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ANNOUNCEMENTS

On December 7th, the Supreme Court adopted rules changes to be effective January 1, 2018. The rules affected are Rules of Civil Procedure 45, 45.1 (new), Sup. Ct. R. 4-6, Rules of App. P.-Civ. 2, and 12 (new). Administrative Order No. 2 was amended regarding the entry of orders by the judge.

CRIMINAL

Ray v. State, 2017 Ark. App. 574 [**constitutional challenges; Ark. Code Ann. § 12-12-919**] A rational basis exists for treating sex offenders convicted under more than one case number differently than those convicted under a single case number. The legislative intent behind the sex-offender registry is to protect the public from sex offenders, whom the legislature has found to pose a high risk of reoffending after having been released from custody. Individuals convicted of a subsequent sex offense under a second case number have committed more than one sex crime, and the General Assembly could have concluded that these individuals are more likely to reoffend. The requirements under the Sex Offender Registration Act have been determined to be

civil in nature and as such cannot be considered violative of the *ex post facto* prohibitions of the United States or Arkansas Constitutions. (Phillips, G.: CR-17-294; 11-1-17; Klappenbach, N.)

Harrison v. State, 2017 Ark. App. 580 [**severance**] A defendant has a right to a severance when two or more offenses have been joined solely on the ground that they are of the same or similar character. Otherwise, granting or refusing a severance is within the discretion of the trial court, and the decision by the trial court will not be disturbed absent an abuse of discretion. A severance motion may be denied if the two offenses were part of a single scheme or plan or if both offenses require the same evidence. In appellant's case, the circuit court refused to sever the murder-in-the first-degree charge from the possession-of-a-firearm-by-a-certain-person charge. The Arkansas Supreme Court has explained that while possession of a firearm is a common element with murder perpetrated by means of a firearm, the introduction of a conviction of a prior felony as required for a possession-of-a-firearm-by-certain-persons charge has nothing to do with the elements of proof required for murder in the first degree. Moreover, the Court advised that presentation of a prior conviction to the jury runs the risk of prejudicing the trial of the joined offense to some degree. Because the two offenses in appellant's case were not part of a single scheme or plan nor did they require the same evidence, the trial court erred in refusing to sever the two charges. (Proctor, R.; CR-16-820; 11-1-17; Hixson, K.)

Cummings v. State, 2017 Ark. App. 573 [**bond reduction**] The proper means to challenge a bond decision is by a writ of certiorari and a party who does not seek a timely writ of certiorari from a bond decision abandons the issue. Once an appellant has been found guilty and is incarcerated, the issue of pretrial bond is moot. (Clawson, C.: CR-17-187; 11-1-17; Harrison, B.)

State v. Cossio, 2017 Ark. 297 [**rape-shield statute; Ark. R. Evid. 411**] The trial court abused its discretion when it admitted evidence of the victim's prior sexual conduct with a third party because the evidence was not relevant or admissible under the rape-shield statute or Ark. R. Evid. 411. Contrary to the appellant's assertion, the evidence was not relevant to show the *res gestae* of the charged offense or to establish the relationship between the parties. (Wright, H.; CR-17-250; 11-2-17; Goodson, C.)

Pennington v. State, 2017 Ark. 305 [**sentencing**] A trial court cannot amend the original valid sentence to run the sentences consecutively after a sentence has been put into execution. However, that rule does not apply if the original sentences were invalid, and the case is reversed and remanded for resentencing. Additionally, where a sentence involves separate sentences, as with several counts for example, the law generally prohibits the modification of the legal portion of the sentence. However, when there is an error in one portion of an individual sentence, the court views the sentence as an indivisible totality and if modification is required, the court may on resentencing impose any sentence it could have lawfully imposed at the outset. In appellant's case, because his original sentence was invalid, on remand for resentencing the circuit court was

permitted to impose any sentence that would have been permissible at the time the original sentence was imposed, which could include requiring that appellant serve the multiple sentences consecutively. (Wright, H.; CR-17-143; 11-2-17; Wynne, R.)

Hanley v. State, 2017 Ark. App. 583 [**sentencing**] “Double counting” jail time is impermissible. Credit for jail time is appropriate when the pretrial incarceration is due to inability to make bail, but not appropriate when the incarceration is due wholly to unrelated charges based on conduct other than that for which the defendant is sentenced. (Jones, B.; CR-17-185; 11-8-17; Gruber, R.)

Todd v. State, 2017 Ark. App. 587 [**Ark. R. Crim. P. 37.2**] Because appellant’s petition seeking post-conviction relief complied with the terms of Rule 37.2 (g) of the Arkansas Rules of Criminal Procedure, the trial court erred when it denied the petition based upon untimeliness. (Culpepper, D.; CR-17-12; 11-8-17; Virden, B.)

Baltimore v. State, 2017 Ark. App. 622 [**sufficiency of the evidence; possession of cocaine; constructive possession**] Constructive possession can be inferred when drugs are in the joint control of the accused and another. However, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. There must be some other factor linking the accused to the drugs. Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused’s personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile or exercises dominion and control over it; and (5) whether the accused acted suspiciously before or during the arrest. In appellant’s case, the only evidence linking appellant to the cocaine that was found in the vehicle was the fact that he was driving the jointly occupied vehicle when it was pulled over and the cocaine was found in the front center cup holder. Beyond those two factors, there was a lack of evidence linking appellant to the cocaine. The prosecution failed to elicit any testimony that established who owned the vehicle; whether the cocaine was found in plain view or whether things had to be moved in order to see it; where in the cup holder the cocaine was found; whether the cup holder was open or had a closed lid; the proximity of the cocaine in the front center cup holder to the front-seat passenger; on which floorboard the cocaine was found; whether the cocaine was found with appellant’s personal effects; and whether he acted suspiciously before or during his arrest. Based upon the facts of the case, the appellate court concluded that the evidence was insufficient to raise a reasonable inference that appellant knew that the two small rocks of cocaine were in the front center cup holder or on the floorboard of the vehicle. Accordingly, substantial evidence did not support the circuit court’s finding that appellant constructively possessed the cocaine. (Johnson, L.; CR-17-157; 11-15-17; Vaught, L.)

Myers v. State, 2017 Ark. App. 617 [**sex-offender**] Sexual abuse in the second degree is not a substantially equivalent offense to aggravated sexual abuse as defined in 18 U.S.C. § 2241(a)(1), which requires “knowingly causing another person to engage in a sexual act by using force against that other person.” Thus, sexual abuse in the second degree is not an “aggravated sex offense” as that term is defined by Ark. Code Ann. §12-12-903(3). (Dennis, J.; CR-17-131; 11-15-17; Klappenbach, N.)

