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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: 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.

CRIMINAL

Wilson v. State, 2017 Ark. App. 64 [**sentencing**] Because the sentence imposed by the circuit court exceeded the maximum allowable sentence available for appellant's Class D felony conviction, the sentence was an illegal sentence. [**revocation**] The circuit court lacked the authority to revoke appellant's probation because the probationary periods had already expired at the time of the revocation. (Sims, B.; CR-15-796; 2-1-17; Whiteaker, P.)

Gordin v. State, 2017 Ark. App. 61 [**motion to suppress**] At the time that appellant made an incriminating statement to law enforcement officials, he was not in custody and was free to ignore their questions and leave the scene. It was not until appellant admitted that the package that was intercepted by law enforcement officials contained contraband that the circumstances

changes and appellant was not free to leave. Accordingly, the trial court did not err when it refused to suppress appellant's statement. (Johnson, L.; CR-16-397; 2-1-17; Glover, D.)

Campbell v. State, 2017 Ark. App. 59 [**admission of evidence; hearsay**] Although appellant acknowledged that the statements that he made during his police interview, which were recorded on a DVD, were admissible at trial, he asserted that the actual DVD recording constituted inadmissible hearsay. Specifically, appellant argued that the questions of the interviewer, the visual location of the scene, and other sensory sights and sounds on the DVD exceeded the scope of his statements and constituted inadmissible hearsay. After the trial court admitted the DVD, the appellate court rejected appellant's argument and held that the visual location of the scene of the interview and the sights and sounds associated with the scene were not statements and thus not subject to the hearsay rule. [**admission of evidence; Ark. R. Evid. 1004**] The trial court did not abuse its discretion when pursuant to Ark. R. Evid. 1004 it permitted a witness to testify about the content of email messages that appellant sent to the witness because the messages had either been destroyed or lost and there was no allegation that the State lost or destroyed the messages or that the communications were lost or destroyed in bad faith. (Jackson, S.; CR-16-134; 2-1-17; Klappenbach, M.)

Handy v. State, 2017 Ark. App. 74 [**habitual offender**] The habitual criminal statute was not designed as a deterrent, but is simply a punitive statute that provides in clear language that in an appropriate case, a prior conviction, regardless of the date of the crime, may be used to increase punishment. The statute distinguishes between the conviction being enhanced, which must have occurred after June 30, 1983, and the "previous" conviction(s) used for enhancement purposes of the new conviction, for which no limitation period is stated. (Philhours, R.; CR-16-735; 2-1-17; Brown, W.)

Williams v. State, 2017 Ark. 20 [**error coram nobis**] When the Supreme Court grants a request to reinvest jurisdiction in the circuit court for consideration of a petition seeking a writ of *error coram nobis*, the circuit court is required to do more than merely deny the petition without allowing discovery, holding an evidentiary hearing, or making any findings of fact. (Fox, T.; CR-16-511; 2-9-17; Wynne, R.)

Beverage v. State, 2017 Ark. 23 [**Rule 37**] Based upon the independent judgment of three medical professionals and the agreement of appellant's own witness that he was competent to stand trial, his trial counsel made a reasonable decision not to pursue the issue of appellant's competency, and that decision did not prejudice appellant. Accordingly, the circuit court did not err when it denied appellant's Rule 37 petition, which was based upon the allegation that his trial counsel's performance was deficient because he did not request a competency hearing. (Dennis, J.; CR-16-487; 2-9-17; Womack, S.)

Hubbard v. State, 2017 Ark. App. 93 [**sufficiency of the evidence; residential burglary; theft of property**] There was substantial evidence to support appellant's convictions. [**Ark. R. Evid. 404 (b)**] The facts and circumstances surrounding three additional burglaries in which appellant was involved was independently relevant to the crimes for which appellant was charged and convicted. Specifically, the facts and circumstances of the other crimes corroborated an accomplice's testimony and identified appellant as the person involved in the

crimes. Additionally, the facts and circumstances surrounding the other crimes were similar to the facts and circumstances surrounding the crime for which appellant was charged and convicted. Accordingly, the circuit court did not abuse its discretion in admitting the Rule 404(b) evidence. (Langston, J.; CR-16-19; 2-15-17; Vaught, L.)

Finfrock v. State, 2017 Ark. App. 90 [**jury instructions**] The trial court did not abuse its discretion when it refused to instruct the jury on the law related to the nonbinding recommendations for consecutive sentences found in AMCI 2d 9112 or the law related to transfer and parole eligibility found in AMCI 2d 9401 and AMCI 2d 9404-A. The trial court determined that the instructions would “not serve any purpose” and that they would confuse the jurors. (Lindsay, M.; CR-16-516; 2-15-17; Klappenbach, M.)

