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CRIMINAL

Simon v. State, 2017 Ark. App. 209 **[double jeopardy]** The conduct that led to appellant being found in contempt of a temporary restraining order in a divorce proceeding was different than the conduct that formed the basis for appellant being charged with the offense of unlawful distribution of sexual images or recordings. To establish that the offense of unlawful distribution of sexual images or recordings had occurred the State was not required to prove the same elements as were necessary to establish contempt. Additionally, contempt is not a lesser-included offense of unlawful distribution of sexual images or recordings. Thus, the trial court did not err when it denied appellant's motion to dismiss the criminal charges based upon double-jeopardy grounds. (Wilson, R.; CR-16-617; 4-5-17; Hixson, K.)

Gamet v. State, 2017 Ark. App. 206 **[motion to suppress]** Because appellant was not in custody for purposes of *Miranda* when he made various statements to law enforcement, the trial court did not err when it denied his motion to suppress the statements. **[allocution]** Failure to allow allocution as provided for in Ark. Code Ann. § 16-90-106 is not reversible error on appeal when the appellant did not object in the trial court. (Arnold, G.; CR-16-880; 4-5-17; Glover, D.)

Swain v. State, 2017 Ark. 117 **[Rule 37]** The trial court did not clearly err when it determined that defense counsel's decision to call a witness was reasonable trial strategy and denied appellant's request for postconviction relief. (Lindsay, M.; CR-16-804; 4-6-17; Wood, R.)

Christopher v. State, 2017 Ark. App. 237 **[motion to suppress]** Law enforcement officials had probable cause to believe that appellant violated a traffic law. Thus, the initial stop of appellant's automobile was lawful. Once the automobile was stopped, law enforcement officials smelled marijuana, which provided probable cause to search the vehicle. Additionally, law enforcement was permitted to conduct a warrantless search of appellant's vehicle, which was located in a public parking lot, pursuant to Ark. R. Crim. Pr. 14.1. Because the stop and search of appellant's car was lawful, the trial court did not err when it denied appellant's motion to suppress. (Wright, R.; CR-16-1006; 4-19-17; Klappenbach, M.)

Noble v. State, 2017 Ark. 142 **[sufficiency of the evidence; first-degree murder; committing a terroristic act]** There was substantial evidence to support appellant's convictions. (Sanders, E.; CR-16-228; 4-20-17; Wood, R.)

Hunter v. State, 2017 Ark. App. 256 **[sufficiency of the evidence; engaging in a continuing criminal enterprise]** There was substantial evidence to support appellant's conviction. **[illegal sentence]** By imposing a suspended sentence, which was prohibited by Ark. Code Ann. § 5-64-405 and Ark. Code Ann. § 5-64-104 (e)(1)(A), following a conviction for the offense of engaging in a continuing criminal enterprise, the trial court overstepped its authority. **[habitual offender]** The habitual-offender statute does not create a distinct additional offense or independent crime but simply affords evidence to increase the punishment and to furnish a guide for the court or jury in fixing the final punishment in event of conviction of the offense charged. **[sentencing standards]** Because the testimony against appellant was overwhelming, and because the presumptive sentencing standards are merely advisory, the trial court did not abuse its discretion by deviating upward by 250% from the Arkansas Sentencing Commission's presumptive sentence when it sentenced appellant. (Talley, D.; CR-15-577; 4-26-17; Harrison, B.)

Hoey v. State, 2017 Ark. App. 253 **[double jeopardy]** Because appellant did not object when the trial court *sua sponte* declared a mistrial during his first trial, double-jeopardy principles were not violated when appellant was thereafter retried. **[motion to suppress]** The initial stop of appellant's vehicle, which was based upon a traffic violation, was lawful. Thereafter, before the traffic stop was concluded, law enforcement officials developed reasonable suspicion that appellant was involved in criminal activity, which allowed law enforcement to detain appellant beyond the time necessary for the initial stop. Additionally, law enforcement officials acted diligently in securing the closest "drug dog" to conduct an air-sniff around appellant's car. The officer's continued detention of appellant was reasonable under the circumstances to determine the lawfulness of his conduct. **[admission of evidence]** The trial court did not abuse its discretion when it admitted text messages, photographs, and internet searches from appellant phones because the information was authenticated pursuant to Ark. R. Evid. 901 and the evidence established that appellant was involved in a "scheme" pursuant to Ark. R. Evid. 404(b). (Johnson, K.; CR-16-681; 4-26-17; Gladwin, R.)