Cutsinger v. State, 2017 Ark. App. 647 [**motion in limine**] Appellant requested that the trial court exclude from evidence a portion of a text message that he sent to a friend. The challenged message stated: “I’m ready to kill me some cops.” Appellant’s defense at trial was that he did not have the requisite mental state to commit the crimes with which he was charged which included murder and attempted murder of individuals who were not police officers. The appellate court concluded that because the text message was not relevant to the issue of appellant’s mental state for the murder and attempted murder of individuals who were not police officers, the trial court erred by denying appellant’s motion in limine and admitting the evidence. (Cox, J.; CR-17-96; 11-29-17; Whiteaker, P.)

CIVIL

Gerber Products Co. v. CECO Concrete Const., LLC, 2017 Ark. App. 568 [**work product interlocutory appeal**] Based on the facts of the case, Gerber waived its right to assert the privilege by failing to object in a timely fashion. Gerber failed to object on the grounds of attorney-client and work-product privileges in its initial responses to discovery, it waited more than two years to assert those privileges. Moreover, Gerber’s lack of a timely objection persisted, despite its having been informed in the earliest stages of discovery that it had inadvertently delivered privileged materials to CECO; and despite the fact that the circuit court’s July 2013 order to compel pointed out Gerber’s failure to object to the requests. Further, Gerber continued to produce over 100,000 pages of documents during discovery while still making no objection on the basis of the attorney-client and work-product privileges. [**inadvertent disclosure**] The circuit court was within its discretion to determine that a waiver occurred based on Gerber’s lack of precautions to prevent inadvertent disclosure. The record shows that the court’s concern about Gerber’s lack of precautions was well-founded. For example, Gerber cites an affidavit from a representative of its former law firm as evidence of precautions taken against the inadvertent disclosure of privileged documents. However, the affidavit is lacking in detail on that subject and would by no means require the circuit court to find that reasonable precautions were taken. Moreover, the series of events throughout the parties’ multiyear history of discovery demonstrates a pattern by Gerber of providing large numbers of documents without objection and without sufficient and diligent screening for privileged materials. (Tabor, S.; CV-16-1096; 11-1-17; Abramson, R.)

Dept. of Corrections Co. v. Shults, 2017 Ark. 300 [**FOIA-lethal drugs**] The circuit court was correct in determining that the identity of drug manufacturers is not protected under the confidentiality provisions of section 5-4-617. However, because disclosure of information such as lot, control, and/or batch numbers could lead to the identification of the seller and/or supplier of the midazolam, the ADC is correct that it is required to redact and maintain this information as confidential under section 5-4-617(j). The portion of the circuit court's order requiring disclosure of the unredacted records is reversed and remanded for the court to determine, based on the evidence presented by the parties, which information must be redacted on the midazolam labels and/or package inserts at issue. (Pierce, M.; CV-17-888; 11-2-17; Goodson, C.)

Box v. J.B. Hunt, 2017 Ark. App. 605 [**employment-noncompete**] Box, a former employee of J.B. Hunt brings this interlocutory appeal from the trial court's order granting Hunt's motion for an injunction and temporary restraining order. In the order, the trial court enjoined Box from disclosing confidential information and trade secrets to Hub Group and from employment with Hub Group for a period of one year from Box's separation from J.B. Hunt. The temporary order was based on three agreements containing confidentiality, noncompete, and restricted stock provisions executed between the parties during Box's employment. 1. The trial court erred in finding that J.B. Hunt established a likelihood of success that Box had violated the 2013 noncompete and nonsolicit agreement. A party seeking a preliminary injunction bears the burden to prove a reasonable probability of success on the merits. In this case, there was testimony indicating that any information obtained by Box while working for J.B. Hunt in the intermodal division between 2004 and 2011 would be dated and less useful due to changed conditions. Moreover, J.B. Hunt produced no evidence of any specific confidential information that Box had obtained during his employment. And there was an absence of any evidence that any confidential information would be inevitably disclosed by Box or would give Hub Group an unfair advantage. J.B. Hunt's witnesses merely testified in conclusory fashion that unspecified information obtained by Box during his employment with J.B. Hunt could be used in his employment with Hub Group; this was not sufficient to demonstrate a reasonable probability that Box violated the agreement. 2. The trial court did not find the necessary facts to trigger the noncompete clause in the restricted stock agreement. The trial court here and in other parts of its order used the phrase "presumptively and voluntarily" to essentially find that, because Box voluntarily signed the agreements, J.B. Hunt is presumptively entitled to injunctive relief regardless of the facts. However, by signing the restricted stock agreement, Box did not agree that J.B. Hunt would automatically be entitled to injunctive relief; he agreed that it would be entitled to injunctive relief only if Box committed a violation of the agreement. This necessarily involves an inquiry into whether Box likely violated the agreement based on the evidence presented. Because the trial court made no findings on that issue, it erroneously awarded injunctive relief based on the restricted stock agreement. (Karren, B.; CV-17-207; 11-9-17; Hixson, K.)

Baker v. Dept. Human Services, 2017 Ark. App. 593 [**employment termination**] Employee challenged her firing. ADHS contends that Baker's suit was properly dismissed for her failure to challenge her termination through ADHS's grievance procedures. It is well established that a litigant must exhaust her administrative remedies before instituting litigation to challenge the action of the administrative agency. (Fox, T.; CV-17-171; 11-9-17; Gladwin, R.)

Holladay v. Glass, 2017 Ark. App. 595 [**FOIA**] A prison transport manifest did not fall within the scope of the "undisclosed investigation" exception to the Arkansas Freedom of Information Act. The manifest at issue in this case was simply a record kept in the regular course of business and was not investigatory in nature such that the exemption would apply. Attorney's fees and costs were properly awarded to person making the request. (Griffen, W.; CV-17-159; 11-9-17; Harrison, B.)

Ogborn v. DHS, 2017 Ark. App. 600 [**administrative appeal**] Ogborn appeals the administrative decision of the Department of Human Services (DHS) to place her name on the Child Maltreatment Central Registry. Circuit court properly affirmed the administrative decision. The administrative judged did not err in finding that it was bound by the decision of the Benton County Circuit Court in the dependency-neglect adjudication. (Smith, T; CV-17-173; 11-9-17; Whiteaker, P.)

Ashley Bancstock Co. v. Meredith, 2017 Ark. App. 598 [**corporations-shareholders rights**] Shareholders of ABC demanded to inspect and copy certain records of ABC pursuant to Arkansas Code Annotated section 4-26-715. Instead of providing the requested records, ABC sued them in circuit court seeking declaratory relief regarding the nature and extent of the records the shareholders were entitled to inspect and copy pursuant to the statute. The circuit court properly found the shareholders were entitled to all the records they sought. Challenges to request on the following grounds were properly rejected: (1) Corporation was not required to produce sensitive financial records that spanned a nine-year period; (2) Shareholders were not entitled to inspect and copy the records of related entities; and (3) Shareholders were not entitled to copies of liability-insurance policies. (Glover, D.; CV-16-657; 11-9-17; Glover, D.)

