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ANNOUNCEMENTS

The Supreme Court published for comment proposals regarding Ark. R. Civ. P 11, 64, 87. The comment period ends October 6, 2017, and a copy of the per curiam was included in the weekly mailout.

CRIMINAL

Rowland v. State, 2017 Ark. App. 415 **[jury instruction]** Because the term "temporary caretaker" is not defined by statute, the AMC instruction does not include a definition of the term. The definition in the non-AMC instruction, which was offered by the State in appellant's case, was a correct statement of law. Thus, the appellate court concluded that the circuit court did not err in giving the non-AMC instruction defining "temporary caretaker." (Clawson, C.; CR-16-981; 8-30-17; Brown, W.)

Mardis v. State, 2017 Ark. App. 433 **[Rule 37]** The petition, the files, and the record in appellant's case conclusively established that he was not entitled to relief, and as such, the trial court did not err in refusing to hold an evidentiary hearing before denying appellant's petition for Rule 37 relief. (Arnold, G.; CR-16-813; 9-6-17; Virden, B.)

Rainey v. State, 2017 Ark. App. 427 **[motion to suppress; evidence]** The driver of the vehicle that appellant was riding in violated a traffic law, which gave law enforcement officials probable cause to stop the car. During the traffic stop, the officers developed reasonable suspicion that a crime was occurring or was about to occur, which permitted the officers to continue to detain appellant. During the stop, the driver of the vehicle voluntarily gave consent to search the car. Based upon the foregoing facts, the stop, detention, and search that occurred in appellant's case were lawful. Thus, the trial court properly denied appellant's motion to suppress. **[motion to suppress; statement]** After being advised of his rights both orally and in writing, appellant signed a *Miranda*-rights form waiving his right to remain silent and he voluntarily signed a statement that the drugs found in the vehicle were his. After reviewing the totality of the circumstances, the trial court's denial of appellant's motion to suppress was not clearly erroneous. (Clinger, D.; CR-12-950; 9-6-17; Hixson, K.)

West v. State, 2017 Ark. App. 416 **[sufficiency of the evidence; aggravated robbery; battery; accomplice liability]** Based upon the facts in the case, the jury reasonably concluded that appellant committed the crimes with which he was charged. Additionally, there was substantial evidence to support a determination that the testimony from a witness, who was not an accomplice, tended to connect appellant to the robbery and the battery and to independently established the commission of those crimes**.** **[jury instructions; accomplices]** Whether two individuals, who were with appellant at the time the crime for which he was convicted occurred, were accomplices was a mixed question of law and fact. Thus, instructing the jury that the individuals were accomplices as a matter of law would have been improper. (Hearnsberger, M.; CR-16-830; 9-6-17; Gruber, R.)

Hart v. State, 2017 Ark. App. 434 **[probation revocation]** The circuit court's finding that appellant had inexcusably failed to comply with a condition of his probation was not clearly against the preponderance of the evidence. **[preliminary hearing]** Appellant's failure to either request a preliminary hearing or object to the timeliness of such a hearing for more than a year constituted a waiver. (Johnson, K.; CR-16-856; 9-13-17; Gruber, R.)

Kauffeld v. State, 2017 Ark. App. 440 **[sufficiency of the evidence; first-degree murder; second-degree murder; residential burglary]** There was substantial evidence to support appellant's convictions. **[authentication]** The State established the authenticity of a statement that was written on a jail-cell wall by: (1) appellant's acknowledgment that he wrote a portion of the statement and that he saw the entire statement; (2) the testimony from the jail administrator that appellant was the only person in the jail cell; and (3) the fact that the statement included appellant's last name, which had a unique spelling. Thus, the circuit court did not abuse its discretion when it admitted the evidence. (Pearson, W.; CR-16-854; 9-13-17; Klappenbach, N.)

Lewis v. State, 2017 Ark. App. 442 **[Ark. R. Evid. 404(b)]** Appellant sought to exclude certain testimony at trial based upon an alleged violation of Rule 404(b) of the Arkansas Rules of Evidence. However, because the challenged testimony was not offered to show the witness's character or conformity therewith but rather was offered to impeach the witness, Rule 404(b) was not implicated and the trial court properly admitted the testimony. (Sims, B.; CR-16-533; 9-13-17; Glover, D.)

Hamilton v. State, 2017 Ark. App. 447 **[sufficiency of the evidence; aggravated robbery; aggravated assault]** There was substantial evidence to support appellant's convictions. **[mental evaluation]** Based upon the following facts, the appellate court concluded that the trial court did not err when it denied appellant's request for a second mental evaluation: (1) the first examination established that appellant was competent to stand trial; (2) after talking with appellant on the day of the trial, the evaluator's opinion from the first exam did not change; and (3) although hospitalized on the day of the trial, appellant was coherent and was released without the need for significant treatment. (Haltom, B.; CR-17-37; 9-13-17; Hixson, L.)

Reed v. State, 2017 Ark. 246 **[right to self-representation]** After appellant made statements such as: "I'm debating [about] whether to represent myself or let [my current counsel] represent me," the trial court correctly determined that appellant's attempts to waive his right to counsel and represent himself were equivocal. (Green, R.; CR-16-1061; 9-14-17; Womack, S.)

Garcia v. State, 2017 Ark. App. 457 **[sufficiency of the evidence; rape; second-degree sexual assault]** There was substantial evidence to support appellant's convictions. **[motion to suppress]** Although law enforcement questioned appellant before reading the *Miranda* warnings, the preliminary questions were not asked in an effort to elicit a confession. Appellant's confession was not obtained until after he was read the *Miranda* warnings and voluntarily waived them. Thus, the trial court did not err when it denied appellant's motion to suppress the custodial statements. (Wright, R.; CR-16-368; 9-20-17; Gladwin, R.)

Coger v. State, 2017 Ark. App. 466 [**sufficiency of the evidence; manufacture of methamphetamine; possession of drug paraphernalia to manufacture methamphetamine; possession of drug paraphernalia to ingest methamphetamine; being a felon in possession of a firearm]** There was substantial evidence to support appellant's felony convictions. [**sufficiency of the evidence; acquisition of ephedrine/pseudoephedrine]** The State failed to establish that appellant "knowingly purchase[d], acquire[d], or otherwise receive[d] in a single transaction . . . . [m]ore than three (3) packages" of ephedrine or pseudoephedrine." Thus, there was insufficient evidence to support appellant's conviction for acquisition of ephedrine/pseudoephedrine**. [motion for new trial]** Because appellant "opened the door" to certain comments from the State, he could not complain about them later. Thus, the trial court did not err when it denied appellant's request for a mistrial, which was based upon the State allegedly making an improper comment on appellant's right to not testify. **[404(b)]** Testimony about appellant's prior conviction of possession of a controlled substance with intent to manufacture was relevant to show a similar pattern of conduct and demonstrated appellant's knowledge and intent regarding the pending charge of manufacture of methamphetamine. Accordingly, the trial court did not abuse its discretion when it admitted the testimony pursuant to Ark. R. Evid. 404(b). (Lindsay, M.; CR-16-1105; 9-20-17; Whiteaker, P.)