Payne v. State, 2017 Ark. App. 263 **[sufficiency of the evidence; possession of methamphetamine' possession of drug paraphernalia]** There was substantial evidence to support appellant's convictions. **[new trial]** The trial court did not abuse its discretion when it denied appellant's motion for a new trial, which was based upon an allegation of newly discovered evidence. (Webb, G.: CR-16-948; 4-26-17; Hixson, K.)

Sandrelli v. State, 2017 Ark. 156 **[Rule 37]** The circuit court did not clearly err when it concluded that trial counsel's decision not to call character witnesses at appellant's trial was based upon reasonable professional judgement. Additionally, the circuit court did not clearly err when it found that trial counsel's advice to appellant that he should not testify at his trial was also based upon reasonable professional judgment. Accordingly, the circuit court decision to deny appellant's Rule 37 petition was not clearly erroneous. (Fitzhugh, M.; CR-16-606; 4-27-17; Wood, R.)

Morris v. State, 2017 Ark. 157 **[contempt]** There was substantial evidence before the circuit court with which to conclude that appellant was in willful contempt of the court's scheduling order by arriving approximately thirty minutes late for a jury trial. **[fine for contempt]** A judge's power to punish for criminal contempt is not limited by Ark. Code Ann. § 16-10-108. After reviewing the facts of the case, the Supreme Court concluded that the purpose of the punishment for contempt could be accomplished by reducing appellant's fine from $4,000 to $2,000. (Gibson, B.; CR-16-969; 4-27-17; Wynne, R.)

Stanton v. State, 2017 Ark. 155 **[character evidence]** The trial court abused its discretion when it permitted the State to introduce testimony regarding appellant's character for lack of peacefulness because there was no testimony on that characteristic for the State to rebut. (Johnson, K.; CR-16-809; 4-27-17; Hart, J.)

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

Cave v. State, 2017 Ark. App. 212 (delivery of methamphetamine and oxycodone; maintaining a drug premises) CR-16-860; 4-5-17; Murphy, M.

Ressler v. State, 2017 Ark. App. 208 (rape) CR-16-753; 4-5-17; Vaught, L.

Vega v. State, 2017 Ark. App. 259 (attempted murder in the second degree; felon in possession of a firearm) CR-16-912; 4-26-17; Whiteaker, P.

Savage v. State, 2017 Ark. App. 261 (theft of property) CR-16-838; 4-26-17; Vaught, L.

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:

Payne v. State, 2017 Ark. App. 265 (suspended sentence) CR-16-1034; 4-26-17; Murphy, M.

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:

Mardis v. State, 2017 Ark. App. 233 (Arnold, G.; CR-16-813; 4-19-17; Virden, B.)

Shadwick v. State, 2017 Ark. App. 243 (Pearson, W.; CR-16-837; 4-19-17; Brown, W.)

Vaughn v. State, 2017 Ark. App. 241 (Yeargan, C.: CR-16-769; 4-19-17; Hixson, K.)

Ross v. State, 2017 Ark. App. 234 (Hearnsberger, M.; CR-16-713; 4-19-17; Gladwin, R.)

Blackwell v. State, 2017 Ark. App. 248 (Johnson, L.; CR-16-833; 4-26-17; Abramson, R.)

CIVIL

Nissan, Inc., v. Harlan, 2017 Ark. App. 203 **[default]** The circuit court committed no abuse of discretion in denying Nissan's motion to set aside the default judgment because Nissan failed to establish a legally acceptable reason or excuse for not answering Harlan's complaint. Once a default judgment has been entered, Rule 55(c) requires a two-step analysis before a defaulting defendant can succeed in having a default judgment set aside. Nissan did not make a threshold showing by proving that one of the four enumerated categories of legally acceptable reasons or excuses existed to justify setting aside the default judgment. Failure to properly attend to business and answer a lawsuit does not constitute a legally acceptable reason or excuse. Because the threshold was not met, the second step of the analysis --- whether Nissan had a meritorious defense or whether Harlan would have been prejudiced had the motion been granted --- is not addressed. The circuit court's denial of Nissan's motion to set aside the default judgment was proper because the circuit court did not act improvidently, thoughtlessly, or without due consideration. The circuit court's findings on damages are supported by the evidence. Award of attorney's fees was not an abuse of discretion. (Philhours, R.; CV-16-590; 4-5-17; Gladwin, R.)

