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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

Administrative Plans are to be submitted to the Supreme Court by July 1, 2015.

On March 19th, the Supreme Court published for comment a proposal from the Criminal Practice Committee to amend Ark. R. App. P.- Crim. 2 and Ark. R. Crim. P. 37.2 regarding filings by inmates of notices of appeal and Rule 37 petitions. The comment period ends May 18th. The per curiam was included in the weekly mailout.

CRIMINAL

Clark v. State, 2015 Ark. App. 142 [**sufficiency of the evidence; breaking or entering; failure to appear**] Although there was substantial evidence to support appellant's conviction for breaking or entering, the evidence was insufficient to sustain his conviction for failure to appear. [**motion to sever**] The circuit court denied appellant's motion to sever the charge of failure to appear from the breaking or entering charge because it concluded that appellant's failure to appear was evidence of his guilt on the breaking-or-entering charge. The appellate court held that the circuit court's basis for refusing to sever the offenses was improper pursuant to Rule 22.2 of the Arkansas Rules of Criminal Procedure and that the circuit court's failure to sever the offenses prevented appellant from

receiving a fair determination of guilt on the individual offenses. (Storey, W.; CR-14-851; 3-4-15; Gruber, R.)

Camp v. State, 2015 Ark. 90 [**Rule 37**] Because appellant failed to establish that his trial counsel's performance was deficient, the circuit court did not clearly err in denying appellant's Rule 37 petition. (Yeargan, C.; CR-14-88; 3-5-15; Hannah, J.)

Flowers v. State, 2015 Ark. App. 181 [**fitness to proceed**] The test for determining whether a trial court should *sua sponte* order a competency hearing is whether there is substantial evidence that the defendant may be mentally incompetent to stand trial. Although appellant's behavior may have been questionable, there was no evidence before the court that appellant was unable to consult with counsel or assist in preparing his defense or that he lacked the ability to understand the nature and object of the proceedings against him. Thus, the trial court did not err when it did not *sua sponte* order appellant to undergo a competency hearing. (Hill, V.; CR-14-849; 3-11-15; Hixson, K.)

Jackson v. State, 2015 Ark. App. 164 [**sufficiency of the evidence; theft of property**] There was substantial evidence to support appellant's conviction. [**admission of evidence; Rule 401**] Because appellant opened the door to the questioning when he said that he was a certified law enforcement officer, the circuit court did not abuse its discretion when it allowed the State to ask appellant whether he took an ethics course and signed a code of ethics during his law-enforcement certification. (Singleton, H.; CR-14-445; 3-11-15; Abramson, R.)

Spraglin v. State, 2015 Ark. App. 166 [**motion to suppress**] When law enforcement officials smelled the overwhelming odor of marijuana on appellant's person they had reasonable suspicion to stop him and determine if he was involved in the criminal activity about which the police department had received numerous complaints and were investigating. Accordingly, the circuit court did not err when it denied appellant's motion to suppress the evidence obtained as a result of the stop and search. (Jones, B.; CR-14-556; 3-11-15; Virden, B)

Curtis v. State, 2015 Ark. App. 167 [**sufficiency of the evidence; delivery of a controlled substance; maintaining a drug premises**] There was substantial evidence to support appellant's convictions. [**chain of custody**] For the trial court to allow admission of physical evidence, it is not necessary for every person who could have conceivably come into contact with the evidence to account for every moment from the time the evidence comes into the possession of a law-enforcement agency until it is introduced at trial. It is also not necessary to eliminate every possibility of tampering. It is necessary only that the trial court, in its discretion, be satisfied that the evidence presented is genuine and, in reasonable probability, has not been altered. (Williams, C.; CR-14-823; 3-11-15; Virden, B)

Jones v. State, 2015 Ark. 119 [**Rule 37**] In a Rule 37 proceeding, to establish prejudice and prove that a petitioner was deprived of a fair trial due to ineffective assistance of counsel, a petitioner who has pleaded guilty must demonstrate a reasonable probability that, but for counsel's errors, the petitioner would not have so pleaded and would have insisted on going to trial. Because appellant's

petition made sufficient allegations to create a question of fact that his counsel's performance was deficient, and because the circuit court applied the wrong standard in reviewing appellant's petition, the circuit court's order was reversed and the case was remanded for a full hearing on appellant's petition. (Hart, J.; CR-14-211; 3-19-15; Johnson, L.)