DHS v. Ledgerwood, 2017 Ark. 308 (**TRO**) DHS contends that the circuit court abused its discretion in granting appellees' motion for temporary restraining order and enjoining it from reassessing appellees by using the RUGs methodology. Specifically, DHS argues that the circuit court abused its discretion in finding that appellees (1) demonstrated a likelihood of success on the merits and (2) will suffer irreparable harm in the absence of a TRO. Given the evidence, appellees have provided a sufficient showing of irreparable harm to justify the circuit court's issuance of a temporary restraining order. Appellees have sustained injuries for which money damages are not available. Based on their sworn affidavits, appellees admit that they have suffered lack of food, have remained in soiled clothes, have gone without bathing, have missed

treatments and turnings, face increased risk of falling, have become more isolated, and have suffered worsened medical conditions as a result of their lack of care provided by DHS. The moving party has demonstrated a likelihood of success on the merits. Without delving into the underlying merits of appellees' ongoing claims, it appears that they have demonstrated a substantial likelihood of success on the merits that, by failing to provide proper notice, DHS did not substantially comply with section 25-15- 204 in promulgating the new RUGs methodology. (Griffen, W.; CV-17-183; November 9, 2017; Kemp, J.)

Tran v. Vo Meredith, 2017 Ark. App. 618 [**new trial/jury instructions**] Trial court abused its discretion in finding that a new trial was warranted due to a jury instruction not including a definition of clear and convincing evidence. There was no objection to the instruction and the basis improperly raised by the trial court on its own did not warrant a new trial. (Welch, M; CV-17-117; 11-15-17; Klappenbach, M.)

Swindle v. State Farm, 2017 Ark. App. 632 [**dismissal/res judicata**] The trial court found that res judicata based on issue preclusion applied and dismissed appellant's complaint. This was in error. Although an attorney client relationship is usually sufficient to satisfy the privity requirement, this is not the case when the parties' interests are adversary to each other. Thus, the trial court erred by finding that res judicata supported dismissal of appellant's claim against State Farm. (Karren, B.; CV-17-310; 11-15-17; Brown, W.)

Engleman v. McCullough, 2017 Ark. App. 613 [**jury instruction**] The trial court did not err in giving AMI 1501 because it accurately states the law and must be given in medical-malpractice cases such as this one. A trial court is required to give AMI 1501 in its entirety when plaintiffs contend medical-care providers acted negligently in treating their patients, and failure to do so would have been reversible error. (Jackson, S.; CV-16-786; 11-15-17; Gladwin, R.)

Industrial Welding Supplies v. Pinson, 2017 Ark. 315 [**class certification**] The circuit court's order failed to comply with the mandatory requirements contained in Rule 23(b) of the Arkansas Rules of Civil Procedure -- that "[a]n order certifying a class action must define the class and the class claims, issues, or defenses." Here, the circuit court defined the class as "all persons who were employed by Industrial Welding Supplies of Hattiesburg, LLC on December 31, 2011, were so employed for at least one year prior thereto, and continued to be so employed until Industrial Welding Supplies of Hattiesburg, LLC was acquired by Airgas, LLC on March 31, 2012." However, the circuit court failed to comply with the remainder of Rule 23(b)'s requirements to define the "class claims, issues, or defenses." (Guthrie, D.; CV-17-86; 11-16-17; Baker, K.)

Wait v. Elmen, 2017 Ark. App. 648 [**injunction**] The circuit court abused its discretion in concluding that Elmen had established that irreparable harm would occur in the absence of an

injunction. In both the complaint and the motion for preliminary injunction, Elmen sought an order barring Wait from any role in the management of the companies; enjoining Wait from self-dealing; and a full accounting of all company information and money spent. The circuit court granted this relief, but went further suspending all salary, distributions, and other payments to both Wait and Elmen. A circuit court may not entertain injunctive relief sua sponte in the absence of pleadings requesting such relief. The circuit court abused its discretion when it granted sua sponte relief beyond that requested in the pleadings. (Fox, T.; CV-16-836; 11-29-17; Whiteaker, P.)

Barnett v. Cleghorn, 2017 Ark. App. 641 [**negligence/summary judgment**] The evidence presented to the circuit court demonstrated the existence of a material issue of fact regarding causation. Summary judgment is not designed for assessing the probative strength of conflicting proof or expert opinions. Rather, that process is correctly done by the trier of fact after a trial on the merits. Therefore, the circuit court erred in granting summary judgment. (Williams, C.; CV-17-24; 11-29-17; Klappenbach, M.)

Walker v. Wilmoie Corp., 2017 Ark. 340 [**class certification**] The class definitions require potential plaintiffs to have incurred a debt arising out of pawn transactions with National Pawn Shop. Here, appellee contends that no loans were ever made and, by extension, no one ever incurred a debt pursuant to pawn transactions with National Pawn Shop. Thus, the circuit court would be required to determine one of the ultimate issues in the case—whether a debt was incurred—before it could be determined whether prospective plaintiffs could properly be included in either of the proposed classes. The definitions of the proposed classes are not based on objective criteria. The trial court did not abuse its discretion in denying the motion to certify the classes. (Piazza, C.; CV-17-227; 11-30-17; Wynne, R.)

Arch Street Pawn Shop v. Gunn, 2017 Ark. 341 [**class certification**] The class definition attempts to lasso all who “owe or will incur debts” springing from business with Arch Street. Given the nature of the legal claims, however, proceeding with class litigation on this basis would put the cart before the horse. The ultimate legal issue in this case is whether the transactions Arch Street typically engages in are “loans” that create “debts” for which appellees “owe” payment as those terms are contemplated in, or controlled by, the Arkansas Constitution’s anti-usury language. Determining whether a particular pawn transaction was a loan and thus created a debt is the sort of predicate question that would have to be determined by reference to each potential class member’s situation rather than a uniform set of objective criteria. All customers at Arch Street received similarly phrased pawn tickets. However, some customers redeemed their pawned items, some surrendered their pledges intending to redeem them but ultimately did not, and still others pawned items with no intent to redeem them at all. Proposed class definitions posing such administrative difficulties are not suitable for certification. Because the class as defined is not ascertainable as a threshold matter, the circuit court abused its

discretion by proceeding to a Rule 23 analysis and granting certification. The circuit court erred in certifying the class. (Griffen, W.; CV-17-182; 11-30-17; Womack, S.) See also *Pawnderosa Pawn Shop, Inc. v. Conley*, 2017 Ark. 342.

Desoto Gathering Co. v. Hill, 2017 Ark. 326 [**unauthorized practice of law**] The circuit court did not err in dismissing DeSoto's appeal from the board of equalization to the circuit court for lack of jurisdiction because the appeal was initiated by a nonlawyer. By filing the appeal, the person engaged in the unauthorized practice of law. The appeals filed on behalf of DeSoto must be deemed a nullity because they were filed in violation of the prohibition of the unauthorized practice of law. Because the notices of appeal are a nullity and the deadline for filing an appeal under Ark. Code Ann. § 26-27-318 had lapsed when the amended notices were filed, the petitions of appeal were a nullity, the county court did not have jurisdiction, and the circuit court did not have jurisdiction. The circuit court did not err in granting Hill's motion to dismiss. (Braswell, T.; CV-16-990; 11-30-17; Baker, K.) See also *Desoto v. Hill*, 2017 Ark. 324; *USAC Leasing v. Hill*, 2017 Ark. 329; *USAC Leasing v. Hill*, 2017 Ark. 335.