Lambert v. State, 2017 Ark. 31 [**sufficiency of the evidence; felon in possession of a firearm**] There was substantial evidence to support appellant’s convictions. [**motion for new trial**] Because the evidence that appellant claimed was wrongfully withheld was cumulative to evidence that was admitted at trial, and because appellant failed to demonstrate that there was not a reasonable probability that the outcome of the trial would have been different if the evidence had been disclosed, the trial court did not abuse its discretion when it denied appellant’s motion for a mistrial, which was based upon an alleged *Brady* violation. (Pope, S.; CR-16-427; 2-16-17; Kemp, J.)

Lane v. State, 2017 Ark. 34 [**knock and announce**] In a case of first impression, the Supreme Court held that the knock-and-announce rule applies to parolees, but that the exclusionary rule is not the appropriate remedy if the rule is violated. (Tabor, S.; CR-15-1022; 2-16-17; Wood, R.)

Shreck v. State, 2017 Ark. 39 [**admission of evidence**] The trial court did not abuse its discretion when it admitted into evidence conversations regarding “snuff” sex between appellant and an undercover officer because the evidence had a tendency to prove a fact of consequence in the sentencing hearing of appellant’s trial on conspiracy to commit rape and because the evidence was not unfairly prejudicial. (Clawson, C.; CR-16-827; 2-16-17; Womack, S.)

Geelhoed v. State, 2017 Ark. App. 96 [**Ark. R. Evid. 404 (b)**] The trial court did not abuse its discretion when it admitted evidence of appellant’s prior acts of violence against the victim and other juveniles in the family because the evidence was not unfairly prejudicial and it was relevant to show that appellant intentionally caused injury to the victim. (Erwin, H.; CR-16-725; 2-22-17; Gruber, R.)

Copeland v. State, 2017 Ark. App. 104 [**continuance**] Where appellant had notice that the witness may be called at trial and could not articulate a reason for an extended delay to prepare for the testimony, the trial court did not abuse its discretion in granting an overnight continuance to prepare for the witness’s testimony. (Hearnsberger, M.; CR-16-685; 2-22-17; Klappenbach, M.)

Martin v. State, 2017 Ark. App. 107 [**motion to suppress**] Because the initial encounter between appellant and law enforcement was permissible pursuant to Rule 2.2 of the Arkansas Rules of Criminal Procedure and because the subsequent discovery of the contraband was permissible

pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure after observing a weapon in plain view in appellant vehicle, the trial court did not err when it denied appellant's motion to suppress the evidence discovered during the search of appellant's vehicle. (Singleton, H.; CR-16-635; 2-22-17; Whiteaker, P.)

Owens v. State, 2017 Ark. App. 109 [**admission of evidence**] Appellant was not able to establish that he was prejudiced by the trial court's decision to exclude certain testimony because the excluded testimony was cumulative to testimony already in evidence. [**relevant evidence**] The trial court did not abuse its discretion when it determined that evidence that related to appellant's lifestyle before becoming addicted to drugs, which was approximately ten years prior to the trial, was too remote and therefore irrelevant. (Tabor, S.; CR-16-768; 2-22-17; Murphy, M.)

State v. Thompson, 2017 Ark. 50 [**postconviction relief**] The trial court's findings that appellee established prejudice from his trial counsel's allegedly deficient performance were clearly erroneous. (Lindsay, M.; CR-16-398; 2-23-17; Wynne, R.)

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

Johnson v. State, 2017 Ark. App. 71 (first-degree unlawful discharge of a firearm from a vehicle; first-degree battery) CR-16-718; 2-1-17; Murphy, M.

Jeffries v. State, 2017 Ark. App. 62 (breaking or entering; theft of property) CR-16-688; 2-1-17; Glover, D.

Foster v. State, 2017 Ark. App. 63 (aggravated robbery) CR-16-737; 2-1-17; Glover, D.

Holland v. State, 2017 Ark. App. 49 (second-degree sexual assault; residential burglary) CR-16-175; 2-1-17; Abramson, R.

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:

Cox v. State, 2017 Ark. App. 73 (probation) CR-15-1007; 2-1-17; Brown, W.