Panhandle Oil, Inc. v. BHP Petroleum, LLC, 2017 Ark. App. 201 **[dismissal]** The claim for equitable accounting/appointment of a special master was properly dismissed pursuant to Rule 12(b)(6). The circuit court abused its discretion in dismissing the claims of specific performance, breach of contract, reformation, and unjust enrichment pursuant to Rule 12(b)(6). (Murphy, M.; CV-16-884; 4-5-17; Abramson, R.)

Farm Bureau Ins. v. Davenport, 2017 Ark. App. 207 **[insurance]** At issue in the instant case is the "unoccupancy" provision in the insurance policy. This provision is contained in the policy under the heading of "CONDITIONS." The provision, however, states that Farm Bureau "shall not be liable for any property loss if you vacate or fail to occupy the dwelling on the residence premises for a period of sixty (60) consecutive days." This language presupposes that coverage exists but can be eliminated by Farm Bureau based on some action on the part of the insured. Therefore, the policy language is an exclusion, despite the caption heading. Farm Bureau argues that there was inadequate evidence of occupancy by an insured. Essentially, it claims that Kevin Davenport's two overnight stays were insufficient to render the home "occupied." However, because the question whether a building is unoccupied at the time a loss occurs is one of fact for the jury, the circuit court did not err in denying Farm Bureau's motion for directed verdict. (Mitchell, C.; CV-16-842; 4-5-17; Whiteaker, P.)

City of NLR v. Pfeifer, 2017 Ark. 113 **[mandamus]** Arkansas Code Ann. section 14-88-207 states that the municipal governing body "shall make a finding as to whether the petition is signed by a majority in assessed value of the property owners" and that finding "shall be expressed in an ordinance." Here, the city council failed to perform its duty in making the requisite findings pursuant to section 14-88-207. Thus, the circuit court did not abuse its discretion in granting Pfeifer's petition for writ of mandamus. (Piazza, C.; CV-16-313; 4-6-17; Kemp, J.)

Producers Rice Mill, Inc. v. Rice Hull Specialty Products, Inc., 2017 Ark. App. 219 **[summary judgment- indemnity agreement]** There remain genuine issues of material fact to determine whether the indemnity provision applies in the circumstances of this case. One such issue is the exact nature of the "services or other activities" provided to appellant by appellee and whether those services include Mr. Moore's pickup of the rice hulls. In addition, whether appellant's negligence was the sole cause of the accident remains a question of fact because the indemnity provision applies to losses "directly or indirectly arising out of, relating to, or otherwise resulting in whole or in part" from appellee's services to appellant. Also, the evidence in the record does not conclusively establish the contractual relationships between the parties for this particular transaction, and thus, factual questions remain regarding whether Abe Q was acting "on behalf" of appellee at the time of the accident. (Henry, D.; CV-16-996; 4-12-17; Gruber, W.)

Hurd v. Hurt, 2017 Ark. App. 228 **[summary judgment/landlord-tenant]** The Hurts contend that summary judgment was appropriate because they did not assume by conduct the duty to maintain or repair the gas line to the furnace. When a landlord undertakes to repair the premises, the landlord is liable for any negligence in making those repairs. Here, Hurd argues that the Hurts assumed by conduct the duty of repairing his refrigerator and that there is a genuine issue of material fact as to whether they made the repairs in a reasonable manner. Whether the facts demonstrate that the Hurts performed the repairs to the refrigerator in a reasonable manner or whether the facts rise to the level of negligence is for the jury to decide, summary judgment was not appropriate. (Fowler, T; CV-16-621; 4-12-17; Vaught, L.)

Shannon v. Steinberg, 2017 Ark. App. 231 **[arbitration]** Appellant contends that the trial court erred by failing to vacate the arbitration award because the arbitrator refused to consider proper evidence material to the controversy or to allow appellant a fair hearing. The trial court's only duty was to determine whether the arbitrator acted within his jurisdiction and not to evaluate whether the dispute was correctly decided. Despite his argument, appellant has failed to prove a statutory ground for vacating the award. The ground claimed by appellant is not supported by the evidence. (Fox, T.; CV-16-933; 4-12-17; Brown, W.)