Whitworth v. State, 2017 Ark. App. 462 [**sufficiency of the evidence; residential burglary]** To sustain a residential-burglary conviction, it was the State's burden to provide sufficient evidence of specific intent to commit theft inside the residence. In appellant's case, there was no evidence to support that particular criminal intent existed when he illegally entered the residence. Additionally, the circumstances of appellant's case did not exclude every other reasonable inference than that appellant intended to commit a theft inside the house. Thus, substantial evidence did not support appellant's residential-burglary conviction. (Johnson, L.; CR-16-1029; 9-20-17; Klappenbach, N.)

State v. Ledwell, 2017 Ark. 252 **[statute of limitations]** Pursuant to Ark. Code Ann. § 5-1-109(b)(3)(A), prosecution of a misdemeanor offense must be commenced within one year of the commission of the offense. The plain and unambiguous language in Ark. Code Ann. § 5-1-109(f) states that a prosecution commences when an arrest warrant is issued based on a criminal information or other charging instrument. There is no requirement in the statute that the charging instrument be filed of record within the one-year-limitations period. Accordingly, the circuit court erred in its interpretation of section 5-1-109(f) and in concluding that the prosecution in appellant's case had not commenced within the applicable limitations period. (Williams, C.; CR-17-94; 9-21-17; Goodson, C.)

Turner v. State, 2017 Ark. 253 **[speedy trial]** Rule 28.3 of the Arkansas Rules of Criminal Procedure has not been interpreted to require that an order granting a continuance include an actual date, rather than a to-be-determined trial date. (Talley, D.; CR-16-1145; 9-21-17; Wood, R.)

Edwards v. Kelly, 2017 Ark. 254 **[writ of habeas corpus]** Unless the petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue. Because appellant did not state a ground upon which a writ of habeas corpus could be issued, the trial court was not clearly erroneous when it denied appellant's petition without a hearing. **[Ark. Code Ann. § 16-68-607]** Habeas petitions that fail to state a claim upon which relief can be granted are appropriately counted as strikes under Ark. Code Ann. § 16-68-607. Because appellant's petition clearly failed to state a claim on which relief was merited, it was not error for the circuit court to declare that the petition constituted a strike under the statute. (Dennis, J.; CV-16-705; 9-21-17; Wynne, R.)

Pokatilov v. State, 2017 Ark. 264 **[constructive possession]** In a constructive-possession case involving contraband that is found in a several different vehicles all belonging to people other than the defendant that are being transported on an automobile carrier the State is required to prove additional factors that link the accused to the contraband. **[jury instructions; AMI Crim. 2d 64.420]** Because the model jury instruction that was given by the court was a correct statement of the law, the trial court did not abuse its discretion when it refused appellant's modified version of the instruction. **[motion to suppress]** After appellant was observed violating a traffic law, the law enforcement official had probable cause to stop appellant's vehicle. During the traffic stop, the officer developed a reasonable suspicion that appellant was engaged in criminal activity. Additionally, appellant voluntarily gave consent to search the vehicle. Thus, the trial court did not err when it denied appellant's motion to suppress. (Huckabee, S.; CR-17-196; 9-28-17; Wynne, R.)

Hortenberry v. State, 2017 Ark. 261 **[404(b); pedophile exception]** The Supreme Court declined to expand the pedophile exception to include evidence of a defendant's similar acts with a physically-disabled adult who lived with and was cared for by the accused. Although not admissible pursuant to the pedophile exception, the evidence of similar acts was independently-relevant under Ark. R. Evid. 404(b) because it showed that appellant undertook a deliberate course of conduct to engage in oral sex with younger men and boys who were in his household and who lacked the ability to resist his actions. Thus, its admission was not an abuse of discretion. (Davis, B.; CR-17-149; 9-28-17; Kemp, J.)

Hicks v. State, 2017 Ark. 262 **[sufficiency of the evidence; capital murder]** There was substantial evidence to support appellant's conviction. **[Ark. R. Evid. 803(2)]** The trial court did not abuse its discretion when pursuant to the "excited utterance" exception to the hearsay rule, it permitted an emergency medical technician to testify about statements made by the victim to the technician while the technician was providing medical attention to the victim within minutes of the victim being shot at point-blank range by appellant. (Henry, D.; CR-16-125; 9-28-17; Baker, K.)

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

Stearns v. State, 2017 Ark. App. 472 (first-degree murder) CR-16-914; 9-20-17; Murphy, M.

Brown v. State, 2017 Ark. App. 480 (theft) CR-16-1079; 9-27-17; Gladwin, R.

Horton v. State, 2017 Ark. App. 481 (theft) CR-16-1106; 9-27-17; Harrison, B.

Mosley v. State, 2017 Ark. App. 487 (theft) CR-16-593; 9-27-17; Hixson, K.

McNeely v. State, 2017 Ark. App. 483 (felon in possession of a firearm) CR-17-29; 9-27-17; Klappenbach, N.

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:

Pierce v. State, 2017 Ark. App. 448 (probation) CR-16-1066; 9-13-17; Murphy, M.

Harris v. State, 2017 Ark. App. 452 (suspended sentence) CR-17-1; 9-20-17; Gruber, R.

Henderson v. State, 2017 Ark. App. 486 (probation) CR-17-154; 9-27-17; Vaught, L.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to deny appellant's Rule 37 petition was not clearly erroneous:

Chawangkul v. State, 2017 Ark. App. 456; CR-17-218; 9-20-17; Virden, B.

CIVIL

City of Little Rock v. Muncy, 2017 Ark. App. 412 **[civil service commission]** Police officer was terminated for violation of zero tolerance policy regarding drug use. The circuit court made a factual finding that acknowledged the overwhelming evidence of Muncy's positive tests for methamphetamine; indeed, the scientific evidence supporting that finding was uncontroverted. The court stated that it understood the purpose of the policy, but it questioned whether the situation was so severe to justify termination based on Muncy's history and good character. The appellate court reversed. The LRFD has the authority to govern and regulate its employees. The LRFD provided legitimate public-policy reasons behind its zero-tolerance on drug usage and the necessity for consistency in the application of that policy. Muncy, despite his good reputation, clearly violated the policy. (Piazza, C.; CV-16-471; 8-30-17; Whiteaker, P.)

