible error, it does not equal a loss of jurisdiction. Because the argument is not jurisdictional, it should have been raised below at the adjudication hearing and could not be raised for the first time on appeal. Where the evidence was clear that the parents were unfit and termination was in the best interest of the children, the termination order was affirmed. (Wilson, R.; JV-15-2; December 13, 2017; Virden, B.)

*Rosenbaum v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 680 **[TPR—relative placement preference]** Father appealed termination of rights on the grounds that his mother, the paternal grandmother, sought custody of the child, and should have been preferred as a placement. The appellate court affirmed, noting that the trial court considered placement with the grandmother but decided against it because she did not have income and relied solely on her son's disability income and she expressed a desire to maintain contact between the child and her son, the child's

father. Preferential consideration must be given to a relative when the relative meets all relevant child protection standards and it is in the child's best interest to be placed with the relative. Here, that was not the case. (King, K.; JV-15-135; December 13, 2017; Abramson, R.)

*Hooks v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 687 **[TPR-sufficiency of the evidence]** Mother appealed order terminating rights. Throughout the pendency of the case, the trial court entered multiple orders finding that the mother was making substantial progress and complying with the case plan. However, the DHS supervisor testified at the termination hearing that DHS discovered during the case that the caseworker made false reports about the mother's progress and the caseworker was no longer working for DHS. The evidence at the termination hearing showed that the mother failed numerous drug tests throughout the case, failed to remedy the environmental problems in the home, caused in part, by up to fourteen dogs living in the home, and had lost custody of her other child for similar reasons when she lived in Texas. The appellate court affirmed termination on the grounds of aggravated circumstances. (Johnson, K.; JV-15-80; December 13, 2017; Virden, B.)

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

*Wingate v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 662 (Wilson, R.; JV-15-21; December 6, 2017; Harrison, B.)

*Mouse v. Ark. Dep't of Human Servs.*, 2017 Ark. App. 705 (Smith, T.; JV-15-499; December 13, 2017; Brown, W.)

*Vasquez-Sanchez v. State*, 2017Ark. App. 673 **[Motion to transfer to juvenile court]** Defendant was charged as an accomplice to capital murder, a Class Y felony, after he drove fellow gang members around hunting for a member of an opposing gang to kill and killed the victim in a drive-by shooting. The defendant's former probation officer testified that he had been involved in juvenile court on multiple previous occasions, he received services but violated the terms of his probation, at the time of the transfer hearing the defendant had already attained the age of twenty and could only remain in DYS until the age of 21, and few other services would be available in juvenile court. The trial court entered detailed written findings denying the motion to transfer, citing the defendant's age, his extensive involvement in juvenile court, and the premeditated nature of the crime, among other factors. The appellate court affirmed, finding that that trial court properly considered the transfer factors enumerated in Ark. Code Ann. § 9-27-318. (Lindsay, M.; CR-15-702; December 6, 2017; Hixson, K.)

*Randolph v. State*, 2017 Ark. App. 694 **[Motion to transfer to juvenile court]** Defendant, who was almost seventeen years old at the time of the crime, was charged with aggravated robbery, theft by force, and first-degree battery after robbing a bank with a sawed-off shotgun and shooting a bank employee.

Although there was evidence that the defendant had an abysmal home life, was immature and unsophisticated, had no prior juvenile adjudications, the trial court found more convincing the severity and premeditated nature of the crime and the fact that the defendant was nearing eighteen and there were few services the juvenile court could offer that would likely rehabilitate him. The appellate court found that the trial court properly considered and made written findings of each transfer factor listed in Ark. Code Ann. § 9-27-318 and because it was not left with a firm and definite conviction that a mistake was made, the trial court was affirmed. (Wright, H.; JV-16-492; December 13, 2017; Klappenbach, N.)