Morris v. Knopick, 2017 Ark. App. 225 **[contract]** When a contract contains general and specific provisions relating to the same subject, the specific provision controls over more general terms. The provisions of the real-estate contract can be read harmoniously. The alleged value of the tools was reduced to writing and included as a term of the contract. This specific provision controlled over the more general provision that disallowed reliance on representations by the seller. The trial court did not err by failing to apply the contractual provision that the buyer will not rely on any warranties, representations, or statements of the seller. **[fraud]** The element of justifiable reliance was supported by the evidence. Misrepresentations regarding the value of tools were actionable as fraud. Damages were proven based upon the misrepresented valuation of the tools. (Putman, J.; CV-16-373; 4-12-17; Glover, D.)

Parker v. Parker, 2017 Ark. App. 242 **[foreclosure]** The promissory note, while inartfully drawn, clearly sets forth the principal amount of the loan, the date on which the payment was due each month, and a description of the property pledged as security for the note. The interest rate could be calculated from the face of the note and the mortgage. Although the promissory note itself does not specify the time for payment, when the note and mortgage are read together, it is clear that the note matures in 2036, or thirty years after the execution. The circuit court's finding that the note and mortgage constituted a valid contract is not clearly erroneous. **[conversion]** The circuit court reached the correct result in finding that appellants did not have a claim for conversion. Ordinarily, a debtor has a right to direct the application of his or her payments. Here, the gist of appellants' complaint is that they made monthly payments to appellees for the property taxes, that appellees held the money in escrow instead of remitting the taxes on a monthly basis, and then refused appellants' request to apply the accumulated funds being held for the taxes to the balance due on the note when appellants became delinquent in their interest-only payments. Appellants waived any right of reallocation because their request was not made when the payments were made. It was only after appellants had missed note payments that they attempted to reallocate funds in an effort to extricate themselves from a default under the note. Moreover, the money was ultimately applied to appellants' taxes as agreed. **[deceptive practice]** The circuit court found that appellants were not damaged, and actual damages are required for a private right of action for an ADTPA violation. (Fitzhugh, M.; CV-16-141; 4-19-17; Murphy, M.)

R&L Carriers, LLC v. Markley, 2017 Ark. App. 240 **[implied immunity]** It is argued that the worker's employer can be liable for negligence under the theory of implied indemnity. But such it not the case. In cases where implied immunity is found, statutes or regulations imposed on the indemnitor a specific and supervisory duty over the indemnitee. No such relationship exists here. The relevant statutes and safety regulations that MCTC is said to have violated merely create a duty of safety to the public and MCTC's employees. There was no special relationship between

MCTC and R&L that gave rise to an implied duty to indemnify. **[negligence]** Appellants argue that there was no indication to Wethington that someone would be injured by his attempt to drive under the low-hanging line. Although Wethington testified that he did not see Markley until after the accident had occurred and that the evidence showed that there were no warnings to indicate that work was being done to the line, there is substantial evidence to establish that Wethington foresaw danger. Wethington admitted seeing a low-hanging line and understood it was possible that someone could be hurt if the line became caught on his truck. Wethington also admitted seeing the bucket truck. Although the precise harm that resulted may not have been foreseeable to Wethington, there was substantial evidence of an appreciable risk of harm. **[evidentiary rulings]** The alleged evidentiary rulings were not prejudicial. (Bryan, B.; CV-16-39; 4-19-17; Vaught, L.)

Dept. State Police v. Keech Law Firm, 2017 Ark. 143 **[FOIA]** The circuit court did not clearly err when it found that the investigation into the Stapleton murder was not open and ongoing. Stapleton was murdered in 1963. The record reveals sparse activity by ASP from 1965 until 2014. In challenging the circuit court's ruling, ASP points to various documents in the case file that, according to it, show an active and ongoing investigation. Yet every action that ASP highlights as evidence of an "ongoing" investigation took place after Keech filed the lawsuit in this case. Certainly, an investigation could grow stagnant over a period of years and new information could reignite it. However, the circuit court reviewed the entire case file from 1963 through and including the renewed efforts by ASP in 2014 and concluded that these efforts were not sufficient to make this investigation "open and ongoing." This is a 54-year-old murder case. No charges have been brought or appear to be imminent. The victim's family and the public are entitled to know how the officials in this case performed their duties. (Pierce, M.; CV-16-545; 4-20-17; Wood, R.)