Beverage v. State, 2015 Ark. 112 [Rule 37] Rule 37.3 of the Arkansas Rules of Criminal Procedure requires an evidentiary hearing in a postconviction proceeding unless the petition, files, and records of the case conclusively show that the petitioner is entitled to no relief. Because certain information was missing from the record in appellant's case, the appellate court was unable to say that the record conclusively showed that appellant was entitled to no relief. Thus, the case was remanded for an evidentiary hearing on the claims asserted in appellant's Rule 37 petition. (Dennis, J.; CR-13-389; 3-19-15; Danielson, P.)

Rasul v. State, 2015 Ark. 118 [Rule 37] An attorney's decision not to call a particular witness is largely a matter of professional judgment, and the fact that there was a witness or witnesses who could have offered testimony beneficial to the defense is not, in itself, proof of ineffectiveness. Appellant failed to demonstrate that his counsel was ineffective for not presenting an additional expert witness who would have offered essentially the same testimony as another witness. Therefore, the circuit court did not err when it denied appellant's Rule 37 petition. (Wright, H.; CR-14-136; 3-19-15; Goodson, C.)

Mancia v. State, 2015 Ark. 115 [Rule 37] Appellant failed to establish that his attorney's performance was deficient or that his counsel's actions prejudiced him. Additionally, appellant failed to establish that he would not have pleaded guilty and would have instead gone to trial but for errors made by counsel. Accordingly, the trial court did not err in denying appellant's petition for postconviction relief. [ineffective assistance of counsel; post-conviction counsel] Neither *Martinez v. Ryan*, 132 S.Ct. 1309 (2012) nor *Trevino v. Thaler*, 133 S.Ct. 1911 (2013) require that counsel must be appointed on appeal in a postconviction proceeding. (Green, R.; CR-11-556; 3-19-15; Baker, K.)

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

Scott-Paxson v. State, 2015 Ark. App. 149 (first-degree murder) CR-14-681; 3-4-15; Whiteaker, P.

Hernandez v. State, 2015 Ark. App. 150 (rape) CR-14-151; 3-4-15; Vaught, L.

Gill v. State, 2015 Ark. App. 162 (negligent homicide; failure to maintain liability insurance) CR-14-607; 3-11-15; Gladwin, R.

Brickey v. State, 2015 Ark. App. 175 (residential burglary; theft of property) CR-14-920; 3-11-15; Whiteaker, P.

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

Sparkman v. State, 2015 Ark. App. 156 (suspended sentence) CR-14-839; 3-4-15; Brown, W.

CIVIL

DLC Properties, LLC v. Carmike Cinemas, Inc., 2015 Ark. App. 145 [**conversion**] Gross revenues are not substantial evidence of lost profits; conversion claim failed for lack of proof of damages. (Webb, G.; CV-14-265; 3-4-15; Glover, D.)

Whitey's Truck Center, Inc. v. Robinson, 2015 Ark. App. 146 [**new trial**] Motion for new trial was deemed denied after thirty days. Thereafter, trial court had no jurisdiction to grant it. (Moody, J.; CV-14-325; 3-4-15; Glover, D.)

Breckenridge v. Lowery, 2015 Ark. App. 157 [**admissions**] Requests for admissions were mailed to address provided by party. Requests were not timely answered and deemed admitted. Party claimed they were sent to erroneous address and never received. If they were not received, it was the party's own fault, and it was proper to deem the admissions admitted. (Hughes, T.; CV-14-507; 3-4-15; Brown, W.)

Azzore Veterinary Specialists, LLC v. Hodgson, 2015 Ark. App. 158 [**summary judgment**] Summary judgment was improper because factual issues existed as to scope of veterinarian's practice and whether she was in violation of covenant not to compete. Also there was a fact issue over waiver of monies. (Sutterfield, D.; CV-14-694; 3-4-15; Brown, W.)

Dunn-Wright v. Bd. Of Education, 2015 Ark. App. 152 [**schools**] Appellant filed action in circuit court challenging her removal as school superintendent by the State Board. The State Board had reconstituted the district and removed the school board and superintendent. These actions were not appealed to the State Board. This court action by the former superintendent is not proper. (Moody, J.; CV-14-293; 3-4-15; Hixson, K.)