CIVIL

Longley v. Gatewood, 2017 Ark. App. 48 [**laches**] The first requirement of laches is that the party, here Christine, must have knowledge of her rights and an opportunity to assert those rights. Until the death of Clarence, Christine did not have sole ownership of the property. She shared ownership with Clarence, who had funded the purchase of the property. The court also found that Christine's signature on the deed conveying the property was a forgery. Christine

testified that she had no knowledge of the forged deed and asserted her rights shortly after discovering it several months after her uncle's death. The circuit court's finding that laches was not established by the evidence in this case is not clearly erroneous. (Tabor, S.; CV-15-778; 2-1-17; Gruber, R.)

Ash v. First National Bank, 2017 Ark. App. 57 **[stock transfer]** The circuit court erred as a matter of law when it determined that the stock power, standing alone, effectively transferred the stock and foreclosed all of Ash's claims under Arkansas law. The 3,881 shares of corporate stock at issue in this case are securities. The General Assembly adopted and enacted section 8 of the Uniform Commercial Code, and those statutes govern how a security is effectively transferred and whether an adverse claim is foreclosed. Because it is apparent on this record that the circuit court did not decide the stock-power issue under the UCC, the better course is for the parties to argue, and the circuit court to decide, this case using Arkansas securities law. (Mitchell, C.; CV-16-385; 2-1-17; Harrison, B.)

Waddell v. Ferguson Home Builders, LLC, 2017 Ark. App. 66 **[limine/expert witness]** Waddell argues that the circuit court improperly granted the motion in limine, which was directed at Black's study that began in 2010 and was still ongoing. In granting the motion, the circuit court ruled that it was limiting the information to that which was available at the time of the seller's Disclosure Statement. Here, Black's study was prepared after Waddell had purchased his home and, more importantly, was still not complete at the time of trial. Moreover, the study had not been used to update or revise any FEMA maps. The court determined that the period for which evidence was relevant was that existing at the time of the disclosures in 2003. Here, the court found that the study was not relevant because it was prepared after the time Ferguson had made the disclosures at issue. **[contract rescission]** The circuit court concluded that Waddell "failed to prove by clear and convincing evidence that Ferguson knew or believed any of the representations in the seller's property disclosure were false." Waddell argues that the court misstated the element of his cause of action because, according to Waddell, Ferguson lacked sufficient information to assert that the property was not in the floodplain or floodway. However, this argument ignores the court's next conclusion that Waddell "failed to prove by clear and convincing evidence that Ferguson did not have a sufficient basis of information to make the representations in the seller's property disclosure." (Laser, D.; CV-16-426; 2-1-17; Vaught, L.)

The Academy, Inc. v. Paradigm Bldg., LLC, 2017 Ark. App. 79 **[lease]** Evidence supports finding that lease was renewed for three years by exercise of option to renew. Landlord waived right to collect late fees by failing to collect them over three years. The language of the non-waiver clause in the lease is directed to future, rather than past, contractual violations. Section 9.5 reads that the landlord's failure to seek redress of a violation or insist on strict performance shall not prevent "a subsequent act" from having the force and effect of an original violation. The essence of the non-waiver clause, therefore, is that the landlord's decision to forego redress

on one occasion does not waive his right to insist on compliance and seek applicable remedies in the future. (Bryan, B.; CV-16-258; 2-8-17; Glover, D.)

City of Bethel Heights v. Kendrick, 2017 Ark. App. 78 [**contract**] No mutual agreement or meeting of the minds existed between the parties. Appellees' letter was not an offer and even if the response from Bethel Heights could be considered the basis of any contract, it was at most a counteroffer. There were no definite terms, consideration, or mutual obligations. (Karren, B.; CV-16-336; 2-8-17; Klappenbach, M.)

City of Bethel Heights v. City of Springdale, 2017 Ark. App. 81 [**decl. judgment**] The heart of the motion to dismiss was the determination that a declaratory-judgment action was not the proper vehicle for challenging a zoning decision, a conclusion that Bethel Heights does not challenge on appeal. Although the circuit court made a collateral finding that Springdale's zoning decision was not arbitrary or capricious based on the surrounding zoning, it nonetheless set the matter for a hearing on the remaining issues. Bethel Heights was thus presented the opportunity to adduce any additional evidence on the question that it felt appropriate; indeed, in response to Springdale's subsequent summary-judgment motion, Bethel Heights did just that. Error that does not result in prejudice is not reversible. On summary judgment, the exhibits did not meet proof with proof on the question of whether Springdale's rezoning was compatible with the zoned use of an adjacent property; therefore, the circuit court did not err in granting Springdale's motion for summary judgment. (Karren, B.; CV-16-332; 2-8-17; Whiteaker, P.)