Little Rock Police Dept. v. Phillips, 2017 Ark. App. 410 **[civil service commission]** Circuit court reversed commission's decision to demote office and imposed sanction of 30-day suspension without pay. Phillips admittedly violated LRPD policy. Nonetheless, Phillips had no evil intent, he was attempting to help lower-ranking officers, he had served admirably for eighteen years on the force, and he took responsibility for his error in judgment. It was undisputed that LRPD's previous police chief had permitted the exercise of some discretion in deciding to handle minor repairs without formally adhering to reporting and repair protocol. In light of this evidence, the trial court's decision to impose a thirty-day suspension without pay was not clearly erroneous. (Welch, M.; CV-16-550; 8-30-17; Klappenbach, M.)

Clark v. Caughron, 2017 Ark. App. 409 **[boundary line]** The circuit court did not err by finding a boundary by acquiescence. The circuit court was correct in finding that both Caughron's southern line and western line were established by acquiescence. The unrebutted testimony reflects that the Clarks' predecessor, Simon, and Caughron, had an agreement as to where the fence should be built—on the blaze line created by surveyor Robert Smith's crew. The circuit court concluded that the fence, was in fact, built on that blazed line; and that the Clarks' predecessor in title, Simon, inspected the fence line immediately after it had been completed and annually or semiannually thereafter for about 25 to 30 years. The circuit court also concluded that Simon never had anything to say about the fence or its location except that he was pleased with it. The circuit court's decision on this boundary was not clearly erroneous**. [adverse possession]** In order to prove ownership of land by adverse possession, the party claiming possession must show continuous possession of the property for seven years. The claimant must also prove that possession was actual, open, notorious, continuous, hostile, exclusive, and accompanied by an intent to hold against the true owner. The court did not err in holding that Caughron owned the disputed property by adverse possession. (Murphy, M.; CV-16-911; 8-30-17; Abramson, R.)

Heinrich v. Anders, 2017 Ark. App. 413 **[res judicata]** The first three requirements of res judicata are satisfied in this case. The 2012 divorce proceedings resulted in a final judgment on the merits, it was based on proper jurisdiction, and it was fully contested in good faith. However, the fourth and fifth requirements are not satisfied. The 2012 divorce action did not include Allison's breach-of-contract claim, and David and Seth were not parties to the divorce action. Further, the property in question could not have been disposed of by the parties in the divorce action because the parties did not own it—it belonged to Seth. The circuit court did not err in finding that res judicata did not apply because the disposition of the property was not litigated in the parties' divorce proceedings. **[power of attorney]** The circuit court found that the power of attorney was not used to convey the property from David to Seth because it concluded that the assignment, in which Allison and Larry authorized David to grant the property to Seth, was not signed and not recorded. The circuit court was not clearly erroneous in reaching these findings. (Wyatt, R.; CV-16-534; 8-30-17; Vaught, L.)

Dooley v. Regions Bank Calhoun, 2017 Ark. App. 432 **[res judicata]** All elements of claim preclusion have been satisfied in this case: (1) there was a final judgment on the merits of appellant's claim in the divorce proceeding that she was entitled to a portion of the Trust, (2) the court deciding the claim had proper jurisdiction to do so, (3) the first suit was fully contested by appellant in her attempt to receive a one-half interest in the Trust property even though she conceded that it was not marital property, (4) both suits involve the same claim by appellant that she has a monetary interest in the Trust, and (5) the same parties or their privies are involved in both suits. The suits involve the same claim as the divorce proceeding and res judicata barred appellant's new claim; therefore, appellees were entitled to judgment as a matter of law. (McCain, M.; CV-16-748; 9-6-17; Brown, W.)

Helton v. Calhoun, Ltd., 2017 Ark. App. 418 **[arbitration-confirmation]** A Rule 4 summons is not required for a petition for confirmation of an arbitration award. The confirmation of an arbitration award is a continuation of the arbitration process rather than a lawsuit in the ordinarily understood sense. In this case, Helton did not refuse to participate in the arbitration proceeding. Instead, he responded to Calhoun's petition for arbitration and contested only the amount of fees he owed to Calhoun. Thus, because Helton did not refuse to arbitrate, the AAA did not require Calhoun to file a motion to compel arbitration under section 207. (Murphy, M.; CV-16-515; 9-6-17; Abramson, R.)

Ocwen v. Mickna., 2017 Ark. App. 430 **[sanctions]** On appeal, Ocwen and Freddie Mac argue that their interrogatory answers were sufficient because their answers provided that they "will designate a corporate witness who possesses information relevant to the claims in this case" and later, in supplemental responses, they "identified corporate representatives of additional entities., as persons with knowledge of the claims and as potential witnesses." Even this supplemental discovery, however, failed to name an actual witness or person with knowledge of the matter. From the bench, the court explained that neither it nor Mickna knew the identity of the proper plaintiff due to plaintiffs' counsel's inconsistent representations; that the case had gone on for years because of plaintiffs' deceptive and manipulative actions and inactions; and that it was "offensive" that, over the course of those years, plaintiffs could not provide answers to "standard, simple interrogatories, such as 'name the people with information' and 'provide their phone numbers.'" Ocwen and Freddie Mac argue that there is no evidence that the objections were made in bad faith and that Mickna never consulted them about the objections or filed a motion to compel. However, Rule 37 does not require the trial court make a finding of willful or deliberate disregard or that a motion to compel must be filed before sanctions may be imposed for the failure to comply with the discovery requirements. The circuit court did not make the decision to dismiss this case lightly, the trial court acted thoughtfully and with due consideration. The circuit court was in a superior position to judge the appellants' actions and motives. (Beaumont, C.; CV-16-895; 9-6-17; Murphy, M.)

Thomas v. Meadors; 2017 Ark. App. 421 **[summary judgment-negligence]** Thomas argues that she had established a prima facie claim for medical negligence. She urges that her complaint and the opinions of her two experts established the applicable standard of care, Meadors's failure to act in accordance with that standard, and that such failure was the proximate cause of Thomas's death. But the inquiry on appeal is not whether Thomas established a prima facie case of medical negligence but whether Meadors established a prima facie entitlement to summary judgment in her motion. Thomas has failed to meet proof with proof on the issue of causation. The expert testimony cited by Thomas fails to clearly articulate that Meadors's negligence was the proximate cause of Mr. Thomas's death; instead, Dr. Beacham opined that Mr. Thomas's awakening from the anesthesia was more likely if the surgery had been stopped, but the issue is whether he would have lived, not whether he would have "awakened." Dr. Rinder opined that continuing with the procedure "contributed to the cardiogenic shock," but the presence of a contributing factor is not synonymous with proximate cause. Thomas's expert testimony failed to establish proximate cause and was therefore insufficient to defeat summary judgment. (Fox, T.; CV-16-1033; 9-6-17; Harrison, B.)