McDaniel v. Spencer 2015 Ark. 94 [**Act 1413 of 2013/initiatives and referenda**] Section 21 of Act 1413 is constitutional. It prohibits a sponsor from providing money or anything of value to a canvasser unless the canvasser meets certain requirements. Sponsors are required to provide paid canvassers with a copy of the most recent edition of the Secretary of State's handbook on referenda and initiatives and explain Arkansas law applicable to obtaining signatures on an initiative or referendum petition to the canvasser before the canvasser can solicit signatures. Sponsors must also provide a complete list of all paid canvassers' names and current residential addresses to the Secretary of State and update the list if additional paid canvassers are used. Other sections were found constitutional except for: Section 13 (after the petition has been filed, a canvasser shall not circulate a petition, or collect, solicit, or obtain any additional signatures for the filed petition until

the Secretary of State determines the sufficiency of the petition); and Section 18 (every signature on a petition part is invalidated if the part contains some invalid signatures). (McGowan, M.; CV-14-599; 3-5-15; Wynne, R.)

Marston v. Taylor, 2015 Ark. App. 176 [**deed/capacity**] The circuit court acknowledged that there had been contradictory testimony about the grantor's mental state at the time she executed the deed; however, it also placed great weight on the medical evidence before it. Based on its assessment and balancing of the evidence, the court concluded that the testimony regarding the grantor's "good days" did not outweigh the evidence of her lack of capacity. Credibility determinations resolving inconsistent assertions are for the trial court to decide. (Cottrell, G.; CV-14-36; 3-11-15; Whiteaker, P.)

Triple T Farms v. Union Bank, 2015 Ark. App. 174 [**notice**] The trial court specifically found that Triple T's counsel had notice of the trial setting, and findings of fact by the trial court shall not be set aside unless clearly erroneous. The notice to originally set the case, and all subsequent notices of trial resettings—there were at least three—were sent to Triple T's counsel at her P.O. box. The trial court further noted from the bench that its staff had also confirmed the trial date by telephone. Moreover, there was no evidence that Triple T made any effort to keep abreast of the progress of the action. Counsel should have been diligent in keeping abreast of the progress of the action and inquired as to when the trial had been reset. (Wyatt, R.; CV-14-606; 3-11-15; Glover, D.)

McGee v. Archie Vangorder Custom Homes, Inc., 2015 Ark. App. 170 [**new trial**] Plaintiff sought a new trial arguing newly discovered evidence. The evidence suggested that the purchaser could have discovered the alleged defects in the house sooner if he had exercised reasonable diligence in investigating the condition of the home. Ordinary prudence and reasonable diligence exercised before the purchase of the home or within the fifteen months between purchase and trial could have allowed McGee to discover the alleged defects through an inspection. The trial court did not abuse its discretion in denying the motion for new trial. (Wright, J.; CV-14-657; 3-11-15; Kinard, M.)

Williams v. Stant USA Corp., 2015 Ark. App. 180 [**dismissal**] Appellants argue that the circuit court erred in dismissing ACRA and common-law claims with prejudice rather than without. This argument is wholly without merit. It is undisputed appellants' complaint and amended complaint raised only state-law claims, the claims were not served within 120 days, and the applicable statutes of limitations had run on these claims at the time of dismissal. The dismissal without prejudice language in Rule 4(I) does not apply if the plaintiff's action is otherwise barred by the running of a statute of limitations. However, the retaliation claim should have been dismissed without prejudice. The statute of limitations had not yet run on the retaliation claim. The circuit court stated that it was dismissing the claim with prejudice because she had already filed a federal lawsuit against the same defendants regarding the same subject matter, and the federal case was currently pending at the time of dismissal. However the pending federal lawsuit provided no legal basis for transforming a Rule 4(I) dismissal, which would normally be without prejudice, into a with-prejudice dismissal. (Wyatt, R.; CV-14-764; 3-11-15; Vaught, L.)