Talley v. Peedin, 2017 Ark. App. 80 [**mineral interest**] The mother did not own half the mineral rights at the time of her death. The children's contention about their mother's ownership interest in the minerals is rooted in their position that, because she was shown as a grantor in a subsequent 1973 warranty deed, the reservation of mineral rights by "the grantors" created a joint ownership of those minerals in the mother and their father—even though it is undisputed that the father originally acquired the Cleburne County property in 1971 in his name only, creating "only an inchoate dower interest" in both the surface property and the minerals underneath for the mother. Moreover, regardless of whether the mother successfully reserved her inchoate dower interest in the minerals with the 1973 deed, and regardless of whether she retained those interests via the 1980 property-settlement agreement, by virtue of the settlement agreement, she only had a life estate in those minerals, which ended on her death. She never acquired a fee simple interest in the minerals that could have passed to the children as part of her estate. [**estoppel**] Children are estopped from claiming ownership of their mother's mineral interests based on the previous lawsuit regarding their father's interest in the mineral rights. (Weaver, T.; CV-16-419; 2-8-17; Glover, D.)

City of Little Rock v. Yang, 2017 Ark. 18 [**statutory immunity**] The circuit court properly denied the City and its employees summary judgment on the negligence claims raised by Yang.

When a defendant pleads an affirmative defense of immunity, that defendant must plead and prove no liability coverage under Arkansas Code Annotated § 21-9-301 for purposes of summary judgment. While the City and its employees note the averment in Yang's initial complaint and their admission in their initial answer, these pleadings were superseded by the third amended complaint and the answer to that complaint. An amended complaint, unless it adopts and incorporates the original complaint, supersedes the original complaint. Here, neither the third amended complaint nor the answer to the third amended complaint incorporated previous pleadings. Thus, the record is devoid of proof of liability coverage for the City and its employees. It was incumbent upon them, and not Yang, to plead and prove that it was entitled to that immunity due to a lack of insurance. (Fox, T.; CV-15-1057; 2-9-17; Hart, J.)

Dye v. Diamante Golf Club, LLC, 2017 Ark. 42 [**transfer fees**] The appellants argue that the circuit court erred in holding that the transfer fee contained in the Declarations is not a violation of Ark. Code Ann. § 18-12- 107. The statute provides that a transfer fee covenant recorded with respect to real property in this state after July 27, 2011, does not run with the title to the real property; and is not binding upon or enforceable at law or in equity The statute further specifically states that it does not validate a transfer fee covenant recorded in this state before July 27, 2011. Here, the Declarations were properly recorded in Saline County in 1997, long before July 27, 2011. Further, the Declarations clearly impose a transfer fee whenever any of the lots are sold. The statute destroys a contractual right to apply transfer fees to property, and is therefore not remedial or procedural. However, the statute by its very terms does not specifically invalidate transfer fees recorded before the act. Therefore, the court did not err in declaring the transfer fees enforceable. [**Restraint on alienation**] The Declarations state that the monthly golf membership dues will be collected for the "use, enjoyment, and maintenance of the club." The Declarations also specifically state "the amount of said monthly dues will be determined solely by the Club in accordance with its Articles, By-Laws, if any, and Rules and Regulations." Appellants argue that these two provisions are too vague and indefinite for a formula to be crafted to determine the amount of the assessment. However, Diamante's ability to determine the amount of the dues would be limited by their purpose, which is for the use and maintenance of the club. This would prevent Diamante from collecting dues completely unrelated to that specific purpose. The circuit court did not err in finding that that the assessment was not an unlawful restraint on alienation. [**restrictive covenants**] The by-laws and rules and regulations were validly incorporated in the covenant. The Declarations repeatedly mention that property owners would also be subject to the provisions contained in both documents. While the by-laws were not created in this case until 2006, nine years after the Declarations were filed, the by-laws, as they relate to the present controversy, simply provide details and amendments to issues that were specifically contemplated and mentioned in the Declarations as filed in 1997. The recording act is designed to put subsequent purchasers on notice of interests affecting real property. There is clearly enough information in the Declarations to allow a purchaser to make an inquiry as to their contents. [**fee deferment**] The deferment of fees did not violate the Declarations. The plain

language of the Declarations gives the club the authority to vary the commencement date between lots. (Arnold, G.; CV-16-127; 2-16-17; Womack, S.)