DOMESTIC RELATIONS

Atchley v. Atchley, 2017 Ark. App. 575 [**motion to dismiss custody case following petitioner's case in chief**] The appellate court found error in the circuit court's granting of Appellee's motion to dismiss because it did not view the evidence in the proper light. At the conclusion of Appellant's presentation, the circuit court was not to weigh the evidence or make credibility determination in ruling on Appellee's motion to dismiss. All the evidence was to be viewed most favorable to Appellant's petition, giving the proof presented its highest probative value and taking into account all reasonable inferences deductible therefrom. Because fair-minded people could have undoubtedly come to differing conclusion on the evidence, it was error to summarily dismiss Appellant's petition to change custody where a prima facie case of material change in circumstance was presented. (McCormick, D.; CV-17-255; 11-1-17; Klappenbach, N.)

Moody v. Moody, 2017 Ark. App. 582 [**plain language of settlement agreement; equal division of marital property; burden regarding proof of nonmarital property; failure to provide evidence to circuit court and failure to provide legal authority at appellate level**] The appellate court found the circuit court did not err in finding Appellant responsible for the real estate taxes on the marital home that appellee received in the property-settlement agreement. The parties' temporary order unequivocally ordered Appellant to pay the property taxes, and the parties' final divorce decree states she would be responsible for the marital residence expenses she was previously ordered to pay until she vacated the marital home. Because it is clear from the plain language of the divorce decree that appellant would receive an increased amount of support for the duration of her stay in the marital home for the express purpose of paying certain expenses including the real estate taxes, the appellate court found no error. Second, the appellate court found no error in the circuit court's ruling to equally divide value of the "missing" flatware following credible witnesses' testimony as to its existence. The appellate court also found no error in the circuit court equally dividing the lion statues, as the court has the obligation to

distribute one-half of marital property to each party. Next, the appellate court found error in the circuit court's failure to include the parties' tractor as marital property. The appellate court stated that the burden was on the Appellee to establish that the property was his separate nonmarital property and that the court could not hold that the burden was met; therefore, it should be included in the division of marital property. Lastly, the appellate court found no error in the circuit court dismissing the Appellant's contempt motion, as she provided no testimony or evidence in support of her contempt allegations regarding the wellbeing of the child. The appellate court recognized that the circuit court did not deny the parties an opportunity to testify regarding any issues—it simply advised the parties that they could not extend their hearing past the scheduled time. The appellate court also did not consider any additional arguments raised by Appellant as she failed to assert any legal authority and failed to provide evidence to the circuit court in support of certain arguments. (Smith, V.; CV-16-514; 11-1-17; Brown, W.)

Kelly v. Kelly, 2017 Ark. App. 599 [**information to be clarified in findings regarding financial need for alimony; repayment of alimony overages following mandate from appellate court**] The appellate court found error in the circuit court's factual finding that Appellee had established a need for \$10,616.50 per month in support. The support order considered the financial needs of her three-person household and not only Appellee's personal financial needs. The appellate court found the circuit court's order should be modified to clarify that the \$10,616.50 need is for Appellee and her children. Appellant did not challenge the \$10,616.50 support amount—only the finding that it was for Appellee's needs only. The appellate court also found error in the circuit court's finding that it would be inequitable to require Appellee to repay a portion of the excess alimony payments received, as it was money that Appellee was not entitled. For a period of 32 months (from the date of the alimony award through the date the circuit court heard the case on remand following the first appeal), Appellant overpaid Appellee monthly by \$6,043.50. Appellee received \$193,392 overpayments in total. While the appellate court found that repaying the total overpayments is inequitable, the court found it is not inequitable for Appellee to repay the 7 months of alimony overage received between the appellate opinion and the circuit court's new order in response to the mandate. The appellate court ordered repayment of the overage by giving Appellant a \$1,000.00 per month credit until repaid in full. (Taylor, J.; CV-17-279; 11-8-17; Glover, D.)

Tipton v. Tipton, 2017 Ark. App. 601 [**unequal distribution of marital property and factors that must be considered**] The appellate court found error in the circuit court's unequal division of marital property without appropriate consideration of the factors established in Ark. Code Ann. 9-12-315. Although the circuit court's ruling from the bench seemed to indicate that the court found that the real estate was not marital property, the written order states it was making an unequal distribution of property and the written order controls over the circuit court's oral pronouncement. Therefore, the circuit court erred when the written Order did consider or recite the factors, basis, and reasons for not dividing the marital property equally between the parties. (Compton, C.; CV-17-266; 11-8-17; Whiteaker, P.)

Stahl v. Smith, 2017 Ark. App. 603 [**order of protection and definition of domestic abuse**] The appellate court found error in the circuit court's entering a final order of protection based on a finding that Appellant had committed domestic abuse against the parties' child. A petition for order of protection shall allege, among other things, the existence of domestic abuse. Because

there is no evidence on the record of harm or injury by Appellant, the circuit court must have relied on the second portion of the domestic abuse definition, i.e. that Appellant inflicted fear of imminent physical harm. The only evidence to arguably support such a finding was that Appellant failed to protect the child from alleged abuse, that Appellant thought the child was lying about the abuse, that Appellant became aggressive and angry when speaking to the child about the allegations, and that Appellant continued to allow the child around the alleged abuser. The appellate court found that this evidence, even if assuming all of Appellee's testimony is true, is insufficient to support the domestic abuse filing. (Duncan, X.; CV-17-415; 11-8-17; Vaught, L.)

Henderson v. Henderson, 2017 Ark. App. 620 [**child support retroactive to child's birth; child support and visitation are separate issues**] The appellate court found error in the circuit court failing to award child support arrearages back to the date that Appellee stopped providing voluntary support for his minor child. While the circuit court awarded retroactive child support only back to the date that the petition to establish paternity was filed, the appellate courts repeatedly have upheld a circuit court's order awarding retroactive child support from the date of the child's birth. The appellate court explained that a parent has a legal duty to support his minor child, regardless of the existence of a support order, and child support is an obligation owed to the child, not the parents. In addition, Appellee never disputed his paternity. The appellate court also found error in the circuit court's abating Appellee's child support obligation for the two years that Appellant had taken the child to Great Britain. The appellate court states that child support obligations and visitation are completely separate issues. When the custodial spouse interferes with visitation, the remedy is to seek enforcement of visitation- not to withhold child support. Child support is an obligation owed to the child independent of the noncustodial parent's relationship or visitation with the child. (Smith, V.; CV-17-257; 11-15-17; Glover, D.)

