APPELLATE UPDATE

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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website:
https://opinions.arcourts.gov/ark/en/nav.do

ANNOUNCEMENTS

On May 7th the Supreme Court published a proposed change to Administrative Order 4 for comment:

> The Board of Certified Court Reporter Examiners submitted proposed changes to Administrative Order 4. The changes would clarify the definition of "verbatim record" and would align the Administrative Order with applicable caselaw. Comments on the suggested changes should be made in writing on or before August 1, 2020.

On May 28th the Supreme Court:

BAR CARDS – announced that it will begin a bar-membership-card program on August 1, 2020. The program is strictly voluntary. Attorneys in good standing may request a bar-membership card in person at the clerk's office and pay a $35 fee. The request must be made in person so that a photograph may be taken and placed on the card. The cards will expire annually.

CERTIFICATES OF GOOD STANDING -- announced that starting August 1, 2020, it will require the payment of a $25 fee for the issuance of certificates of good standing. Attorneys

requesting a certificate of good standing should complete and return to the clerk's office a certificate-of-good-standing request form along with the $25 fee.

CRIMINAL

Powell v. State, 2020 Ark. App. 291 **[mistrial]** The circuit court did not abuse its discretion when it denied appellant's request for a mistrial, which was based upon certain hearsay evidence being inadvertently provided to at least one jury member. The trial court's actions were not erroneous because the challenged testimony was properly admitted through other sources. (Wright, H.; CR-19-730; 5-6-2020; Murphy, M.)

Lawrence v. State, 2020 Ark. App. 285 **[revocation]** When a petition to revoke involves the failure to pay court-ordered obligations, after the State has introduced evidence of nonpayment, the burden shifts to the defendant to provide a reasonable excuse for his failure to pay. It is the defendant's obligation to justify his or her failure to pay, and this shifting of the burden of production provides an opportunity to explain the reasons for nonpayment. If he asserts an inability to pay, then the State must demonstrate that the probationer did not make a good-faith effort to pay. Ultimately, the State has the burden of proving that the defendant's failure to pay was inexcusable. Arkansas Code Annotated § 5-4-205(f)(3) provides that in determining whether to revoke based on failure to pay, the court must consider the defendant's employment status, earning ability, financial resources, the willfulness of the failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. The State can carry its burden of proving willful nonpayment in several ways: (1) by undermining the probationer's credibility; (2) by showing the probationer's lack of effort; (3) by showing that a probationer failed to make a bona fide effort to seek employment or borrow money; or (4) by showing that the probationer is spending money on something nonessential or illegal instead of paying restitution. In appellant's case, the State failed to meet its burden of establishing that appellant willfully and inexcusably failed to pay his court-ordered obligations. Specifically, there was no indication that appellant lacked credibility. Appellant presented undisputed evidence that he made bona fide efforts to seek employment, which were unavailing because of his health issues, and to borrow money from relatives, who were themselves destitute. The State failed to establish that appellant spent his money on illegal or nonessential items. Additionally, the State offered no evidence of appellant's other sources of income, assets, or expenses because there were none. It was undisputed that appellant was homeless, seriously ill, and eating out of dumpsters. Because the State failed to meet its burden, the circuit court erred when it granted the petition to revoke appellant's suspended sentence. (Ramey, J.; CR-19-976; 5-6-2020; Gladwin, R.)

Kolb v. State, 2020 Ark. App. 305 **[sufficiency of the evidence; possession of methamphetamine]** Appellant was convicted of violating Arkansas Code Annotated § 5-64-

419(b)(1)(A), which criminalizes possession of methamphetamine "with an aggregate weight, including adulterant or diluent, of less than two grams." At trial and on appeal, appellant argued that there was insufficient evidence to support her conviction because the State failed to prove that she possessed a usable amount of methamphetamine. Possession of a "usable amount" is sometimes established by evidence that the contraband was visible, tangible, and could be picked up. Such evidence was not presented in appellant's case. The methamphetamine was found "loaded" into syringes, which also contained a red liquid. There was no indication that the methamphetamine was visible, tangible, or could be picked up apart from the syringe full of the unidentified red liquid. There was no evidence identifying the dark-red liquid in the syringes as an adulterant or diluent and therefore no way to know if the syringes were "usable." Without any evidence showing that the red liquid was an adulterant or diluent, the State failed to carry its burden of proving that appellant possessed a usable amount of methamphetamine. Therefore, the trial court erred when it denied appellant's request for a directed verdict. (Gibson, R.; CR-19-824; 5-13-2020; Vaught, L.)