Dye v. Diamante Golf Club, LLC, 2017 Ark. 37 [**rule 60**] The circuit court was without jurisdiction to enter its April 2016 order granting reconsideration and awarding judgment for costs. The trial court loses jurisdiction to set aside or modify an order under Rule 60 if it does not do so within ninety days of the entry of the original order, even though petitioner's motion may have been filed prior to expiration of that period. Here, the circuit court ruled outside of the ninety-day limitation, and no clerical error or other ground for setting aside a judgment was alleged. (Arnold, G.; CV-16-455; 2-16-17; Wynne, R.)

City of Conway v. Schumate, 2017 Ark. 36 [**class action**] City challenges the circuit court's findings on four of the six prerequisites of a class action. First, the City argues that there are no common questions because the mutuality element of a breach-of-contract claim, which requires a meeting of the minds between the contracting parties, requires each plaintiff to resolve his or her individual issues before reaching any common questions. Second, and related to the first point, the City argues that the common questions do not predominate because liability cannot be established on a class-wide basis because each plaintiff will have a distinct set of operative facts for his or her breach-of-contract claim. Third, the City argues that Reed and Shumate's claims are atypical of those of the class as a whole. And fourth, the City argues that a class action is not a superior method to adjudicate plaintiffs' claims. Trial court did not err in certifying the class. (Braswell, T; CV-16-284; 2-16-17; Wood, R.)

Struble v. Blytheville School Dist., 2017 Ark. App. 99 [**teacher termination**] The School Board fired Struble for violating the Mandated Reporter Statute, for delegating her duty as a mandated reporter, and for failing to maintain the chain of custody of the child's letter. It is clear that the circuit court did not err when it found that the School Board had complied with the ATFDA when it terminated Struble for just and reasonable cause. (Honeycutt, P.; CV-16-319; 2-22-17; Virden, B.)

Havner v. Northeast Arkansas Elect. Coop., 2017 Ark. App. 111 [**duty/utility**] Havner was injured when a cable, owned by a third party, was pulled down by the sickle on Walker's tractor. It is undisputed that NAEC was not the owner of the cable and that the cable was not being used in the transmission of electricity. NAEC's only connection with the cable is that the cable was attached to its poles pursuant to an agreement between NAEC and Rapid Acquisition Company. Havner contends that it was NAEC's duty to inspect, maintain, and repair the cable in question. There is no such statutory duty imposed in this circumstance. The trial court correctly concluded that NAEC owed no duty to Havner. (Putman, J.; CV-15-468; 2-22-17; Brown, W.)

American Express Bank v. Davenport, 2017 Ark. App. 105 [**attorney's fees**] Davenport successfully defended against American Express's breach-of-contract claim, with no judgment being entered against him on that claim. Because of his successful defense against the contract claim, Davenport could receive an award of attorney's fees under Arkansas Code Annotated section 16-22-308. All of Davenport's claims—conversion, outrage, and abuse of process—are torts for which attorney's fees are not recoverable. However, the trial court's comments from the bench clearly reflect that the court considered Davenport's counterclaim to be an "integral part" of his defense against American Express's breach-of-contract action. Because Davenport successfully defended against American Express's breach-of-contract action, and at the end of the case came out "on-top," the trial court did not abuse its discretion in awarding Davenport \$30,597.50 in attorney's fees. (Arnold, G.; CV-16-580; 2-22-17; Glover, D.)

Protect Fayetteville v. State, 2017 Ark. 49 [**local anti-discrimination laws**] The question presented is the meaning of Act 137 and its application to Ordinance 5781. The express purpose of Act 137 is to subject entities to "uniform nondiscrimination laws and obligations." Ordinance 5781 is a municipal decision to expand the provisions of the Arkansas Civil Rights Act to include persons of a particular sexual orientation and gender identity. This violates the plain wording of Act 137 by extending discrimination laws in the City of Fayetteville to include two classifications not previously included under state law. This necessarily creates a non-uniform nondiscrimination law and obligation in the City of Fayetteville that does not exist under state law. (Martin, D.; CV-16-586; 2-23-17; Hart, J.)

Cardinal Health v. Beth Bail Bonds, Inc., 2017 Ark. 54 [**garnishment**] Requiring notice when one party attempts to use the courts to affect another party's liberty or property is at the very core of our legal system's obligation to protect the constitutional right to due process. That requirement was not met here. The circuit court's denial of Cardinal Health's motion for relief from the order to pay is reversed and all proceedings in the garnishment action that have occurred since the defective notice are vacated. (Fox, T.; CV-16-183; 2-23-17; Womack, S.)