Grindstaff v. Strickland and minor children, 2017 Ark. App. 634 [**material change of circumstance; best interest; changing custody before using contempt powers**] The appellate court found that there was sufficient evidence for the circuit court to have found a material change of circumstance to warrant a modification of custody. The circuit court noted the following concerns: Appellant's rigid imposition of visitation exchange times, her failure to list Appellee as a parent on school forms, her failure to follow their agreement to jointly decide children's issues, her suggestion for Appellee to give up his parental rights, and her "miserable job" of communicating with Appellee. The appellate court also rejected Appellant's argument that, because there was no testimony that the children were aware of Appellee's poor choices, the circuit court erred in finding that it was in the best interest of the children to modify custody. The appellate court recognized that once the noncustodial parent has established a material change in circumstances, the court itself is to weight the best interest of the child, and the circuit court did not clearly err in its best-interest analysis. Lastly, the appellate court found no error in the circuit court's choosing not to use its power to hold Appellant in contempt as a step preceding the change of custody. There is no requirement to do so. The attorney ad litem and circuit court were concerned about the effect that alienation and failure to communicate would have on Appellee's relationship with the children. The ad litem, noting Appellant's repeated behavior and violation of court orders, specifically recommended it was in the children's best interest that the court change custody rather than holding her in contempt. (Schrantz, D.; CV-17-333; 11-29-17; Gruber, R.)

Jenkins v. Jenkins, 2017 Ark. App. 642 [**alimony modification and enforcement**] The appellate court found no error in the circuit court's findings of facts regarding Appellant's income and found no error in the circuit court's finding that Appellant had failed to prove that his income had decreased. The parties' 2010 property settlement agreement stated Appellant would pay Appellee \$3,000 per month in alimony until Appellant's "income is reduced". The agreement did not recite what his income was in 2010. Appellant failed to pay any alimony beginning in January 2016, and he claimed his income had decreased. The appellate court found that Appellant's 2010 1099 was the best evidence of Appellant's income that year, and the only remaining evidence on income was the 2015 1099, which showed a higher income than that in 2010. It was Appellant's burden to establish that there was a decrease in his income, and he failed to present any evidence regarding his year-to-date income in 2016. The appellate court also found no error in the circuit court ordering Appellant to pay an additional \$1,000 per month towards his alimony arrearage. Appellant argued, but failed to explain, how the circuit court's enforcing the written contractual agreement constituted a modification of that agreement. The circuit court had the power to construe, clarify, and enforce the agreement, and the circuit court did not change the terms of the alimony agreement in any way. The additional \$1,000 was merely a method of enforcing payment. (Reif, M.; CV-17-83; 11-29-17; Klappenbach, N.)

James v. Walchli, 2017 Ark. App. 645 [**child support in joint custody; attorney's fee finding**] The appellate court found error in the circuit court's failure to establish an award of child support in Appellant's favor. The parties each have custody of one minor child, Appellant's W-2 income reflected an income of \$37,000, and an expert witness testified that Appellee's income was between \$300,000-\$500,000 for the 2-year period proceeding. Because the parties each have custody of one child, and since the circuit court found no clear figure on Appellee's income, the circuit court ordered no child support. The appellate court found error and remanded the matter for further proceedings. The appellate court directed the circuit court to follow Administrative Order No. 10(c) addressing calculation of support for self-employed payors, specifically the procedure for determining child support by using the net-worth method. The appellate court found no error in the circuit court's award of attorney's fees in favor of Appellee, as Appellant willfully violated the order regarding the children's passport. The sanction for her disregard was appropriate, despite the disparity of the parties' incomes. Note: Appellant did not challenge the finding of contempt which resulted in the award of attorney's fees. (Cox, J.; CV-17-124; 11-29-17; Glover, D.)

Cooper v. Kalkwarf, 2017 Ark. 331 [**relocation- Hollandsworth vs. Singletary**] The appellate court found error in the circuit court's application of *Hollandsworth v. Knyzewski* in Appellee's request to relocate. In *Hollandsworth*, the Court announced a presumption in favor of relation for custodial parents with sole or primary custody, with the noncustodial parent having the burden to rebut this presumption. In *Singletary*, the Court explained that the *Hollandsworth* presumption does not apply when the parents share joint custody of a child. The proper analysis for a change-in-custody request due to the relocation of one parent in a joint-custody situation is the same as that when relocation is not involved; the court must first determine whether a material change in circumstances has transpired since the divorce decree and then whether the change in custody is in the best interest of the child. In this case, just as in *Singletary*, the decree states that the parties are to share joint legal custody but that appellee is the primary physical custodian. The decree then awards Appellant nearly equal time with the minor child. Because

the language in the decree is unclear whether the parties had joint custody such that the *Singletary* analysis should apply, the circuit court was correct in reviewing the parties' subsequent statements and conduct. The circuit court found that Appellant had custody 42.9 percent of the time, and he had some form of contact with the child at least 60 percent of the days in the year. Despite these findings, the circuit court concluded that Appellee was the primary custody and entitled to a presumption in favor of relocation based on the fact that the parties' custodial arrangement was not 50/50. The appellate court disagreed and clarified that the *Hollandsworth* presumption should be applied only when the parent seeking to relocate is not just labeled the "primary" custodian but also spends significantly more time with the child than the other parent. The appellate court did not impose a percentage of time that a parent must spend with the child for the *Singletary* analysis to apply. The appellate court then concluded that the analysis set forth in *Singletary* governs Appellee's relocation petition and remanded for the circuit court to apply this analysis to the facts of this case. (Smith, V.; CV-17-298; 11-30-17; Goodson, C.)

PROBATE

Childress v. Braden, 2017 Ark. App. 569 [**consent not required in stepparent adoption; definition of "failed significantly" within the consent statute; best interest of child**] The appellate court found no error in the circuit court's finding that Appellant's consent to adoption was not required because she failed significantly without justifiable cause to provide for the care and support of her child for a period of at least one year. Appellant argued that her failure to pay child support was justified because she had no knowledge of the order requiring her to pay child support, but the circuit court specifically discredited her testimony regarding this. Also, the circuit court found that Appellants gifts to the child did not constitute support in a meaningful degree. "Failed significantly" within the statute does not mean "failed totally"; it only means that the failure must be significant, meaningful, or important. Lastly, the appellate court found no error in the circuit court's ruling that the adoption was in the child's best interest, as the mother had not seen the child in three years which was ½ of the child's life, the evidence showed the maternal grandparents could continue their relationship with the child after the adoption, and the stepmother had a strong relationship with the child. (McCormick, D.; CV-17-67; 11-1-17; Abramson, R.)