Virgil v. State, 2020 Ark. App. 314 **[motion to suppress; knock and talk]** Law enforcement must inform citizens of their right to refuse a warrantless search of their homes before an officer may enter, not after the warrantless entry has already occurred. **[Fifth Amendment]** When a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection. Thus, the trial court erred when it permitted the State to offer appellant's pretrial stipulation, which was made for the purpose of a Fourth Amendment challenge in a suppression hearing, to be admitted during the State's case-in-chief at appellant's trial over appellant's objection. (Clawson, C.: CR-19-780; 5-20-2020; Harrison, B.)

Terry v. State, 2020 Ark. 202 **[jury notes]** Arkansas Code Annotated § 16-89-125(e) requires: "After the jury retires for deliberation, if there is a disagreement between them as to any part of the evidence or if they desire to be informed on a point of law, they must require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of or after notice to the counsel of the parties." Noncompliance with the statutory provision gives rise to a presumption of prejudice, and the State has the burden of overcoming that presumption. Strict compliance with the rule may be waived where attorneys went with the judge to the jury room, everything that happened was reported in the record, and there was no possibility of prejudice. During its deliberations in appellant's case, the jury sent out two notes. The two notes were the circuit court's only communications with the jury. The circuit court found that the jury instructions and verdict forms that the jury received in response to its questions were part of the record and made part of the supplemental record. Appellant's attorney testified that he was aware of the notes and agreed with the responses to the notes. Further, the supplemental record demonstrates that when the jury posed the two questions, the circuit court met with the prosecutor and appellant's attorney and the parties agreed on a

response to the jury. Although the circuit court did not comply with Ark. Code Ann. § 16-89-125(e), based on the foregoing facts, the State was able to rebut the presumption of prejudice. (Pope, S.; CR-18-982; 5-21-2020; Baker, K.)

Harmon v. State, 2020 Ark. 217 **[discovery violation]** Appellant failed to establish that documentary filmmakers, who filmed the search of his home, were "State actors." Accordingly, the prosecution did not have an obligation to obtain the video footage that was taken during the search and turn it over to appellant. Additionally, the information on the footage was not imputed to the prosecution. The police did not possess the footage and did not take statements from the filmmakers. The State did not call the filmmakers as witnesses or introduce the footage into evidence. The prosecutor also disclosed the existence of the footage and contact information for the filmmakers more than a year before trial. Finally, a discovery violation did not exist because the filmmakers were not law-enforcement officers, nor were they acting as State agents and the State did not possess the video. It was undisputed that neither the police nor the prosecution had the video. As soon as the prosecutor found out about the presence of the filmmakers, she informed defense counsel and provided contact information for one of the filmmakers. She also attempted to get the video herself and later provided additional contact information to defense counsel more than a year before trial. Thus, the trial court did not abuse its discretion by not ordering the State to obtain the video. **[jury instructions]** A nonmodel instruction should be given only when the trial judge finds that the model instruction does not accurately state the law or does not contain an instruction on the subject. The model instruction on trafficking a controlled substance accurately states the law. It tracks the trafficking statute, Ark. Code Ann. § 5-64-440, which does not include "purpose to deliver factors." The AMCI 2d 64.440 "Note on Use" explains that this exclusion of those factors was intentional. In appellant's case, because AMI 2d 64.440 was an accurate statement of the law, it was an abuse of discretion for the trial court to give a non-AMI instruction that included six factors that the jury could consider in determining whether appellant had "purpose to deliver." (Clawson, C.; CR-18-1057; 5-28-2020; Wynne, R.)