Crenshaw v. Mcfalls, 2015 Ark. App. 186 [**party**] McFallses were not a party, individually, to the action. They were sued in their representative capacities only and the McFallses' counsel represented them in their representative capacities only. The McFallses's counsel's request that the judgment be made against the McFallses individually does not make them parties in that capacity. Nor does the McFallses's counsel's erroneous signature line on a few documents asserting that McFallses were signing in both their individual and representative capacities make them parties. The circuit court's finding that the McFallses were sued in their individual capacities was clearly erroneous. (Hughes, T.; CV-14-744; 3-11-15; Brown, W.)

Wilmoth v. . SWEPCO, 2015 Ark. App. 185 [**condemnation**] In a condemnation action, there is no requirement of payment prior to the taking or a pre-taking hearing. The statutory scheme called for a deposit into the registry of the court and for a jury to determine the amount of the compensation. Safari fully participated without objecting to the procedure by which SWEPCO obtained possession. Landowner sought to have its witnesses testify as to elements of severance damages to the remaining tract and whether it could continue to be used as a wild-animal safari park. The circuit court excluded the testimony, ruling that the only proper testimony was that concerning the before-and-after value of the property. In doing so, the court inadvertently took an unduly narrow view of what proper damages are in a condemnation case. It did so by not considering how certain testimony, although not directed specifically at the property's fair market value, may nevertheless be relevant in determining the fair market value. There is no requirement that each witness be able to directly relate his or her testimony to the fair market value of the property. (Karren, B.; CV-14-289; 3-11-15; Brown, W.)

Barton AG Center, Inc. v. Case, 2015 Ark. App. 198 [**conversion**] Evidence supported proof of element of exercising possession or dominion of tractors by the defendant. Punitive damages were not in order because more than conversion must be shown; it must have occurred for the purpose of violating plaintiff's rights or causing him damage – not shown here. (Griffen, W.; CV-14-693; 3-18-15; Hixson, K.)

Martin v. Nationwide Ins., 2015 Ark. App. 201 [**order/entry**] Judge was free to reconsider what he said orally at the end of the hearing; order is not effective until written and entered. (Schrantz, D.; CV-14-712; 3-18-15; Brown, W.)

Cagle v. Williger, 2015 Ark. App. 191 [**service**] Suit filed; summons was issued, but service was never completed. Defendant filed a response, though he had not yet been served, and in his response he reserved the right to object on jurisdictional grounds. Service was never completed and defendant moved to dismiss. Plaintiffs argued that they were deceived into not serving summons. Plaintiffs did not complete service, and the statute of limitations ran in the meantime. They are barred by our court rules, and the savings statute does not apply under the present facts. (Capeheart, T.; CV-14-721; 3-18-15; Virden, B.)

Gilbow v. Crawford, 2015 Ark. App. 194 [**negligence**] Directed verdict was proper as there was a failure of proof as to what caused the plane accident; plaintiff merely presented speculation and conjecture. (Taylor, J.; CV-14-672; 3-18-15; Glover, D.)

Gafford v. Allstate Ins. Co., 2015 Ark. 110 [**certified question answered-insurance**] The recovery of attorney's fees to an insured in an insurance contract action is exclusively available pursuant to Arkansas Code Annotated section 23-79-208, precluding an award of attorney's fees pursuant to Arkansas Code Annotated section 16-22-308. (E. D. Ark.; CV-14-786; 3-19-15; Hannah, J.)

Hobbs v. McGehee, 2015 Ark.116 [**Act 139/lethal injection**] Act 139 does not violate the separation-of-powers principle contained in article 4 of the Arkansas Constitution. The delegation of authority contained within Act 139 is not unfettered and is bounded by reasonable guidelines from the legislature. Act 139 is not a sentencing statute and, because it will be applied only to executions after its enactment, does not violate principles against retroactive application of sentencing statutes. (Griffen, W.; CV-14-542; Baker, K.)