Thompson v. Broussard; 2017 Ark. App. 423 **[recession-offset]** The circuit court received evidence of bank deposits and business expenses. The circuit court additionally heard testimony from both Broussard and Thompson that the business was not profitable at all. It was well within the circuit court's purview to deem both women's testimony credible on the issue of whether the business was ever profitable in determining the amount of any offset. **[Attorney's Fees]** Thompson argues that in an action for rescission, attorney's fees are not available pursuant to Arkansas Code Annotated section 16-22-308. The gist of the action that Thompson originally brought against Broussard was filed as a breach-of-contract action. It sounded entirely in contract, and the mere fact that the parties agreed to rescind that contract does not defeat the original nature of the action. Because the complaint was brought as a breach-of-contract action, the award of attorney's fees to Broussard, as the prevailing party, was therefore appropriate under section 16-22-308. (Hearnsberger, M.; CV-16-1099; 9-6-17; Whiteaker, P.)

Silva v. Napier; 2017 Ark. App. 422 **[deed-set aside]** The circuit court entered an order setting aside the deed. The court found that there was clear and convincing evidence that Napier had no intent to pass title "immediately or otherwise." The court noted several pieces of evidence it found credible that demonstrated lack of intent: (1) the statement by Davis in his jail phone call that Napier had no idea what she was signing; (2) Debra Silva's testimony that Napier was told to stop asking questions and to just sign it; (3) Napier's and Davis's testimony that Napier did not understand what she was signing and did not intend to relinquish control of her home; and (4) Napier's and Davis's testimony that Davis used duress, undue influence, and fear to control Napier and force her to do what Davis wanted. The court also found that there was no legally sufficient consideration for the deed. Silva argues that because the deed was intended to be a security, the circuit court should have found the deed to be a valid mortgage. This court has held that if there is a debt existing and the conveyance was intended by the parties to secure its payment, equity will regard and treat an absolute deed as a mortgage. The party claiming that the deed was a mortgage has the burden of showing that the deed was, in fact, a mortgage, that there was an indebtedness, and that the deed was intended to secure the debt. The circuit court's order setting aside the deed was not clearly erroneous. (Threet, J.; CV-14-1142; 9-6-17; Klappenbach, M.)

Franklin v. Waldron Nursing Center, 2017 Ark. App. 449 **[constructive trust]** Evidence did not support imposition of a constructive trust based upon alleged mistakes. **[notary]** At trial, Imodel admitted executing the deed. The purpose of a notary public taking an acknowledgment of an instrument is to certify the identity of the person who executed the instrument. Here, that purpose has been met. Moreover, assuming arguendo that the acknowledgement was invalid, the deed would still be valid as between the parties. (Sullivan, T.; CV-16-400; 9-13-17; Brown, W.)

Johnson v. Equity Ins, Co., 2017 Ark. App. 436 **[dismissal-two lawsuits]** Johnson argues that the court erred in dismissing his action because he established venue first by filing suit and serving Equity in the Phillips County action before Equity served him in the Pulaski County action. The case *Gadbury-Swift* holds that the first party to file suit establishes venue and the doctrine of forum nonconveniens cannot be invoked to dismiss a suit when venue is proper in another county. Under the rules of civil procedure, an action will commence upon filing with the

clerk, subject only to the requirement that service be complete within 120 days from the filing of the complaint, unless the time for service has been extended by the court. Thus, in this case, the fact that Johnson served Equity first in the Phillips County suit is immaterial. Accordingly, the court properly dismissed Johnson's action in Phillips County. (Mitchell, C.; CV-16-577; 9-13-17; Abramson, R.)

Rider v. Longbow Ranch, LLC, 2017 Ark. App. 444 **[adverse possession]** Fencing a disputed area is an act of ownership evidencing adverse possession; the fact a fence may be degraded does not necessarily mean the area is no longer "enclosed"; rather, the question is whether the enclosure is sufficient to "fly the flag" over the land and give notice to the true owner the land is being claimed adversely. Here, there was evidence the fence had been in place since at least 1966; cattle had been run on the enclosed property since that time; Phillips never told anyone she owned the land on the south side of the fence and never attempted to take possession of the disputed property; and while the Riders knew that the fence was not on the property line, having been given this information by Phillips when they purchased the property from her in 1995, they said nothing until 2007. This was well after the seven-year period for adverse possession, as that was established at least in the mid-1970s. This evidence was sufficient to "fly the flag" that the enclosed disputed property was being claimed adversely. The circuit court's decision to quiet title to the disputed property in Longbow under the theory of adverse possession was not clearly erroneous. (Weaver, T.; CV-17-151; 9-13-17; Glover, D.)

Bales v. City of Fort Smith, 2017 Ark. App. 443 **[wrongful termination-appeal]** Bales argues that the initial decision was made "after business hours" and therefore was not "entered of record" until the next day, i.e., November 5. Section 14-51-308 provides that an appeal of a Civil Service Commission decision "shall be taken by filing with the commission, within thirty (30) days from the date of the decision, a notice of appeal." The statute does not define "date of the decision," and it does not specify that the decision starting the clock is to be "final"—just that an appeal of a Commission decision shall be taken by filing a notice of appeal with the Commission within thirty days from the "date of the decision." The circuit court's finding that the Commission made its initial decision on November 4, 2014, and that the thirty-day time limit for Bales to file his notice of appeal with the Commission pursuant to section 14-51-308 was triggered on that date is not erroneous. Even though Bales postmarked his notice of appeal on December 4, 2014, he did not file it with the Commission until December 5, 2014, which was one day beyond the thirty-day time limit. The circuit court did not have jurisdiction to hear the appeal. (Tabor, S.; CV-16-148; 9-13-17; Glover, D.)

Pingatore v. Union Pacific Railroad, 2017 Ark. App. 459 **[invasion of privacy]** There was no unlawful invasion of privacy on either the basis of invasion of privacy or false light and UP was entitled to judgment as a matter of law on these facts. Pingatore performed drug tests for years without complaining. He filed no complaint until the testing period had ended. He requested no accommodations nor did he behave in any way that would have put UP on notice that it lacked his consent to the tests. His leave due to a job-related injury factored into the frequency of the testing. And his rather isolated job location affected the manner in which the tests could be given. Pingatore had a privacy interest as an employee with a history of substance misuse. The

privacy interest he has does not, however, extend to cover the fact that he was being drug tested; nor was he entitled to complete anonymity as he was being tested. He was not an anonymous urine donor. Moreover, the particular manner and circumstances under which the tests were conducted in this case do not rise to an unlawful invasion of Pingatore's privacy. (Honeycutt, P.; CV-16-810; 9-20-17; Harrison, B.)