CIVIL

Altenbaumer v. Southland Management Corp., 2020 Ark. App. 287 **[negligence]** It was undisputed that dog was on a leash in accordance with the pet policy when Altenbaumer fell. Furthermore, the pet policy clearly placed liability for injuries caused by tenants' pets on the tenant, not the apartment complex, and Altenbaumer presented no evidence to the contrary. There are no genuine issues of material fact in dispute, and as a matter of law, Southland owes Altenbaumer no duty pursuant to a statute or an agreement. Altenbaumer's negligence claim fails, and summary judgment to Southland was proper. (Cooper, T.; CV-19-654; 5-6-20; Switzer, M.)

Davis v. Pennymac Loan Services, LLC, 2020 Ark. 180 **[CERTIFIED QUESTION ANSWERED – STATUTORY FORECLOSURE]** The question of law presented concerns the requirement for creditors to comply strictly with the Arkansas Statutory Foreclosure Act. Specifically, the provision under section 18-50-104(b)(4) that requires the trustee's notice of default to set forth "[t]he default for which foreclosure is made." The bankruptcy court certified the following question:

> Whether mere acknowledgment that a default has occurred is sufficient for the trustee's Notice of Default and Intention to Sell or does the Arkansas statute require disclosure of the specific default under the terms of the mortgage agreement?

Section 18-50-104(b)(4) requires disclosure of the specific default under the terms of the mortgage agreement. Specificity beyond mere acknowledgement that a default has been made is required. (U.S. Bankruptcy Court; 5-7-20; Baker, K.)

Elliott v. Morgan, 2020 Ark. App. 297 **[sheriff/qualified immunity]** There need not be actual probable cause for an officer to be shielded by qualified immunity; an objectively reasonable belief that there was probable cause is enough. In the event that a genuine dispute exists concerning predicate facts material to the qualified-immunity issues, the defendant is not entitled to summary judgment on that ground. But once the predicate facts have been established, for the purposes of qualified immunity, there is no such thing as a "genuine issue of fact" as to whether an officer "should have known" that his conduct violated constitutional rights. The conduct was either reasonable under the circumstances, or it was not, and this is a question of law. In this case, Roberson told Officer Morgan at the scene that he had been struck, Officer Morgan observed that Roberson's ear was red where he said he had been struck, Roberson's mother said she had witnessed the incident, and Officer Morgan observed that Elliott appeared intoxicated and extremely agitated. As a matter of law, Officer Morgan's conduct in arresting Elliott for domestic battery was objectively reasonable. (Bailey, A.; CV-19-867; 5-13-20; Gruber, R.)

Motal v. City of Little Rock, 2020 Ark. App. 308 **[FOIA]** A citizen has the right under FOIA to make a copy of a public record. The term "copy" should be liberally interpreted to include the taking of a photograph using a personal cell phone. (Pierce, M.; CV-19-344; 5-13-20; Hixson, K.)

Stow v. Montgomery, 2020 Ark. App. 310 **[sex offender registration]** Stow was convicted in Colorado and is required to register as a sex offender for life there. He subsequently moved to Arkansas. He is required to register as a sex offender in Arkansas under the plain language of Ark. Code Ann. § 12-12-906(a)(2) because Stow would be required to register as a sex offender in the jurisdiction in which he was adjudicated guilty of a sex offense. As is clear on its face, this

statute contains no limitations with respect to when the sex offender was adjudicated guilty or required to register in the foreign jurisdiction. The statute makes clear that if the person is presently required to register in the foreign jurisdiction, he or she is required to register in Arkansas. (Pierce, M.; CV-19-616; 5-13-20; Hixson, K.)

Mickles v. Milam, 2020 Ark. App. 299 **[tortious interference with an inheritance expectancy]** The circuit court did not abuse its discretion when it dismissed Linda's complaint. The Arkansas Supreme Court has expressly declined to recognize tortious interference with an inheritance expectancy. This complaint fails to plead facts sufficient to make a claim. The complaint and supporting documents do not establish that she had an expectancy to anything other than that amount contained in the account at the time of Stiles's death. (Griffen, W.; CV-19-619; 5-13-20; Gladwin, R.)