DOMESTIC RELATIONS

Potts v. Potts, 2017 Ark. 33 [**divorce—property division, modification of custody, and modification of visitation without a hearing**] The appellee husband filed a complaint for divorce, for joint custody of the parties' only child, and for an equitable distribution of the parties' assets and liabilities. The appellant wife answered and filed a counterclaim for divorce, for sole custody of the child, and for child support. She also requested the court to determine property rights and the allocation of debts, unless otherwise agreed upon by the parties. In an amended complaint, the appellee sought sole custody of the child and claimed that a home he had acquired before marriage should be awarded to him as nonmarital property. The circuit court granted the appellant temporary custody of the child, set visitation for the appellee father, and ordered him to pay child support. At a final hearing, the parties announced that they had

settled the custody issue and they stated their agreement into the record. Among other things, the agreement provided if either parent willfully created conflict to disrupt the parties' joint custody arrangement, the circuit court may deem such behavior a material change in circumstances that may result in an order of primary custody to the non-disruptive parent. With the court's permission, the parties reserved the property issues and agreed to work on a settlement. The husband offered testimony on residency and his grounds for divorce. The circuit court stated that it would sign a decree approved by the parties. Before a decree was entered, the appellee father filed a motion to modify the joint-custody arrangement, based upon her alleged non-cooperation, bad faith, and other transgressions. He claimed that he was entitled to sole custody pursuant to the agreement, and he submitted an affidavit in support of his accusations. In her response, the appellant denied the allegations and claimed that he was the one creating conflict because he was dissatisfied with the terms of the agreement because she had been keeping the child while he was at work. The parties, through their respective counsel, and the circuit court exchanged at least seven letters back and forth between the three of them discussing the case. Along the way, the court entered an order granting the appellee father sole custody of the child, based upon the mother's repeated refusal to allow him to make up his missed time when she kept the child during periods of his custody. In the last letter described in the Supreme Court's opinion, the appellee's counsel attached two proposed decrees. The circuit court entered the decree that the appellee preferred. The appellant filed a motion for reconsideration and to modify the decree, which the court denied. The Supreme Court held that a circuit court may not resolve contested factual issues by dispensing with a hearing and accepting the position offered by one party over the other party's objection. It also held that the circuit court erred by rendering decisions regarding custody and visitation without a hearing. The Court reversed and remanded on the issues of the division of property, debts and custody. (Spears, J.; No. CV-16-10; 2-16-17; Goodson, C.)

Hortelano v. Hortelano, 2017 Ark. App. 98 [**divorce—child custody**] The issue in this case was which parent should be the primary custodial parent in a joint custody award. The Court of Appeals held that the circuit court did not clearly err in awarding the parties joint custody with the mother being the primary custodial parent. Reviewing the testimony of the parties and the circuit court's superior position to judge the credibility of the witnesses, the Court said it was not left with a definite and firm conviction that a mistake had been made, and it affirmed the custody award. (Gray, A.; No. CV-15-193; 2-22-17; Abramson, R.)

Boyd v. Crocker, 2017 Ark. App. 108 [**child support**] The circuit court determined the appellant father's child support obligation by imputing income to him. He contends on appeal that the court erred as a matter of law in its application of the "net-worth method" of calculating income for a self-employed payor. The evidence showed that the appellant is a self-employed farmer. The appellee mother of the child alleged that the appellant lived an extravagant lifestyle, whereas he contended that his monthly income for child-support purposes was \$3,500, based upon his affidavit of financial means. Evidence was presented of his bank records, tax returns, and lifestyle. Bank records from his family's farming business for nearly two years, bank records from his personal checking account indicating deposits and withdrawals, and tax returns were introduced, evidence was presented about his lifestyle: his building a house on land he owned and paying cash for it, purchase of a new truck, a camper and an ATV, the sale of a boat, a four-wheeler and a house in Paragould. He testified that he used his personal checking account to pay

expenses for a housekeeper, truck accessories, boat insurance, lake visits and hotel rooms, payment on several vehicles, construction of his house, and, eventually, child support payments of \$400 per month pursuant to a temporary order. Based upon the evidence, the circuit court imputed monthly income of \$11,105 to him and set child support at \$1,606 per month. In discussing whether the circuit court erred in the methodology in calculating his income, the Court gave an overview of pertinent provisions of Administrative Order No. 10 and *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007), which the Supreme Court references in Administrative Order No. 10. The Court of Appeals concluded that the best evidence the court had was the appellant's bank records, and that it considered two years' worth of information that they provided, as well as the factors set out in Administrative Order No. 10, to reach a realistic assessment of his income. Based upon the record, the Court did not find the circuit court's approach and conclusions to be clearly erroneous. The decision was affirmed. (Honeycutt, P.; No. CV-15-1058; 2-22-17; Whiteaker, P.)