DOMESTIC RELATIONS

Fields v. Fields, 2015 Ark. App. 143 [**divorce-premarital property**] The facts were undisputed that the appellant husband owned a home before the parties married and that the appellee wife paid for repairs and improved his property with her own funds both before the marriage, after she had moved into the home, and during the parties' nine-month marriage. At trial, she introduced a receipt for windows that she purchased for the home and a personal check from her own funds for \$4,401. She also testified that she opened a Home Depot account in her name while they were married which they used to purchase such things as paint, light fixtures, and ceiling fans for the house. The balance on that account was \$717.25 at the time of the trial. The circuit court ordered the appellant husband to pay the balance of the account of \$717.25, and to reimburse the appellee \$4,400 for the windows. He argued on appeal that the court clearly erred because the appellee failed to meet her burden of proving any increase in value to the property from the expenditures, that the court made no findings in support of an unequal division of assets, and that the expenditure for windows was a gift before the marriage. In affirming, the Court of Appeals noted that there is no presumption that an equal division of debt must be made, but the manner in which it is allocated is a question of fact. On the issue of the windows, the court said that the appellant owned the home before the marriage and the appellee owned the windows, which, as a practical matter, could not be returned to her (and she did not request that). The circuit court "used its broad powers to make a fair and equitable division under the circumstances of this case," and the court held the division complied with Ark. Code Ann. Section 9-12-315. (Foster, H.G.; No. CV-14-503; 3-4-15; Gruber, R.)

Robinson v. Lindsey, 2015 Ark. App. 148 [**divorce-division of property**] The appellant wife appealed the circuit court's equal division of the parties' property at the time of divorce. She claimed that an equal division was not equitable and should be reversed. The property at issue included two jointly-titled houses and jointly-titled financial accounts. The Court of Appeals said that when property is placed in the names of a husband and wife without specifying the manner in

which they take, they presumptively own the property as tenants by the entirety, and the presumption is overcome only by clear and convincing evidence. Here, the appellant did not overcome that presumption. In fact, in testifying that she had appellee's name added to the financial accounts in anticipation of her own death, she supported, rather than dispelled, the presumption. The facts surrounding the placement of both names on the deeds to the real property are more convincing that joint ownership was intended than that it was not. (Harkey, A.; No. CV-14-720; 3-4-15; Glover, D.)

Black v. Black, 2015 Ark. App. 153 [**divorce—child custody**] Both parties sought primary custody of their child at the time of divorce. Both had shared approximately equal time with the child following their separation. The circuit court ordered that the appellee father would have primary custody and the appellant mother would have visitation. She argued on appeal that the trial court clearly erred in granting custody to the appellee or, alternatively, in not awarding joint custody. The Court of Appeals noted that the trial court heard competing evidence in a day-long hearing and that the court made its “hard decision” based upon the best interest of the child. The trial court specifically stated that it “reached its decision through a deliberative process relying on several factors, none...considered conclusive but when combined together showed that...[the father]...offered a more stable and settled situation for the child.” On the appellant's alternative argument that the trial court clearly erred in not awarding joint custody, the Court of Appeals said that the appellant made no request for joint custody. Each party asked for sole custody of the child. The Court of Appeals held that the trial court's findings were not clearly erroneous because the best interest of the child would not have been served by an award of joint custody. (McCallum, R.; No. CV-14-638; 3-4-15; Hixson, K.)

Barnett v. Barnett, 2015 Ark. App. 178 [**contempt**] After the parties' divorce, the appellee husband filed an action to have the appellant wife held in contempt. The circuit court found her in willful contempt based upon three independent and alternative bases: (1) that the small-business section of the divorce decree covered more than just the ordinary expenses of the business; rather, it covered all debts and obligations related to the business, including appellee's personal tax liability derived from the profits of the business; (2) that, even if the debt was construed to be marital debt, the court could allow for an unequal division of the debt; and (3) that the appellant's failure to provide the appellee with the K-1 tax-reporting forms from the business created an undisclosed debt payable by the appellant under the divorce decree. The appellant appealed only the first basis for the court's ruling. She did not challenge the two other alternative findings to contempt. In particular, she did not challenge the court's finding that she did not provide the appellee with the K-1s and that this undisclosed debt became her responsibility under the decree. She took the position that she did not know the significance and simply placed them in a folder. She testified that she believed she had given the appellee the K-1s, but provided no details about it. The trial court did not determine her to be credible, as is the trial court's duty. Because she failed to challenge the court's alternative, independent bases for its ruling, the decision was affirmed. (Kilgore, C.; No. CV-14-703; 3-11-15; Whiteaker, P.)