Hall v. Immanuel Baptist Church, 2020 Ark. App. 301 **[licensee/invitee]** Hall was a member of a different church in a different town; Hall went to the church in Carlisle that day because she was invited by the church to attend the fiftieth-anniversary celebration; Hall stayed after the 11:00 a.m. service for the celebratory lunch; and Hall fell after helping her grandson prepare for the afternoon musical performance. On these undisputed facts, the primary purpose of the church's invitation and Hall's attendance was for the anniversary celebration. Certainly, the church was interested in Hall's being present, hence the mailed invitation, but this was primarily a social event. On these undisputed facts, the circuit court did not err in determining that Hall's status was that of licensee. In Hall's case, with no allegation and no evidence to support that the church breached the duty owed to licensees, there could be no error in granting summary judgment to the church. (Huckabee, S.; CV-19-688; 5-13-688; Klappenbach, M.)

Hutchinson v. McArty, 2020 Ark. 190 **[sovereign immunity]** McArty did not plead any facts that the governor acted illegally or that he refused to perform a purely ministerial action. Rather, the governor merely fulfilled his duty as governor by signing the FSMA into law. A complaint alleging illegal and unconstitutional acts by the State as an exception to the sovereign immunity doctrine must comply with fact-pleading rules. The circuit court erred in ruling that McArty pleaded sufficient facts to overcome the defense of sovereign immunity. (Fox, T.; CV-19-844; 5-14-20; Kemp, J.)

Walther v. Wilson, 2020 Ark. 194 **[attorney's fees]** Wilson's attorney was not able to present an actual amount of time spent preparing Wilson's case. Instead, Wilson provided other types of evidence that established the amount of work that Ogles performed in representing him in this illegal-exaction suit. In sum, the circuit court considered the *Chrisco* factors in its award of attorney's fees. **[prejudgment interest]** Here, the cause of action is an illegal-exaction matter. In order to prevail, a method must have existed for fixing the exact value of a cause of action at the time of the occurrence of the event that gives rise to the cause of action. In other words, there

must be a definite value for the damages at the time the illegal-exaction lawsuit was filed. However, here, according to the record, there is not an exact value of damages that gave rise to this action. Simply put, a sum certain for the alleged damages from the statutes that were challenged was not available at the time of the suit. Therefore, the circuit court's denial of Wilson's request for an award of prejudgment interest is affirmed. (Piazza, C.; CV-19-884; 5-14-20; Baker, K.)

Hankook Tire Co. v. Philpot, 2020 Ark. App. 316 **[expert testimony]** The circuit court did not abuse its discretion when it did not allow Hankook's expert to testify about an opinion that was not timely disclosed pursuant to the scheduling order. Additionally, the judge's finding that the opinion was not reliable was proper. **[sanction-attorney's fees]** The circuit court did not abuse its discretion awarding Philpot attorney's fees in the amount of $43,025 for Hankook's failure to timely provide discovery. A Rule 37 sanction was warranted for Hankook's failure to obey the order compelling discovery. The circuit court found—and Hankook does not dispute—that Hankook failed to obey the court's order when it omitted the adjustment data for thirty-three models of "similar green tires" from its supplemental responses. Under Ark. R. Civ. P. 37(b)(2)(E), Hankook was required to pay reasonable expenses, including attorney's fees, caused by the failure, and the judge's determination of the amount of the fees was proper. (Sullivan, T.; CV-19-461; 5-20-20; Murphy, M.)