Dawson v. Dawson, 2017 Ark. App. 584 [**reopening estate following 41(b) dismissal**] The appellate court found no error in the circuit court's finding that it did not have jurisdiction to reopen the estate following a 41(b) dismissal. Because Appellant did not appeal the 2011 dismissal of the case nor file a motion to set aside or vacate the dismissal, the appellate court found it is now too late to argue that the circuit court erred in dismissing the case in 2011. Furthermore, while Ark. Code Ann. 28-53-119 allows the circuit court to reopen an estate in certain circumstances, the statute only authorizes a reopen when the estate "has been settled and the personal representative discharged". Because the estate was dismissed for failure of the executrix to administer the estate, it was not settled and the personal representative was not discharged. Therefore, this statute does not apply. (Bell, K.; CV-16-992; 11-8-17; Gruber, R.)

In the Matter of the Estate of Tom Alexander Deceased, and David Neal, et al. v. Sparks Regional Medical Center, 2017 Ark. App. 588 [**decedent's intent when beneficiary name misnomer; entity changes effect on devise; cy pres applied to charitable bequest; decedent's charitable intent; cy pres beneficiary**] Appellants, the natural heirs of decedent, appealed the circuit court's decision to grant the decedent's estate to Sparks Regional Medical Center (SRMC). The appellate court found error in the circuit court's finding that SRMC is the same entity as Sparks Memorial Hospital (SMH), but the appellate court found no error in the other points on appeal. First, the appellate court found no error in the circuit court's finding that the decedent intended to leave his estate to the specific legal entity, SMH. The decedent's use of the name "Sparks Hospital" rather than "Sparks Memorial Hospital" could have been a simple misnomer, and the circuit court successfully effectuated the intent of the testator to devise his estate to the entity that owned and operated Sparks Hospital, i.e. SMH. Second, the appellate court found that SRMC is not the same entity as the Sparks Hospital named in the will, nor does SRMC have the same function as SMH. The changes that took place are transformative and profound, including SRMC no longer identifies charity care as a purpose, no longer operates as a hospital, and does not even provide direct medical care. Because SRMC is not the same entity as SMH and does not serve the same purposes, the decedent's devise fails and the appellate court must address the issues regarding cy pres. Third, the appellate court found no error in the circuit court's finding that cy pres may be applied to charitable bequests. The equitable doctrine of cy pres in the principle that equity will, when a charitable originally or later becomes impossible or impracticable of fulfillment, substitute another charitable object which is believed to approach the original purpose as closely as possible. Although the general assembly codified cy pres as it relates to charitable trusts, there is no indication that the legislature sought to end the application of cy pres to bequests and the Arkansas Supreme Court acknowledges that cy pres may be applied to devises and trusts alike. Fourth, the appellate court found no error in the circuit court's finding that the decedent had charitable intent and that the decedent's underlying charitable intent of his bequest was to promote public health, which is an enumerated statutory charitable purpose. Fifth, although disagreeing with the circuit court that SRMC is not the same entity as SMH, the appellate court found SRMC is the appropriate cy pres beneficiary. The circuit court fashioned a use for the funds as near to the decedent's intent as possible under the circumstances, and the appellate court found no error. (Spears, J.; CV-16-805; 11-8-17; Virden, B.)

Clark v. Clark, 2017 Ark. App. 612 [**due process rights in adoption**] The appellate court found that the biological parents/Appellants' due process rights were violated for failure to receive notice of the adoption petition filed by the grandparents/guardians. Even though more than one year had elapsed since entry of the adoption decree, the appellate court found there was no evidence that the Appellants received any notice of the adoption proceeding before entry of the decree. In *Mayberry v. Flowers*, 347 Ark. 476, the Arkansas Supreme Court found that the one year statute of limitations (to question a decree of adoption for failure to give the required notice) did not bar a father's motion to set aside an adoption when the father received no notice of the adoption petition until after the entry of adoption. In contrast, the Supreme Court has also held that because a mother received actual notice of the pending adoption, her due process rights were not violated even if the evidence revealed defects in the service of process. Due process requires notice reasonably calculated to apprise parties of the pendency of the adoption action and to afford them an opportunity to respond. The appellate court found that the dependency neglect

action did not give the Appellants notice reasonably calculated to apprise them of the pending adoption and afford them an opportunity to respond. (Choate, S.; CV-17-326; 11-15-17; Abramson, R.)

JUVENILE

Connors v. Ark. Dep't of Human Servs., 2017 Ark. App. 579 [TPR –**sufficiency of the evidence; adoptability**] Termination order was appealed on the basis that there was insufficient evidence that termination was in the child's best interest. Appellant father, who was incarcerated during the pendency of the case, argued that the trial court erred in terminating his rights because there was insufficient evidence that the child was adoptable due to the child's sexual aggression, and there was a relative willing to take custody of the child. The appellate court affirmed, explaining that the trial court considered evidence of adoptability, including the case worker's testimony concerning sexual aggression. Moreover, the court found that sexual aggression was not an issue because the child was not sexually aggressive. With regard to relative placement, the relative that Appellant claimed was interested in placement did not contact DHS as a potential placement until after the child had been in DHS custody for over twenty months and did not testify at the termination hearing. Termination was affirmed. (James, P., JV-15-725; November 1, 2017; Vaught, L.)

Jacobs v. Ark. Dep't of Human Servs., 2017 Ark. App. 586 [TPR—**sufficiency of evidence of potential harm**] Order terminating parental rights was affirmed where mother was arrested on four separate occasions throughout pendency of the DN case, completed two in-patient drug-treatment programs but failed to demonstrate long-term sobriety, and the children were out of the mother's custody for twenty months. The appellant mother argued that there was insufficient evidence that termination was in the children's best interest because there was insufficient proof that the children would be subjected to potential harm if returned to her. The appellate court disagreed, noting that this was a case where the child's need for permanency and stability overrides a parent's request for additional time to improve circumstances. (Zuerker, L.; JV-15-299; November 8, 2017; Abramson, R.)

Knight v. Ark. Dep't of Human Servs., 2017 Ark. App. 602 [TPR—**sufficiency of evidence of potential harm**] Child was removed after mother was arrested for possession of methamphetamine, drug paraphernalia, and a pipe bomb, all while the child was present. The trial court found grounds for termination based on twelve months failure to remedy and subsequent other factors. On appeal, the appellant mother argued that there was insufficient evidence of potential harm to the children if they were returned to her custody. The appellate court disagreed, finding that there was sufficient evidence of potential harm because the mother's continued drug use demonstrates potential harm. Moreover, potential harm includes the harm a child suffers from lack of stability. Here, the mother never once provided a clean drug screen

during the case and did not demonstrate stability. Termination was affirmed. (Richardson, M.; JV-16-1; November 8, 2017; Whiteaker, P.)