Emis v. Emis, 2017 Ark. 52 [**jurisdiction--sufficiency of the notice of appeal**] The appellant mother of the child appealed the circuit court's changing custody from her to her former husband, the appellee. The case initially was filed in the Court of Appeals. The Supreme Court granted review and concluded "that the notice of appeal substantially complies with our rules and therefore does confer appellate jurisdiction...." The Court said that the notice of appeal was timely as to the final order and that the appellee suffered no prejudice from the failure to reference the final order. The Court held that the notice substantially complies with Rule 3(e) and is therefore not fatal to appellant jurisdiction. Having decided that threshold issue, the Supreme Court vacated the Court of Appeals opinion and remanded to the Court of Appeals for further consideration. (Welch, M.; No. CV-16-821; 2-23-17; Wynne, R.)

PROBATE

Pardew v. Arkansas Dept. of Human Services, 2017 Ark. App. 70 [**Adult Maltreatment Custody Act**] The circuit court awarded long-term protective custody of the appellant to DHS pursuant to the Adult Maltreatment Custody Act, Ark. Code Ann. Sections 9-20-101, et seq. The appellant argued that the trial court erred in ordering custody to DHS because it was not established that she was an endangered adult requiring such placement. The Court of Appeals affirmed, outlining the evidence before the circuit court supporting its decision, including its specific finding that the petitioner was unable to provide for her own protection from maltreatment. See discussion below of Concurring Opinion in *Howard v. Arkansas Department of Human Services*, 2017 Ark. App. 68. (Herzfield, R.; No. CV-16-680; 2-1-17; Hixson, K.)

Howard v. Arkansas Dept. of Human Services, 2017 Ark. App. 68 [**Adult Maltreatment Custody Act**] The circuit court granted long-term protective custody of the appellant to DHS. On appeal, the Court of Appeals found that DHS attempted to contact appellant's known family through phone numbers that she had for both of them, and that neither called her back or attempted to assist in appellant's care. The evidence was that he had been left alone in his home and that he required 24-hour care. The Court also found that the testimony presented regarding the appellant's assets showed that appellant's placement in an institution was the least restrictive alternative that met his needs. He needs continuous care; his home was unsafe for his return; no

willing family members offered him the necessary level of care. Although he testified that he had additional assets, the circuit court is in the best position to determine the credibility of witnesses. The decision was affirmed. In a concurring opinion, one Court of Appeals' judge agreed with the results reached in four similar cases, both on their facts and their legal challenges. The concurrence noted, however, that because of failures of attorneys and courts below, the Court of Appeals was unable to reach legal issues of concern and, thus, "meaningful due process may have been effectively denied to these four appellants, and due to our limited standard of review, we are unable to address the issues." The bench and bar was put on notice that simple due process requires that cases have a meaningful hearing with notice to family, a zealous representation of the impaired adult, and the opportunity to present all relevant evidence, including the preservation of the right to appellate review. (Hendricks, A., No. CV-16-595; 2-1-17; Hixson, K.)

Brown v. Arkansas Department of Human Services, 2017 Ark. App. 67 [**Adult Maltreatment Custody Act**] The appellant appeals a circuit court order placing her in the long-term protective custody of DHS. She argues on appeal that her family was not provided notice of the proceedings and that her lawyer was erroneously prevented from cross-examining a witness about her assets. Because neither issue was preserved for appeal, the Court of Appeals affirmed. The issue of no notice to the family was not made to the trial court. The second issue was a challenge to the trial court's ruling that she could not cross-examine the nurse-witness about any additional assets the appellant may have beyond those discussed during her testimony on direct examination. First, the Court said the issue was not preserved because the appellant's counsel objected, she provided no argument as to why the testimony should be presented, such as the arguments she made on appeal: that the court misinterpreted the statute and, alternatively, that the statute as interpreted is unconstitutional. Second, the Court will not reverse a ruling on the admission of evidence without a showing of prejudice, and appellant cannot demonstrate prejudice here from the exclusion of the testimony. See discussion above of Concurring Opinion in *Howard v. Arkansas Department of Human Services*, 2017 Ark. App. 68. (Hendricks, A.; No. CV-16-591; 2-1-17; Vaught, L.)