Dollar General Corp. v. Elder, 2020 Ark. 208 **[directed verdict motion]** There was sufficient evidence to submit issues to jury that the sidewalk was unreasonably dangerous and that the landlords failed to maintain the sidewalk. **[expert testimony]** The circuit court did not err by allowing a chiropractor to testify as an expert regarding the causal connection between Elder's fall and the treatment provided by other physicians. The chiropractor had treated Elder since 2004 and was uniquely qualified to testify as to the causal connection between her fall and her subsequent medical procedures because he was familiar with her condition both before and after her fall. Carson's specific training and his expertise were relevant to the weight a jury might give to his testimony, but the circuit court did not abuse its discretion when it allowed him to provide causation testimony. **[prejudicial error]** By allowing Elder to give causation testimony regarding her treatments that were not rendered in temporal proximity to the occurrence of the accident, reversible error was not created. Much of Elder's treatment, including her surgeries, occurred more than a year after her fall. Thus, Elder's testimony, standing alone, cannot establish that the necessity of the treatment was causally related to her fall, and the circuit court erred by allowing her testimony in this regard. However, Carson's testimony did provide a causal link, and Elder's testimony was therefore cumulative. Because Carson's testimony, standing alone, was sufficient to establish the causal necessity of Elder's treatment, there was no prejudice in the admission of Elder's causation testimony. (Ryan, J.; CV-18-313; 5-28-20; Hudson, C.)

Hurd v. Ark. Oil and Gas Comm., 2020 Ark. 210 **[oil/gas regulation]** Two statutes authorize the agency's decision to reduce the royalty rates payable under the oil-and-gas leases in this case, Arkansas Code Annotated section 15-71-110(a)(1), and section 15-72-304(a). The latter governs integration orders. While there is no statutory provision specifically stating that the AOGC may reduce the royalty rate contained in a lease, there is also no statutory language expressly stating that the consenting parties, such as SWN, are responsible for payment of royalties when an uncommitted leasehold working-interest owner, such as Hurd Enterprises or Killam Oil, elects to go non-consent. State agencies possess such powers as are conferred by statute or are necessarily implied from a statute. Section 15-72-304 expressly authorizes the AOGC not only to enter integration orders but also to ensure that they are on just and reasonable terms. The supplemental orders were neither ultra vires nor arbitrary or capricious. (Fox, T.; CV-19-808; 5-28-20; Hudson, C.)

DFA v. Carpenter Farms, LLC, 2020 Ark. 213 **[sovereign immunity]** When a party appeals from an agency adjudication, the sovereign-immunity doctrine does not apply. The State's role is that of a "quasi-judicial decision-maker rather than a real party in interest." Sovereign immunity allows actions that are illegal, unconstitutional or ultra vires to be enjoined. An allegation of "ultra vires" or "illegal" acts by the State remains an exception to sovereign immunity that even following *Andrews* is "alive and well." **[circuit court jurisdiction]** All agree that the Commission's decision to disqualify Carpenter Farms took place without notice or a hearing. Nor did the Commission hear testimony, make factual findings, or render legal conclusions. The Commission issued a disqualification letter and never acted quasi-judicially. Indeed, the Commission's decision to disqualify Carpenter Farms took place administratively not judicially. There was no adjudication for a court to review and the circuit court lacked subject-matter jurisdiction over Carpenter Farms' challenge to the Commission's application of its own rules. But Carpenter Farms' allegation that the Commission failed to adopt model rules as required by law, or give a reason for not doing so, can proceed under the "ultra vires" or "illegal acts" exception. (Griffen, W.; CV-19-739; 5-28-20; Wood, R.)

DOMESTIC RELATIONS

Cherry v. Cherry, 2020 Ark. App. 294 **[including periodic payments in income determination; awarding alimony and modifying alimony; contempt for lesser payment of alimony despite "agreement" of parties; personal injury settlement determined nonmarital property; insuring alimony award]** The following issues were addressed: (1) Calculating income for purposes of alimony: The circuit court did not err in considering average monthly income to include the periodic, lump-sum amounts that the husband had received in the past and is guaranteed to receive in the future. (2) Awarding alimony as a substitute for division of nonmarital property: The circuit court considered Appellee's need and Appellant's ability to pay,