Brinkley v. Ark. Dep't of Human Servs., 2017 Ark. App. 625 [TPR—sufficiency of the evidence] Three young children were removed from mother after she left them locked out of their home and unsupervised for two hours while she was across town. The father of the children was incarcerated at the time of removal and remained incarcerated throughout the case. Efforts to reunify were unsuccessful and a termination hearing was ultimately held. The mother's rights were terminated because the children had remained out of the home for twelve months and the mother had failed to remedy the situation that led to the removal and also on the basis of factors that arose subsequent to the filing of the case, including the mother being incarcerated on seventeen separate occasions during the case and continued persistent alcohol abuse. The father's rights were terminated on the grounds of abandonment. The appellate court affirmed the mother's termination, finding no error in the termination based on subsequent factors. However, the father's termination on the ground of abandonment was reversed. There was no proof that the father had been served the emergency order of custody or any subsequent orders, and DHS offered no assistance, guidance, and only minimal contact concerning what the father needed to do to comply with the case plan, which he also never received. The DHS caseworker testified that DHS had no contact with the father and offered no services throughout the case. Additionally, the father was not appointed an attorney until immediately before the termination hearing. The father testified that he was incarcerated throughout the proceedings, that he did not abandon his children, and he was not included by DHS as a participant in the case although they knew his location. The appellate court found that the father's conduct under these circumstances does not rise to the level of abandonment under a clear-and-convincing standard, and termination as to the father was reversed. (Richardson, M.; JV-15-173; November 15, 2017; Hixson, K.)

Burleson v. Ark. Dep't of Human Servs., 2017 Ark. App. 616 [TPR—sufficiency of the evidence] Mother appealed order terminating her parental rights. Children were removed after the family was involved with DHS in a protective services case, the mother was arrested for failing to attend a court hearing regarding one of the children's school absences, and a law enforcement officer found the front door of the home open one morning and the home in a state of squalor. The mother had mental health issues and a history of illegal drug use and was ordered to submit to a psychological evaluation and a drug-and-alcohol assessment. During the case, the mother attempted suicide on three separate occasions, continued failing drug tests, visited the children infrequently, and waited until a month before the termination hearing to obtain housing and complete her psychological and drug assessments. The trial court terminated the mother's rights on three separate grounds, and the appellate court affirmed. The court found that there were grounds for termination based on factors that arose subsequent to the removal of the children where the mother failed to comply with the case plan for almost a year. Under the

circumstances, termination was in the children's best interest in order to provide them stability and permanency. (Sullivan, T.; JV-16-7; November 15, 2017; Harrison, B.)

Horton v. Ark. Dep't of Human Servs., 2017 Ark. App. 633 [**TPR—sufficiency of the evidence**] Termination order was entered after mother failed to remedy the circumstances that caused removal. The mother was low functioning and the infant was removed due to neglect after being hospitalized and diagnosed with failure to thrive. There was evidence that the mother did not properly mix the baby's formula, and that the mother's learning disabilities, for which she received SSI benefits, affected her ability to read and write and her ability to parent. Evidence from multiple sources indicated that the mother needed assistance from another competent adult in order to parent her child, and the mother testified that she could take care of her child with help from others. The maternal grandmother provided some assistance but was not always reliable and there were concerns about her being consistently available to provide the necessary support. Fourteen months into the case, the mother filed a motion requesting accommodations under the ADA due to her disability. The trial court denied the motion, finding it untimely, and the appellate court found that the order denying the motion was not properly designated in the notice of appeal and noted in a footnote that the court's opinion does not address the issue of whether the ADA applies as a defense in a termination proceeding. Termination was affirmed because the circumstances that led to removal had not been remedied, as the mother could not demonstrate after fifteen months of service that she could safely parent her child. (Sullivan, T.; JV-15-39; November 15, 2017; Brown, W.)

Hudson v. Ark. Dep't of Human Servs., 2017 Ark. App. 629 [**TPR—sufficiency of the evidence; potential harm**] Mother appealed termination of her rights, arguing that there was insufficient evidence that termination was in the child's best interest because it was not proven that the child was at risk of potential harm if custody were returned. The court affirmed termination, finding that the undisputed evidence that the mother sexually abused the child was sufficient evidence of potential harm. A parent's past behavior may be viewed as a predictor of potential harm and living in uncertainty, concerning permanency, is potentially harmful to children. (Jackson, S.; JV-16-34; November 15, 2017; Murphy, M.)

Johnston v. Ark. Dep't of Human Servs., 2017 Ark. App. 615 [**Permanency Planning**] After a permanency planning hearing twelve months into the case, the trial court found that the mother had not made substantial and measurable progress and a permanency planning order was entered changing the goal of case to APPLA for the seventeen-year-old, to a permanent guardianship for the fourteen-year-old, and to permanent custody with grandparents for the five-year-old. On appeal, the appellate court recognized that the case was close on the merits but affirmed the trial court. The problem that brought the children into care was inadequate housing after the mother was arrested and DHS became involved with the family. In addition to obtaining stable housing and employment, the mother was also ordered to undergo a drug-and-alcohol

assessment, complete a drug-treatment program, under a psychological evaluation, and submit to counseling. By the time of the permanency planning hearing, the mother had had at least five different living arrangements, but she had completed her drug-and-alcohol assessment and drug treatment, she had completed her psychological evaluation and followed the recommendations, she had completed parenting classes and visited the children. The case worker's concern focused on the fact that the mother had been in her current home only a month, had had several temporary living arrangements that were inappropriate for children, did not have employment, and had gotten married a few days prior to the hearing to a man that the case worker had not had the opportunity to background check, and who was later determined to be a felon. Ultimately, the court found that because the problem that caused the removal of the children was inadequate and unstable housing and this problem had not been remedied, the mother had not made sufficient and measurable progress and the goal change was appropriate. Under these circumstances, the appellate court found no clear error and affirmed the permanency planning order. (Elmore, B.; JV-16-17; November 15, 2017; Harrison, B.)

Meyers v. Ark. Dep't of Human Servs., 2017 Ark. App. 614 [**Adjudication; Termination of Reunification Services; Change of Custody**] Two-year-old child whose body covered in cockroach bites was removed from cockroach-infested home which was cluttered with dirty dishes, clothes, and dog feces. The mother from whom custody was removed reported that she suffered from schizophrenia, ADHD, bipolar disorder, and a "split personality" for which she did not take medication or receive treatment. The mother further reported that she had older children who had been removed from her custody, two who were placed in their father's custody after the mother attempted to kill him and was jailed for breaking the tibia of one child, and another child that had been placed for adoption due to a birth defect. The father of the two-year-old, who lived in Tennessee, appeared at the adjudication hearing and requested that custody be placed with him. He testified that he was gainfully employed, that he had an approved home study from Tennessee, that he had passed all background checks, and that he had previously been awarded joint-custody of the child along with the mother. The trial court thereafter entered an order terminating reunification services, changing custody to the father, and closing the case. The mother appealed, arguing that Ark. Code Ann. § 9-27-365 provides that a motion for no reunification services be provided to all parties in writing at least twenty days prior to a hearing and the failure to provide notice violated her constitutional rights. The appellate court agreed that terminating reunification services without written notice to the mother constituted reversible error and also found that a change of custody was improper where only a dependency-neglect petition had been filed. (Talley, D.; JV-17-11; November 15, 2017; Gladwin, R.)