Foster v. Estate of Collins, 2017 Ark. App. 65 [**guardianship; fraud; constructive trust; laches**] The appellant was injured in an automobile accident in 1957, after which her father was appointed her guardian. He entered into a settlement on her behalf. She contends that her father used the proceeds of the settlement to pay off the family farm and, when it was sold years later, those proceeds were used to purchase two certificates of deposit that were placed in the name of appellant's mother, Deleta Collins. She claimed that after her father died in 1990, two of the appellees, her siblings, obtained the CDs by fraud, duress, undue influence, and breach of fiduciary duty. She requested that the court impose a constructive trust. The circuit court, after numerous proceedings, dismissed her action based upon laches, finding that any claim arising from the alleged misappropriation of funds in the 1950s was barred. The Court of Appeals noted that the issue of laches is one of fact, which will not be reversed unless clearly erroneous. The Court set out what it called appellant's "lengthy and somewhat confusing" arguments from her brief and found that the circuit court's decision must be affirmed. The appellant did not preserve her issues for review, or did not analyze how her authority applied to her case, or did not present cogent legal argument for her allegations that the circuit court's decision regarding laches was erroneous. The Court said that it will not make a party's argument for him or her. The Court

also declined to consider her final “points that are incomprehensible and lacking in convincing authority or argument.” (Smith, P.; No. CV-15-755; 2-1-17; Whiteaker, P.)

Nicholson v. Arkansas Department of Human Services, 2017 Ark. App. 52 [**Adult Maltreatment Custody Act**] This appeal is from a decision by the circuit court placing the appellant in the long-term protective custody of DHS. The appellant raised issues on appeal that were raised in previous cases above based upon the Adult Maltreatment Custody Act. In this decision, the Court of Appeals set out the statutory basis for DHS’s authority to take maltreated adults into custody, both on an emergency and a long-term basis. The appellant raised the issue on appeal of no notification of her family and no proof presented by DHS that no caregiver was willing and able to provide her with the care she required. Her alternative argument was that there was no indication that her family members had been unable to assist in collecting entitlements to provide the care she required. However, these points were not raised below and were not preserved for review on appeal. The appellant also raised the issue on appeal that the trial court erred in limiting counsel’s inquiry into the assets or available benefits and to prohibit additional questions on the subject on cross-examination. Although she contends on appeal that section 9-20-108 provides that the Public Defender Commission shall be appointed for an indigent maltreated adult to represent the maltreated adult “as to the issue of deprivation of liberty, but not with respect to issues involving property, money, investments, or other fiscal issues,” she did not argue the statutory interpretation for the trial court to have an opportunity to rule on it, so that argument is not preserved for appellate review. The Court found that the circuit court had not clearly erred in placing the appellant in the long-term protective custody of DHS. See discussion above of Concurring Opinion in *Howard v. Arkansas Department of Human Services*, 2017 Ark. App. 68. (Hendricks, A.; No. CV-16-594; 2-1-17; Virden, B.)

Johnston v. Arkansas Department of Human Services, 2017 Ark. App. 51 [**Adult Maltreatment Custody Act**] The appellant in this case, after the circuit court ordered him into the long-term protective custody by DHS, raised the same issues as in other cases set out above: (1) that DHS failed to present evidence that his family was notified as required by section 9-20-111, and (2) that the circuit court erred in limiting counsel’s cross-examination regarding appellant’s assets and finances. The appellant came to the attention of DHS through a hotline call and an investigation ensued, resulting in his being taken into custody. On the issue that no evidence was presented that the appellant’s family members had received notice, the issue is not preserved for appeal. His alternative argument, that no evidence was presented concerning his children’s ability to collect entitlements or income available to him, was not raised below and is therefore not considered on appeal. On the issue of limiting cross-examination of the nurse regarding his assets or available benefits, the Court of Appeals interpreted section 9-20-108(f)(1) and said that because his liberty interest relates directly to his financial assets, questioning should have been allowed on that matter. However, based upon the court’s ruling and the response of the nurse who was testifying, the Court said the appellant cannot demonstrate prejudice. Because the circuit court made the requisite findings, the Court of Appeals could not say that the court clearly erred in entering an order placing the appellant in the long-term custody of DHS. (Hendricks, A.; No. CV-16-592; 2-1-17; Virden, B.)