as well as additional factors. The circuit court heard much testimony regarding the parties' incomes and expenses and entered an order concerning alimony that was reasonable from the circumstances of the parties and the nature of the case. (3) Holding husband in contempt, calculating an arrearage, and imposing a fine for nonpayment of alimony: Husband acknowledged that he was aware that he was ordered to pay $2750 and that he was paying less because the parties had agreed to him paying a lower amount. He admittedly disobeyed the order, and the appellate court found no error in the contempt finding or calculation of arrearage. (4) Finding no change of circumstances to support a reduction or elimination of the alimony award: Husband contended that the circuit court failed to consider wife's need and his ability to pay. While the order may not say those words, the circuit court heard testimony and considered the parties' affidavits of financial means and briefs in denying his request for modification. The circuit court did not err in ultimately finding that wife's income remains limited and considerably less than husband's income. (5) Finding that two annuities resulting from husband's personal-injury settlement were not marital property: The appellate court found no error in the circuit court's ruling that both prongs of the Mason test were met and that the personal annuity payments were an exception to the marital property statute. There is no dispute that Appellant was severely injured in a car accident, is permanently disabled, and is unable to work. (6) Refusing to order husband to obtain a life-insurance policy or maintain her as beneficiary on the annuities to secure payment of alimony after his death. Because alimony generally terminates upon the death of the payor unless otherwise ordered by the court or agreed to by the parties, and because this matter does not involve any payment for marital property or child support, the appellate court found no error in the circuit court refusing to order husband to insure the alimony award in the event of his death. (Singleton, S.; CV-19-363; 5-14-20; Gruber, R.)

Szwedo v. Cyrus, 2020 Ark. App. 319 [**attorney ad litem report admissible; alienating behavior as material change in circumstance to change custody even though it occurred prior to last court order and continued]** The attorney ad litem's report, required by Administrative Order No. 15, was admissible as a matter of law and does not violate Arkansas Rule of Professional Conduct 3.7, which prohibits an attorney from acting as an advocate at a trial in which he or she was likely to be a fact witness. There was no indication in the record that Appellant sought to have the ad litem testify as a witness; therefore, the appellate court found no error. The circuit court also properly considered the evidence of Appellant's worsening alienating behavior and the impact that behavior was having on the children in determining whether there had been a material change in circumstances. To accept Appellant's argument that it could not be a change in circumstances because she had always done it would reward Appellant for her behavior the court warned against and could lead to further loss of time with the children. The circuit court here found that the lack of cooperation was due to Appellant's inability or unwillingness to cooperate with Cyrus to parent their children. The circuit court found the actions to be essentially unilateral and refused to reward Appellant for creating the

situation, and the appellate court found no error in the award of joint custody. (Smith, V.; CV-19-546; 5-27-20; Virden, B.)

PROBATE

Kohler v. Croney, 2020 Ark. App. 289 **[single parent adoption by father; mother's consent not required]** The appellate court found no error in the circuit court granting Appellee's petition for adoption. Appellee had been the sole custodian and Appellant had not had any visitation since May 2017. Appellant had provided little support and no gifts or other supplies to the child in those two years. Appellant had been in and out of jail, had used illegal drugs, and had no stability in her life. The child did not have a relationship with her half siblings, and she had not had any interaction with Appellant's family for more than one year. The child was thriving in Appellee's care. There was sufficient evidence to support that Appellant had failed to have contact with her child and failed to support for more than one year. The circuit court expressly stated that it did not consider her incarcerations, drug use, or injury sufficient justification to excuse her failure to maintain contact and support. The circuit court thoughtfully recites the applicable law and evaluated the evidence at length, including the best interest of the child. (Layton, S.; CV-19-670; 5-6-20; Vaught, L.)