Smith v. Boatman, 2017 Ark. App. 488 **[adverse possession]** The trial court did not clearly err in finding that the Boatmans proved each of the elements of adverse possession with regard to the disputed strip of land. When a landowner takes possession of land under the belief that he owns it, encloses it, and holds it continuously for the statutory period under claim of ownership, without recognition of the possible right of another on account of mistake, such possession is adverse and hostile to the true owner. The conduct of the Boatmans satisfied the hostility element of adverse possession and demonstrated an intent to hold against the true owner. (Fogleman, J.; CV-16-873; 9-27-17; Hixson, K.)

DOMESTIC RELATIONS

Myers v. Ridgley, 2017 Ark. App. 411 **[military retirement division; payment not waiver of appeal but attempt to avoid contempt citation; survivor benefit plan request barred by res judicata]** The appellate court found error in the circuit court's ruling that appellee ex-wife was entitled to an equitable interest in appellant's military retirement. The parties' 1999 divorce decree divided appellant's reserve-duty retirement that was vested; the decree did not divide the active-duty retirement because it was not yet vested. When appellant attained eligibility for active-duty retirement, he was no longer eligible to receive his reserve-duty retirement per military regulations, and appellee filed a motion to receive a marital share of any military retirement that he would receive. The circuit court awarded appellee a 33.7% share of appellant's military retirement, and the order did not differentiate between the reserve-duty and active-duty retirement, unlike the 1999 decree. In *Pelts v. Pelts*, 2017 Ark. 98, 514 S.W.3d 455, the supreme court found that reserve-duty and active-duty retirement are not unified retirement systems but should be viewed separately for purposes of marital-property division. Therefore, the appellate court found error in the circuit court's award of appellant's active-duty retirement to appellee as well as the attorney fee award. The appellee's motion to dismiss the appeal was denied because the appellate court found that appellant's partial payment was not a waiver of his appeal but an attempt to avoid a contempt citation. The appellate court affirmed appellee's cross-appeal, as her request for survivor benefit plan was barred by res judicata. (Gray, A.; CV-16-4; 8-30-17; Glover, D.)

Chambers v. Chambers, 2017 Ark. App. 429 **[modification of stipulated spousal support amount; unequal division of property requires listed reasons; attorney's fee award**] Appellant ex-husband challenges the circuit's courts findings on modification of alimony, unequal division of marital property, and the award of attorney's fees. First, the appellate court found error in the circuit court's ruling that the temporary spousal support order was not modifiable because it was an agreement of the parties. In *Law v. Law*, 248 Ark. 894, 455 S.W.2d 854 (1970), the supreme court stated that the burden was on the party seeking to rely on an independent contract to prove the existence of that contract. The appellate court found that the

parties in this matter merely had an agreement to stipulate to some issues on a temporary basis at the temporary hearing to avoid putting on proof until the final hearing. Just as in *Law*, the appellate court found there was nothing in the record to indicate that the parties intended their agreement to be an independent contract, and therefore, the agreement can be modified by the circuit court on an appropriate change in circumstances to be determined by the circuit court. Second, because the parties' divorce decree does not set forth the circuit court's oral findings regarding the bases and reasons for the unequal division of martial property, the case was remanded for the circuit court to enter an order that satisfies the requirements of Ark. Code Ann. §9-12-315. Lastly, because the appellate court remanded the support and property issues, the attorney's fee award was also remanded so the circuit court could reconsider the fee award in light of these holdings. (McCormick, D.; CV-16-1054; 9-6-17; Hixson, K.)

Hays v. Hays, 2017 Ark. App. 439 [**denial of alimony based on public policy- but not sole consideration**] The appellate court found no error in the circuit court's denial of a permanent alimony award following a seven-year marriage. Appellant claimed that the court abused its discretion by applying a public-policy argument—that awarding alimony would discourage marriage to disabled persons. While the appellate court stated that the circuit court's public-policy reasoning was unsupported, the appellate court found there was no abuse of discretion because public-policy was not the circuit court's sole consideration. The circuit court divided marital property, considered that marital funds had been used to pay down Appellant's mortgage and that she was retaining the $9,000 benefit, and the circuit court noted that Appellant left the marriage in the same or better position than when she entered it. The appellate court references other cases with similar facts and circumstances wherein the appellant court upheld the denial of alimony. (Clark, D.; CV-17-30; 9-13-17; Gladwin, R.)

Doughty v. Douglas, 2017 Ark. App. 445 [**UCCJEA- communication of courts, record of communication; UCCJEA unjustifiable conduct and jurisdiction; attorney's fees award considering only disparity of income**] First, the appellate court found no reversible error in the circuit court's UCCJEA communications with a California court. In accordance with the UCCJEA, the lower courts spoke, and the appellate court found no discrepancy of the findings as alleged by Cross-Appellant. Furthermore, having acquiesced to the manner in which the circuit court made a record of its previous communication with the California court and failing to object to the circumstances of the record, Cross-Appellant cannot argue on appeal for the first time that the circuit court's record of that communication was somehow improper. The appellate court also found no error in the circuit court's decision to accept jurisdiction of the custody matter. Although Cross-Appellant argued he was deprived of the opportunity to present facts relevant to unjustifiable conduct which could have resulted in the circuit court declining jurisdiction, the appellate court recognized that California had already declined jurisdiction. Regardless of any alleged unjustifiable conduct, if Arkansas declined jurisdiction, the parties would be without a forum for their litigation. Lastly, the appellate court found that the circuit court erred in awarding attorney's fees (on two of the three orders for attorney's fees). While the appellate court found no error in the circuit court's first order which awarded attorney's fees and costs after numerous considerations, the following two orders for attorney's fees and costs made no mention of any factors that contributed to the court's decision. At the second and third hearing requesting attorney's fees, the primary focus was the relative financial ability of the parties to invest in the case and the disparity of income. There was no mention of additional factors. In *James v. Walchli*, 2015 Ark. App. 562, the appellate court found that the relative financial ability

of each party is a consideration, but it is not determinative. Pertinent considerations in determining an attorney's fee amount are listed in *James*. (Cook, V.; CV-15-250; 9-13-17; Whiteaker, P.)