Trucks v. Trucks, 2015 Ark. App. 189 [**divorce—alimony**] The appellant husband alleged on appeal that the circuit court abused its discretion in awarding alimony of \$600 per month for thirty years to

the appellee wife. The Court of Appeals found that the circuit court did not abuse its discretion in awarding alimony. The circuit court considered the necessary factors in making an award of alimony, and indicated that the appellant could seek a reduction in alimony or its term in the future if circumstances changed. The Court of Appeals also said that nothing in the record indicated that the circuit court's award of alimony was meant to be punitive, although the court noted that the trial court could have considered fault or marital misconduct if it related meaningfully to the need or ability to pay. (Hannah, C.; No. CV-14-775; 3-18-15; Gladwin, R.)

Williams v. Geren, 2015 Ark. App. 197 [**change of custody—material change in circumstances**] The circuit court modified custody of the parties' two daughters, removing them from the custody of the appellant mother and placing them in the custody of the appellee father, finding a material change in circumstances and that it was in the best interest of the children to be placed with their father. The Court of Appeals, reviewed all of the evidence and the circuit court's order, in which the court noted three specific material changes in circumstances. The Court of Appeals said that it could not affirm any of the circuit court's findings of changed circumstances, nor could it find, after a thorough review of the evidence, an independent basis for finding a change in circumstances. Concluding that the circuit court's finding of a material change in circumstances was clearly erroneous, the court did not reach the issue of the best interest of the children. (Hendricks, A.; No. CV-14-776; 3-18-15; Vaught, L.)

Hix v. Hix, 2015 Ark. App. 199 [**divorce—alimony**] The parties divorced in 2001, when their two sons were ages two and three, and the appellee wife was granted custody. The appellant husband was ordered to pay monthly child support of \$2,750 and monthly alimony of \$1,500. The appellee filed a petition to modify child support in late 2013, based upon appellant's increase in income. He filed a counter-petition to eliminate alimony for a material change in circumstances because she "has had more than ample time...to enter the job market and become employed." Evidence indicated that appellant's income had increased from \$98,000 at the time of the divorce to about \$280,000 at the time of the hearing. He admitted that an increase in child support was warranted based upon his current monthly income, but he requested a reduction from the chart amount based upon transportation expense in his exercising visitation. Since he now lives in Fayetteville and the children still live in Jonesboro, he bought an airplane to transport the children for visitation. He testified that he and his current wife are both OB-GYN physicians with a combined adjusted gross income of \$1,001,059. He had a monthly budget surplus of \$7,000 while the appellee's affidavit of financial means showed that she had a monthly budget deficit of about \$1,500. The circuit court increased child support to \$4,891 per month. The court also found that the alimony obligation should be phased out beginning with the older child's high-school graduation in May 2016, when it would be reduced by 20% to \$1,200 per month. Each year thereafter, the alimony would continue to be reduced by \$300 until it was entirely phased out. The court referred to the finding in the original divorce decree the parties had agreed that the appellee would be a stay-at-home mother, potentially until the children graduated from high school. The court found that perpetual alimony was not warranted in this case because the appellee was well educated. The Court of Appeals said that the circuit court had considered the original decree, the length of time the appellant had paid alimony, the children's current needs, and the differences between the parties' earning capacities and

resources. The appellant admitted that he has the present ability to pay alimony. The court said that, under the circumstances in this case, it was not an abuse of discretion for the court to find that appellee has a need for alimony until the older child graduates from high school, when phase-out will begin. (Philhours, R.; No. CV-14-772; 3-18-15; Hoofman, C.)

Miller v. Arkansas Office of Child Support Enforcement, 2015 Ark. App. 188 [**child support–adult child with special needs**] The Court of Appeals affirmed the decision of the circuit court modifying the appellant’s child-support obligation to his adult son, based upon the son’s special-needs status and inability to care for himself, and awarding retroactive support from May 12, 1998, through January 24, 2014. The Court of Appeals discussed that the son had a disability at the time the decree was entered, although the decree was silent on that issue, and a disability when he reached the age of majority. Also, he continued to live with his mother because he was not able to live alone and he needed continued support. The appellant attempted to raise issues on appeal that had not been presented to nor considered by the trial court, so the Court of Appeals was precluded from considering them on appeal. (Welch, M.; No. CV-14-616; 3-18-15; Gladwin, R.)