ITMO the Estate of Charles Cook, Deceased, 2020 Ark. App. 292 **[LLC passed to surviving member outside of probate; therefore, member not required to pay estate for one-half]** The circuit court considered whether the operating agreement signed by both the decedent and his grandson ("Brooks") authorized transfer of decedent's LLC interest outside of the estate to Brooks or whether decedent's interest should transfer to his estate. First, because the question before the circuit court involved the administration, settlement, and distribution of the decedent's estate, namely how his interest in the LLC will be distributed, the appellate court found no error in the circuit court's determination of its jurisdiction. Second, while the circuit court properly acknowledged that this was a contractual transfer, the appellate court found that the circuit court erred in finding that this contractual transfer lacked consideration and could not be properly effectuated. The operating agreement's language clearly and unambiguously establishes that the decedent and Brooks intended for their ownership, interest, and income from the LLC to pass automatically and immediately to the surviving member in the event of either of their deaths. The operating agreement between the decedent and Brooks delineated multiple mutual promises and obligations including both contributing initial capital to the LLC and both agreeing to operate and manage the company. Also, the provision directing that the interest of a member upon his death shall immediately pass to the surviving member applied to both the decedent and Brooks, and both parties gave up the rights for their respective estates and heirs to receive a buy-out from the other party in the event of death, incompetency, or bankruptcy. As such, their mutual promises and obligations supplied the necessary consideration to form a valid, enforceable

contract. Because the decedent and Brooks created an LLC under the authorizing statutes and drafted an operating agreement that included terms that clearly intended a member's interest to pass to the surviving member upon either of their deaths, the appellate court held that the decedent's interest transferred upon his death to Brooks rather than to the estate. (King, K.; CV-18-1033; 5-6-20; Murphy, M.)

ITMO the Guardianship of Katheryn Grace Kennedy, 2020 Ark. App. 311 **[intervention in guardianship case]** Appellant argued that he established a meaningful relationship with the Ward sufficient to warrant intervention in her guardianship matter. He testified that he was the "next friend," maintained a friendship with the Ward for several years, and acted as a mentor to her. Appellant was not allowed to intervene as a matter of right because he has no recognized interest in the subject matter of the primary litigation and the circuit court found that Appellant was unable to prove the Ward's interests were not adequately represented by existing parties. The appellate court also found no error in the denial of permissive intervention, as the evidence only established that Appellant had a general interest in Kennedy's wellbeing. His involvement with her was not as extensive as other cases he cited, as he was never a former caretaker, had never been her guardian, and never maintained a healthcare proxy for her. Further, the appellate court found it significant that the circuit court gave due regard to appointing a blood relative and to the ward's preference. (Blatt, S. CV-19-689; 5-14-20; Murphy, M.)

JUVENILE

Cloninger v. Ark. Dep't of Human Servs., 2020 Ark. App. 282 **[TPR—sufficiency of the evidence; insufficient services]** Because termination was based on grounds of aggravated circumstances, the appellant's argument that the department failed to provide sufficient reunification services is without merit. When termination is based on aggravated circumstances, reunification services are not required due to the unlikelihood of successful reunification. In this case, appellant's three-year prison sentence, the young age of the children, and the appellant's lack of progress working with case plan all indicated that reunification was unlikely. Finding no clear error, termination was affirmed. (Sullivan, T.; JV-18-58; May 6, 2020; Gruber, R.)

Dean v. Ark. Dep't of Human Servs., 2020 Ark. App. 286 **[TPR – best interest]** Infant born to mother who was incarcerated was adjudicated dependent and the mother's rights were later terminated. The appellate court rejected the mother's arguments that it was not in the child's best interest to terminate her rights while the father's rights were still intact. Termination of one parent's rights are appropriate when in the child's best interest and necessary to provide permanency and to protect a child's health, safety, and welfare. (Branton, W.; JV-18-7; May 6, 2020; Klappenbach, N.)

Gill v. Ark. Dep't of Human Servs., 2020 Ark. App. 284 **[Adjudication – jurisdiction; UCCJEA]** Mother challenged the court's jurisdiction over dependency-neglect proceeding, claiming that she and the children primarily resided in Missouri rather than Arkansas. After considering evidence from the department that the primary residence and home state of the children is Arkansas and evidence from the mother that the primary residence and home state is Missouri, the court found Arkansas to be the primary residence and home state and exercised jurisdiction. On appeal, the mother argued that the trial court improperly applied the jurisdiction statute found in the Juvenile Code rather than applying the UCCJEA as it should have. The appellate court affirmed, confirming that the UCCJEA applies in dependency-neglect proceedings and finding that the trial court properly applied the UCCJEA in determining the home state of the children. (Jackson, S.; JV-19-78; May 6, 2020; Virden, B.)