Jones v. Sanchez, 2017 Ark. App. 461 [**order of protection is special proceeding- Ark. Rules Civ. Pro. do not apply**] The appellate court found no error in entry of an order of protection against Appellant. Appellant first argues that he should have had 60 days to file a response to the petition because he was incarcerated, that he should have been transported to the hearing to defend himself, and that he was denied a sufficient opportunity to obtain counsel. However, the appellate court explained that because proceedings filed under the Domestic Abuse Act are special proceedings, and to the extent that the statutes creating special proceedings provide for a procedure that is different from the rules of civil procedure, the Arkansas Rules of Civil Procedure do not apply. Arkansas Code Annotated §9-15-204(b)(1)(A) requires that service be made at least five days (not sixty days) before the date of the hearing, which was done in this matter. Furthermore, the circuit court had no obligation to arrange transportation, and the Appellant could have requested transportation or arranged representation, but he failed to do so. The appellate court also acknowledged that the exclusion of weekend in computation of time per Ark. R. Civ. P. 6(a) would not apply to this special proceeding. Lastly, Appellant argued that he can show that he did not do the abusive acts alleged by Appellee. However, because he did not refute all allegations of abuse, the appellate court found no reversible error. (Williams, L.; CV-16-1149; 9-20-17; Harrison, B.)

Guin v. McWhorter, 2017 Ark. App. 463 [**child support deviation factors; modification of child support**] The appellate court found no error in the trial court's order reducing Appellee's child support obligation. The appellate court found that the trial court's order complied with Administrative Order No. 10 in that it determined Appellee's income, recited the amount of support due under the chart, and made findings on relevant factors to justify deviation from the chart. Contrary to Appellant's assertion, the appellate court found that there did not have to be a change in the deviation factors since the last order to modify child support. The material change in circumstances to warrant a modification was established by Appellee's undisputed substantial reduction in income. The circuit court then made proper findings regarding relevant deviation factors including the extraordinary time Appellee had custody of the children, as well as the facts that he provided most of the clothing for the children, their entire automobile expenses, their track expenses, and the majority of the extra funds for the children. Lastly, the appellate court stated that Appellant was not prejudiced by any testimony regarding money spent on the adult children, as these expenses were not among those listed by the trial court in finding that a downward deviation in child support was justified. (Storey, B.; CV-16-1042; 9-20-17; Klappenbach, N.)

PROBATE

Rogers v. Ritchie, 2017 Ark. App. 201 **[guardianship expenditures- living expenses, spouse support, miscellaneous expenditures, funeral expenses, life insurance payments; invited-error doctrine]** Appellant was guardian for her husband for the three years proceeding his death. Appellee, personal representative of the ward's estate, challenged whether certain expenditures were permissible expenses of the guardianship. Both parties appealed the circuit court's findings of allowing and disallowing specific expenditures. The appellate court found that the circuit

court erred by ruling that, as a matter of law, funds of the guardianship could not be expended for Appellant's support. In *Stautzenberger v. Stautzenberger*, 2013 Ark. 148, the supreme court held that expenditures contributed to the ward's care and maintenance that were consistent with the ward's previous pattern of expenditures and charitable giving could constitute permissible payments for the ward's maintenance, so long as the support may be construed to be proper for the care and maintenance of the ward and if they are reasonable and necessary. Because Appellant was the ward's spouse and she testified that he was the financial provider for their 40-year marriage, the appellate court remanded for the circuit court to consider whether certain expenses (food, car, home, insurance, storage, etc.) were reasonable and proper and could be construed to be proper for the ward's care and maintenance. Furthermore, the appellate court instructed the circuit court to allow, at a minimum, some expenditures for the ward's housing, utilities, and transportation, as Appellant had an obligation to care and provide for the ward. The appellate court found error in the circuit court's ruling to allow the funeral expense expenditures, as the guardianship terminated by law when the ward died because the guardian did not take steps to convert the case to a ward's estate; therefore, the funeral expenses were not proper expenses of the guardianship. The appellate court also found error in the circuit court's ruling that the life insurance premiums on the ward's life were an allowable expense of the estate. The appellate court instructed the circuit court to consider whether the money expended for the premium was proper for the care and maintenance of the ward; and if not, the circuit court was directed to reduce the allowable amount to account for only the premiums paid on the ward's behalf. Pursuant to the invited-error doctrine, the appellate court found that Appellant is precluded from arguing that the guardianship is void because she defended the validity of the guardianship to the circuit court and she cannot complain of the ruling on appeal. Therefore, the circuit court was affirmed on that point. (McGowan, M.; CV-16-639; 9-6-17; Gladwin, R.)

JUVENILE

Threadgill v. Ark. Dep't of Human Servs., 2017 Ark. App. 426 **[TPR -- appropriate services to remedy factors that arose subsequent to removal]** Trial court terminated mother's rights based on factors that arose subsequent to the filing of the dependency neglect petition and based on the mother's failure to remedy the conditions that brought the child into care. The Department initially removed custody alleging failure to protect after the State Police opened an investigation of sexual abuse by stepfather. Services provided by the Department included therapeutic foster care, case management services, PACE evaluation, DDS referrals, medical services, counseling, transportation, and parenting classes. A month before the termination hearing, the mother disclosed for the first time that she was addicted to methamphetamine. The mother argued on appeal that the Department failed to provide the appropriate family services needed to remedy the circumstances of the subsequent factors because it did not offer substance abuse treatment. The court found that the mother was at fault for not admitting that she had a drug addiction in a timely manner so that she could undergo treatment, and that the other services that she received were appropriate family services under the circumstances. (Sullivan, T.; JV-15-33; September 6, 2017; Vaught, L.)

Ladd v. Ark. Dep't of Human Servs., 2017 Ark App. 419 **[TPR—aggravated circumstances]** Parents rights were terminated as to then seven-year-old, who by time of the termination hearing had lived over half her life in the foster care system after being removed from parents and placed in foster care three different times because of parents' drug use. Due to multiple prior attempts to rehabilitate the parents, the court found aggravated circumstances based on little likelihood of successful reunification and granted the department's motion for no reunification services. On appeal, the mother argued that apart from one failed drug test, she was compliant with the case plan. However, the determinative issue is whether the parent has become a stable, safe parent who is capable of caring for her child, not merely that the parent complied with the case plan. The mother's long history of drug use, rehabilitation, and subsequent relapse is sufficient evidence that there is little likelihood of successful reunification and supports the trial court's finding of aggravated circumstances and termination. (Harrod, L.; JV-15-13; September 6, 2017; Virden, B.)