PROBATE

Beavers v. Williams, 2015 Ark. App. 140 [**wills and estates–summary judgment; Rule 11**] This case involves a dispute over decedent Emma Gene Shipp’s last will and testament and whether her caregiver, the appellee, a beneficiary under the will, exerted undue influence in the making of the will. The circuit court granted summary judgment to the appellee. The Court of Appeals held that the parties’ dispute presented genuine issues of material fact that needed to be decided by a fact-finder, reversed the summary judgment and remanded. The court also reversed the circuit court’s Rule 11 sanction of attorney’s fees, finding that the circuit court had abused its discretion in finding a violation on this record. (Foster, H.G.; No. CV-14-711; 3-4-15; Harrison, B.)

JUVENILE

Ark. Dep’t of Human Services v. Waugh, 2015 Ark. 155 [**UCCJEA Jurisdiction**] DHS filed an appeal and argued that the court had subject matter jurisdiction under UCCJEA. Arkansas Code Ann. § 9-19-102 (7) defines the home state in which a child lives with a parent or person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. Commencement is defined as the filing of the first pleading in a proceeding. A.C.A. § 9-19-102 (5). In this case, neither Arkansas, nor Oklahoma was the home state because the child had not resided in either state for a least six months immediately prior to the dependency-neglect proceeding. The circuit court erred in dismissing the case, finding that the parent and children lived in Oklahoma at the time the petition was filed. Further, the court failed to engage in the home state analysis to determine if the parent and children had a significant connection with the state other than a mere physical presence, and if substantial evidence was available in this state concerning the children’ care protection, training and personal relationships. Reversed and remanded to make further findings. (Hewett, M; CV-14-831; 3-4-2015; Hoofman, C.)

Beckman v Ark. Dep't of Human Service v. Nelson, 2015 Ark.192 [DN Adjudication]

[notice] Appellant argued that the petition failed to describe the type of abuse with any specificity. The affidavit set forth physical abuse and the petition alleged abuse, neglect and parental unfitness. [sufficiency] Appellant argued that his sons' claims were not credible and that he administered reasonable discipline. The trial court was not required to believe that appellant's assertion that his physical discipline was reasonable and moderate, and not abuse. The photographs showed that his son sustained physical injuries and the trial court could defer to the credibility of the sons' testimony and reasonably determine that appellant struck his son repeatedly with a chair and it was not an accident. [FINS] Appellant's argument that his dependency-neglect case should have been converted to a FINS case has no bearing on the dependency-neglect adjudication. (Edwards, R; CV-14-1026; 3-18-2015; Virden, B.)

Middlebrook. v. Ark. Dep't of Human Service v. Nelson, 2015 Ark. 161 [DN Adjudication - sufficiency] Appellant argued that she took affirmative steps to protect her child and ended contact with her boyfriend who had sexually abused her daughter. While there was conflicting testimony, the circuit court was not convinced by appellant's claims. The circuit court specifically found that the mother failed to take reasonable action to protect her child. The court further found that the mother did not believe her child's statements that she had been sexually abused, and she would not be able to protect or would or would not keep her child away from her boyfriend. (Cook, V; CV-14-927; 3-4-2015; Brown, W.)

Williams. v. Ark. Dep't of Human Services, 2015 Ark. App. 171 [TPR – best interest] The adoption specialist testified at the termination hearing that the child was readily adoptable and was healthy and there were no barriers to adoption. [potential harm] The circuit court found that appellant was homeless, a longtime drug abuser (with only a period sobriety while incarcerated in prison), a repeat felony offender and no ability to support his child. (James, P.; CV-14-982; 3-11-2015; Kinard, M.)

Cases in which the Court of Appeals affirmed No-Merit TPR and Motion to Withdraw Granted:
Hawkins v. Ark. Dep't of Human Services, 2015 Ark. App. 190 (Zimmerman, S.; CV-14-1009; 3-18-2015; Abramson, R.)

Matlock v. Ark. Dep't of Human Services, 2015 Ark. App. 184 (James, P.; CV-14-984; 3-11-2015; Hoofman, C.)

Heflin v. Ark. Dep't of Human Services, 2015 Ark. App. 182 (Clark, D.; CV-14-1025; 3-11-2015; Hixon, K.)

Collins v. Ark. Dep't of Human Services, 2015 Ark. App. 165 (James, P.; CV-14-988; 3-11-2015; Abramson, R.)