Schweitzer v. Ark. Dep't of Human Servs., 2020 Ark. App. 288 **[TPR—validity of consent]** Mother challenged order terminating her parental rights, but, as neither of the issues raised on appeal were raised below, the appellate court refused to consider the arguments. Termination was affirmed. (Hendricks, A.; JV-18-194; May 6, 2020; Whiteaker, P.)

Johnson v. Ark. Dep't of Human Servs., 2020 Ark. App. 313 [**TPR—sufficiency of the evidence]** Order terminating parental rights was entered after allegations of sexual abuse involving young child prompted opening of dependency-neglect case. Multiple protective service cases had been attempted by the department previously to assist the family with serious environmental issues in the home, methamphetamine use by parents, and issues of domestic violence in the home. Considering the lack of progress made by the parents previously and the lack of effort put forth in the dependency-neglect case, the finding of aggravated circumstances by the trial court was not erroneous nor was the finding that termination was in the best interest of the children. Finding no clear error, the termination order was affirmed. (Sullivan, T.; JV-19-13; May 20, 2020; Gladwin, R.)

Belt v. Ark. Dep't of Human Servs., 2020 Ark. App. 320 **[TPR—best interest]** Parents appealed order terminating rights to their six children based on multiple statutory grounds. On appeal, they did not challenge the grounds for termination but argued that termination was not in the children's best interest. However, the parents' repeated failure to comply with the court orders demonstrated the potential harm that could occur if the children were returned. Finding no clear error, the order was affirmed. (Zuerker, L.; JV-499; May 20, 2020; Vaught, L.)

Walton v. State, 2020 Ark. App. 318 **[Motion to transfer]** The order denying the juvenile's motion to transfer to juvenile court was not erroneous where the trial court made written findings on each of the statutory factors. (Alexander, T.; CR-18-1354; May 27, 2020; Abramson, R.)

DISTRICT COURT

*Jorja Trading, Inc. et. al vs. Leah Willis and Adrian Bartholomew***,** 2020 Ark. 133**, [Arbitration Agreements] [Contract Formation] [Consideration] [Mutual Obligations]** Jorja Trading, Inc. filed a motion to compel arbitration, and it was denied after the circuit court concluded the arbitration agreement lacked mutuality of obligation in the following three areas: (1) it reserved the right of both parties to seek self-help remedies, (2) it provided that both parties waive class-action lawsuits, and (3) it allowed appellants to reject appellees' selection of an arbitrator. Additionally, the circuit court found that even if the arbitration agreement was valid, the appellants waived it by first proceeding in district court. The supreme court reversed. The failure of all parties to receive precisely the same benefit from the arbitration agreement did not negate the entire contract's mutuality of obligation, that the class-action waiver did not violate Arkansas contract law, and the agreement did not allow appellants to avoid arbitration by simply refusing to consent to appellees' selection of an arbitrator. Additionally, this court held arbitration had not been waived as the plain language of the installment-sales contract stated that seeking judicial relief for a monetary judgment was not a waiver to arbitration. (Threet, J., 72CV-16-2237; 4-9-2020; Wood, R.)

*Lenora Robinson vs. Robert Murphy***,** 2020 Ark. App. 293**, [Credibility Determinations] [Bench Trials]** Lenora Robinson and Robert Murphy entered into an oral contract for the remodel of a property owned by Robinson. The circuit court granted a judgment in favor of Murphy following a breach of contract dispute over the construction work. The circuit court found Murphy's testimony to be credible regarding the driveway work performed and a refund issued to Robinson. On appeal, affirmed. (Thyer, C., 47OCV-18-163; 5-6-2020; Brown, W.)