Stricklin v. Ark. Dep't of Human Servs., 2017 Ark. App. 441 **[motion to intervene in dependency neglect proceeding]** Great-grandmother with guardianship of one sibling filed motion to intervene in dependency neglect proceedings concerning a younger sibling, LE. The motion was denied because the grandmother waited twenty-seven months after LE was placed in foster care and eight months after the parents' rights were terminated before filing her motion to intervene. Stricklin was not an intervenor as a matter of right because the termination of parental rights order severed her legal rights to LE. Further, a motion for permissive intervention must be timely filed, and Stricklin's motion was not timely filed. The court found that Stricklin should have moved to intervene earlier in order to request placement of the child and eventually, adoption, and that waiting more than eight months after termination was not timely. (James, P.; JV-14-575; September 13, 2017; Klappenbach, N.)

Haney v. Ark. Dep't of Human Servs., 2017 Ark App. 437 **[adjudication]** Dependency neglect adjudication was not supported by a preponderance of the evidence where the court failed to assess the level of risk to the newborn and instead relied solely on the prior adjudication of siblings. The older siblings' dependency neglect case was initiated after another sibling drowned in a washing machine in the home. The child at issue, a newborn, was born during the pendency of the siblings' dependency neglect case. The Code defines a dependent-neglected juvenile as one who is at substantial risk of serious harm as a result of one or more enumerated acts or omissions. While the death of a sibling may demonstrate an act or omission to a sibling, the Department must also show that the child at issue is at substantial risk of serious harm. The appellate court noted that the only other evidence presented was the mother's "mindset," which it did not find sufficient evidence considering there was no other evidence of a lack of vigilance by the parents. On these facts, the adjudication was reversed. (Talley, D.; JV-15-14; September 13, 2017; Abramson, R.)

McKinney v. Ark Dep't of Human Servs., 2017 Ark. App. 475 **[TPR – no permanency planning hearing held]** Appellant father's rights were terminated more than a year after children were removed from the custody of their mother and without a permanency planning hearing ever being held. Court of Appeals agreed that the failure to hold a permanency planning hearing was

clearly erroneous but affirmed termination because it was in the children's best interest. Parental rights will not be enforced to the detriment of the health and well-being of a child and the child's best interest takes precedence at every stage of termination proceedings. Appellant admitted that he had had a drug problem for more than fifteen years yet he did not complete rehab prior to the TPR hearing. Other evidence included Appellant failing a drug test for methamphetamines two days prior to the TPR hearing; Appellant marrying the children's mother, who also had a drug addiction, after her rights were terminated; Appellant being incarcerated several times throughout the case and having warrants for his arrest at the time of the TPR hearing; and Appellant lacking stable employment, income, and housing. (Thyer, C.; JV-15-410; September 20, 2017; Brown, W.)

Bynum v. Ark. Dep't of Human Servs., 2017 Ark. App. 471 **[TPR --- sufficiency of the evidence]** Appellant mother appealed the termination of her rights to two children, one of whom was born during the pendency of the dependency neglect case involving the first. The court found sufficient evidence for termination where Appellant failed to remedy the conditions that brought the children into care. The Department removed custody after Appellant threatened to kill herself and her baby. Appellant had an IQ of 62, which was considered mid-mild deficient, had a seizure disorder, and was diagnosed by one mental health professional with situational depression and by another as possibly having a schizotypal personality disorder due to hallucinations and her beliefs in casting spells and other "magical thinking." Appellant was incarcerated for several months of the case and made only 36 of 98 possible visits with the children. During the case, Appellant was married to the father of the second child but planned to divorce him due to domestic violence issues, and then became pregnant with a third child with her brother-in-law. Several witnesses testified about Appellant's untreated mental health issues and their concerns with her ability to parent her children. (Harrod, L.; JV-14-23; September 20, 2017; Hixson, K.)

Rogers v. Ark. Dep't of Human Servs., 2017 Ark. App. 469 **[TPR—sufficiency of the evidence]** Appellant father appealed termination of his rights. Appellant had not established his paternity or visited with the child for over five years until the child was removed from the mother and taken into DHS custody. While the dependency neglect case was pending, Appellant was arrested for selling drugs out of his home and illegally possessing a firearm. He was sentenced to three years in the Arkansas Department of Correction but was released on parole prior to the termination hearing. While he was incarcerated, Appellant completed parenting classes, anger-management, and communication classes. However, Appellant had not seen the child in five years and they did not have a bond. He had no stable housing or employment. He was on parole. He testified that he was diagnosed with bipolar disorder and schizophrenia and did not take medication because he did not feel that he needed it. The Department's caseworker met with Appellant before and after his incarceration and made an effort to provide services, but Appellant did not follow the caseworker's recommendations or comply with her referrals. The appellate court agreed that the evidence was clear and convincing in support of termination. (Zuerker, L.; JV-13-582; September 20, 2017; Vaught, L.)

Beck v. Ark. Dep't of Human Servs., 2017 Ark. App. 467 **[TPR—sufficiency of the evidence]** Appellate court affirmed termination after trial court ordered termination on three separate grounds. Because only one ground for termination is required, appellate court found no need for further review after affirming on the ground that the children had been out of Appellant's custody for more than twelve months and the conditions that had necessitated removal had not been remedied despite a meaningful effort by DHS. Evidence was clear and convincing that the Appellant continued using illegal drugs throughout the case, and the little progress that was made recently prior to the termination hearing was too little, too late. Further, given that Appellant had not seen the children in more than twelve months, the appellate court agreed that termination was in the children's best interest. (Capeheart, T.; JV-15-398; September 20, 2017; Whiteaker, P.)

Brasher v. Ark. Dep't of Human Servs., 2017 Ark. App. 455 **[TPR—sufficiency of the evidence]** After her rights were terminated on three separate grounds, Appellant did not challenge grounds for termination, but instead, argued on appeal that the court erred in its best interest finding due to insufficient evidence that Appellant posed a safety risk to the child. The appellate court disagreed, finding that the termination order was detailed and well-reasoned and did not leave the court with a firm conviction that a mistake had been made regarding the child's best interest. Evidence included Appellant previously having her rights terminated to two other children, Appellant being incarcerated eight out of twelve months during the case, the child having spent thirty out of forty-two months of her life in foster care, Appellant having a history of drug addiction and being at risk of an automatic six-year sentence in ADC if she violated the terms of her Drug Court program, and Appellant having no stable employment, income, or housing. (Layton, D.; JV-14-90; September 20, 2017; Abramson, R.)