Rickman v. Ark. Dep't of Human Servs., 2017 Ark. App. 610 [**Termination of Reunification Services; Aggravated Circumstances**] After years of DHS working with the mother, an order terminating reunification services was entered based on aggravated circumstances. The child was first removed from the home due to the mother's testing positive for drugs and using prescription

drugs that were not prescribed to her. Numerous issues arose during the case, including the mother's illegal drug use, significant issues with clutter and trash in the home, the mother's romantic relationship with a man that was abusive, excessive alcohol use, and mental health issues. After more than two years of services, DHS filed a motion to terminate reunification services, arguing that there was little likelihood that services to the mother would result in a successful reunification. The trial court agreed, and on appeal, the appellate court affirmed. The appellate court explained that it gave due regard to the credibility findings of the trial court and great weight to the trial court's personal observations, and that there numerous examples of instability in the mother's life demonstrating little likelihood of successful reunification. (Wilson, R.; JV-14-110; November 15, 2017; Gruber, R.)

Walker v. Ark. Dep't of Human Servs., 2017 Ark. App. 627 [**Adjudication—efforts to prevent removal**] Appeal was taken from entry of adjudication and disposition order. The department had been involved with the family in a protective services cases and had provided services including parenting classes and a bus pass to prevent removal of the children. However, after the mother admitted marijuana and cocaine use, a dependency-neglect petition was filed and the children were removed from the home. On appeal, the mother argued that the department was required to prove that reasonable efforts had been made to prevent removal of the children because the emergency exception provided in Ark. Code Ann. § 9-27-327(a)(2) did not apply because the department was working with the family in a protective services case at the time of removal. DHS conceded that the emergency exception did not apply but argued that under § 9-27-335(e)(2)(C), it was permitted to remove the children without reasonable efforts to prevent removal in order to protect the juvenile's health and safety. The appellate court declined to consider arguments concerning the disposition part of the order, because under Arkansas Supreme Court Rule 6-9(a)(1)(B), a disposition order is appealable only with a 54(b) certificate under Arkansas Rule of Civil Procedure 54(b), which was lacking here. (Zimmerman, S.; JV-17-186; November 15, 2017; Hixson, K.)

Solee v. Ark. Dep't of Human Servs., 2017 Ark. App. 640 [**TPR—sufficiency of the evidence**] Termination order was entered terminating rights to five of appellant mother's six children. The children were removed due to educational neglect and the mother's drug use. During the case, it was discovered that three of the children had serious behavior problems that required additional support staff to assist with transportation of the children and required their visits to be separate from the other three children. One child had been in several placements, was destructive, and was considered a treatment failure, while another child was suspended from school. After the mother failed to remedy the issues that led to removal, the mother's rights were terminated for all but one child who was to be placed in his father's custody. The mother appealed, arguing that there was not sufficient evidence presented that the children are adoptable. The appellate court affirmed, explaining that the trial court is not required to find that the children are adoptable by clear and convincing evidence. Rather, it must be shown that the trial court considered the factor

of adoptability, and the case worker's testimony that the children are potentially adoptable demonstrated that the trial court considered the factor. There are no "magic words" or "specific quantum" of evidence required to prove adoptability. (James, P.; JV-16-295; November 29, 2017; Gladwin, R.)

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

Beaty v. Ark. Dep't of Human Servs., 2017 Ark. App. 621 (Zimmerman, S.; JV-16-546; November 15, 2017; Glover, D.)

Stampley v. Ark. Dep't of Human Servs., 2017 Ark. App. 628 (James, P.; JV-16-106; November 15, 2017; Murphy, M.)

Snow v. Ark. Dep't of Human Servs., 2017 Ark. App. 654 (Layton, D.; JV-16-31; November 29, 2017; Brown, W.)

L.J. v. State, 2017 Ark. App. 607 [**Possession of controlled substance with intent to deliver—sufficiency of the evidence**] Seventeen-year-old was charged as a juvenile with the crimes of possession of a controlled substance with intent to deliver and possession of drug paraphernalia after a traffic stop revealed Xanax pills, methamphetamine, and syringes, and glass pipe in the console of the car she was driving. Appellant argues on appeal that there was insufficient evidence for each crime. The Arkansas Rules of Criminal Procedure apply in juvenile-delinquency proceedings, and under Rule 33.1(b), a motion to dismiss must be made at the close of the prosecution's evidence and renewed at the close of all the evidence in order to challenge the sufficiency of the evidence on appeal. Here, the appellant failed to renew her motion to dismiss at the close of all the evidence, thus waived the argument on appeal. But the appellate court indicated that even if the appellant had preserved the argument for appeal, the evidence was sufficient, because as the driver and owner of the car who admitted to smoking marijuana, her knowledge of the contraband could have been inferred under the circumstances. (Warren, J.; JV-16-945; November 8, 2017; Murphy, M.)

Hubbard v. State, 2017 Ark. App. 636 [**Motion to transfer to Juvenile Court**] The trial court's denial of a motion to transfer a criminal case to juvenile court will not be reversed unless it is clearly erroneous. In this case, the defendant had been previously involved in juvenile court, had been under the supervision of a probation officer, and had participated in the Arkansas Dream Center, but he continued to engage in criminal activity. The trial court's denial of the motion to transfer was not clearly erroneous where it was unlikely the defendant would be rehabilitated in juvenile court. (Wright, H.; CR-16-3702; November 29, 2017; Abramson, R.)

DISTRICT COURT

Trice v. City of Pine Bluff, 2017 Ark. App. 638 [**District Court Appeal**] [**Ex Post Facto Violation**] [**Procedural Due Process**]. Appellant was convicted of a city ordinance violation for failure to abate a nuisance in district court. An appeal to circuit court followed and a bench trial took place. Testimony was heard from various officials concerning city council procedures and appeal processes to the Code Enforcement Board of Zoning Adjustments and Appeal. The appellant testified that the Board heard his appeal, but explained that there was no chance to appeal to the city planning commission. A motion to dismiss the case was denied. The circuit court entered an order finding appellant guilty of failure to abate a nuisance. On argument to the Court of Appeals, appellant contends that the event giving rise to the cause of action, the collapse of the building, happened two months before the ordinance was amended so an ex post facto violation occurred. The Court of Appeals stated that the citation for the failure to abate is the event giving rise to the cause of action and because it occurred months after the collapse there is no constitutional violation. Also affirmed was the contention the Historic Commission properly had jurisdiction because appellant cited no authority superseding a statute which gives a city authority to order removal of unsafe buildings. Another contention of appellant was affirmed as it was not demonstrated how the Inspection and Zoning Office's refusal to issue a repair permit is a violation of procedural due process. (Dennis, J.; CR-17-109; 11/29/2017; Virden, B.)