Hollinger v. Ark. Dep't of Human Servs., 2017 Ark. App. 458 **[TPR—sufficiency of the evidence]** Termination affirmed where Appellant relapsed and tested positive for illegal drugs eleven months into the case and again thirteen months into the case, including an inpatient hospital admission due to overdose. In addition, Appellant's boyfriend, from whom she separated only the weekend prior to the termination hearing, tested positive for methamphetamine. Although Appellant partially complied with the case plan, partial compliance was not sufficient to remedy the circumstances and to render Appellant capable of caring for her children. (Spears, J.; JV-15-278; September 20, 2017; Gladwin, R.)

Curtis v. Ark. Dep't of Human Servs., 2017 Ark. App. 465 **[TPR—sufficiency of the evidence]** Failure to comply with the case plan during the pendency of a dependency neglect case is a subsequent factor that may warrant termination. The appellate court affirmed termination on the subsequent factors ground where the appellant failed to appear for drug screens on a regular basis, had no stable employment, failed to attend NA/AA meetings, was on probation for felony drug charges, and was engaged to a man that the trial court found to be inappropriate and a negative influence on appellant after he posted comments on social media that were derogatory toward the child and portrayed a "party" lifestyle, had a positive drug screen, and fabricated a story about attempting suicide. Further, these facts indicated that termination was in the child's best interest. (Zimmerman, S.; JV-15-745; September 20, 2017; Glover, D.)

Watson v. Ark. Dep't of Human Servs., 2017 Ark. App. 484 **[TPR—sufficiency of the evidence]** Clear and convincing evidence supported termination where Appellant was incarcerated throughout much of the case, did not contact the Department for services during his intermittent periods of freedom, did not comply with the case plan, had no significant contact with the child for years, and had no stable housing, employment, income, or transportation. Additionally, the child was placed in a home with two other siblings and with relatives who wanted to adopt the sibling group. (Hendricks, A.; JV-14-9; September 27, 2017; Glover, D.)

Allen v. Ark. Dep't of Human Servs., 2017 Ark. App. 489 **[TRP—sufficiency of the evidence]** Termination was proper where children were removed after two-year-old ingested cocaine and PCP in the home, and after a year of services, Appellant used methamphetamine a week before the termination hearing. During the case, a trial placement had ended when Appellant was arrested for drug crimes. The evidence was clear and convincing that Appellant was not rehabilitated and that termination was in the best interest of the children. A child's need for permanency and stability overrides a parent's need for more time to remedy the situation. (Sullivan, T.; JV-15-38; September 27, 2017; Murphy, M.)

Canada v. Ark. Dep't of Human Servs., 2017 Ark. App. 476 **[TPR—sufficiency of the evidence]** Trial court did not clearly err in finding aggravated circumstances based on little likelihood of successful reunification where children had been out of home sixteen months, and Appellant had two failed attempts at drug rehab during the case and had entered treatment for the third time only a week prior to the termination hearing. Moreover, Appellant had not seen the children for five months prior to termination hearing, had no stable employment or housing during the case, and was on probation for assaulting the children's mother and possession of drug paraphernalia. The court must consider the adoptability of the children but need not make specific findings on the issue so long as it is considered in determining the best interest of the children. (Smith, T.; JV-15-342; September 27, 2017; Gruber, R.)

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

Allison v. Ark. Dep't of Human Servs., 2017 Ark. App. 424 [failure to remedy; failure to provide support or maintain contact; abandonment; aggravated circumstances; criminal sentence] (Spears, J.; JV-2015-253; September 6, 2017; Whiteaker, P.)

Denen v. Ark. Dep't of Human Servs., 2017 Ark. App. 473 [abuse and neglect; aggravated circumstances] (Cooper, T., JV-16-346; September 20, 2017; Murphy, M.]

McClennan v. Ark. Dep't of Human Servs., 2017 Ark. 460 [failure to remedy] (Williams Warren, J.; JV-15-762; September 20, 2017; Harrison, B.)

Abraham v. Ark. Dep't of Human Servs., 2017 Ark. App. 491 [failure to remedy; abandonment; a sibling found dependent-neglected as a result of abuse that could endanger the life of the child; subsequent factors; felony battery or assault to a child; aggravated circumstances] (Branton, W.; JV-15-1692; September 27, 2017; Brown, W.)

Cotton v. Ark. Dep't of Human Servs., 2017 Ark. App. 479 [failure to remedy; failure to provide support or maintain meaningful contact; subsequent factors; aggravated circumstances] (Sullivan, T.; JV-15-17; September 27, 2017; Virden, B.)

Flowers v. State, 2017 Ark. App. 468 **[Transfer]** In 2014, Appellant was charged with rapes that had occurred in 2009 and 2010, when Appellant was age fourteen to sixteen. By the time the victim reported the crime and Appellant was charged in 2014, he was age twenty. Appellant moved to transfer the case to the juvenile division, and by then he had reached age twenty-one. The appellate court affirmed the denial of the motion to transfer, where the trial court carefully considered each of the statutory factors and found that nearly everyone weighed against transfer. (Jones, C.; CR-14-535; September 20, 2017; Vaught, L.)

K.B. v. State, 2017 Ark. App. 478 **[Rape—sufficiency of the evidence; spoliation of evidence]** *K.B.* is a companion case to *C.J.M. v. State*, after the two juveniles were found delinquent of rape in a joint delinquency proceeding and both appealed. According to the victim's testimony, K.B. and C.J.M. forced the victim into the fieldhouse, where K.B. held her down while C.J.M. digitally penetrated her. The appellate court rejected K.B.'s argument that there was insufficient evidence of forcible compulsion. The victim's testimony was sufficient to establish forcible compulsion and the trial court found the victim credible. The other issue on appeal was the spoliation of potentially exculpable evidence on the victim's phone. There was evidence that the victim and a friend had exchanged 186 text messages after the rape occurred, which the appellant argued were deleted from the victim's telephone by the State. K.B. argued on appeal that he should have been granted a new trial due to the State's destruction of evidence. However, the appellate court pointed out that the trial court offered the defendants a continuance so that they could obtain the deleted text messages from the phone carrier, and if they had done so, they could have shown whether the messages were exculpatory. The court also rejected Appellant's remaining arguments that a statement he made to law enforcement should have been excluded and that a new trial should have been granted based on new evidence. (Capeheart, T.; JV-16-119; September 27, 2017; Abramson, R.)

C.J.M. v. State, 2017 Ark. App. 477 **[Rape; spoliation of evidence]** The companion case to *K.B. v. State*, *C.J.M.*'s delinquency adjudication was also affirmed. C.J.M. also took issue with the State's handling of the victim's cell phone and text messages, but as in K.B., the appellate court pointed out that the trial court offered the defendants a continuance, which they declined, thereby waiving their argument on appeal. (Capeheart, T.; JV-16-120; September 27, 2017; Abramson, R.)