Higgins v. Thornton, 2017 Ark. App. 258 **[deed]** After Thornton provided prima facie evidence that the deed was not delivered prior to Burnett's death, Higgins failed to meet proof with proof and to demonstrate the existence of a material issue of fact. Summary judgment was appropriate under these facts. (Parker, A.; CV-16-984; 4-26-17; Glover, D.)

Pulaski County Special School Dist. v. Lewis, 2017 Ark. App. 264 **[schools]** The trial court did not err when it ruled that the 15-minute physical-activity period in question was "noninstructional" duty under Arkansas Code Annotated section 6-17-117(2)(b). (Fox, T.; CV-16-915; 4-26-17; Hixson, K.)

McClurken v. Willis, 2017 Ark. App. 247 **[service extension]** Appellant's motion for extension of time to serve both defendants was filed on May 17, 2016, the day before the 120-day filing period had expired. The second amended complaint was not filed until May 16, 2016, and appellant alleged in his motion to extend that he had unsuccessfully attempted service of that complaint on both Lauren and Mark. The court ruled simply that appellant's motion for extension to serve was untimely. The motion was not untimely. It was filed on May 17, 2016, one day before the end of the filing period. Therefore, the circuit court's denial of appellant's motion to extend the time for service on the basis of untimeliness was an abuse of discretion. **[dismissal]** It is established law that when a complaint is dismissed under Rule 12(b)(6) for

failure to state facts upon which relief can be granted, the dismissal should be without prejudice. (Fitzhugh, M.; CV-16-698; 4-26-17; Gruber, R.)

Preferred Medical Assoc. v. Abraham Trust, 2017 Ark. App. 260 **[constructive eviction]** Evidence supports court's finding that constructive eviction was not established. At trial, appellants presented evidence that the Abrahams interfered with their use of the leased premises by restricting their use of the leased space; failing to timely provide them with a key to the building; not allowing them to put up a sign outside the building; inhibiting their use and decoration of their office space; and otherwise preventing their full, quiet enjoyment of the leasehold. The evidence on this point was in conflict. Dr. Abraham said that he had received no serious complaints from appellants during their shared occupancy. In support of his testimony, he cited a letter written to him by Dr. Wozniak in which Dr. Wozniak stated that appellants were vacating the premises due to "unforeseen circumstances" and thanked Dr. Abraham for his "cooperation and hospitality." Additionally, witness Sam Sparks, who was an employee of both Dr. Abraham and PMA, testified that he attended a meeting in July 2010 where appellants discussed moving PMA to another location. According to Sparks, the reason given by appellants was that profits were down; no other reason was mentioned. **[mitigation]** Dr. Abraham testified that he ran an ad in the paper seeking to rent the space vacated by appellants. He also said that he talked to several doctors, and to other people who knew doctors, to see if anyone currently in the area, or who might be moving to the area, needed office space. The court found these mitigation efforts to be reasonable, and appellants offer no convincing argument to the contrary. The circuit court did not clearly err in its finding that the landlord attempted to mitigate his damages. (Webb, G.; CV-16-552; 4-26-17; Whiteaker, P.)

DOMESTIC RELATIONS

Fudge v. Dorman, 2017 Ark. App. 181 **[change in custody—material change in circumstances; best interest]** The circuit court found a change in circumstances to justify a change in custody from the appellant father to the appellee mother, who the circuit court found had changed her circumstances positively to remedy the reasons the father was awarded custody in the first place. The Court of Appeals found that the circuit court failed to make specific findings of a material change in circumstances. Further, the Court said, a change in circumstances of the noncustodial parent is not alone sufficient to justify a change of custody. In addition, the court put the interests of the mother before the best interest of the children. The decision was reversed and remanded. (Guthrie, D.; No. CV-16-651; 3-51-17; Murphy, M.)

Poland v. Poland, 2017 Ark. App. 178 **[mootness; order of protection—sufficiency of the evidence]** The appellant appealed from an order of protection that prohibited him from contacting his wife and limited his contact from his ten-year-old daughter for one year, contending that insufficient evidence supported the order that he committed domestic abuse against either of them. The Court of Appeals decided, on its own motion as a threshold matter, the issue of mootness. By the time the case was presented to the appellate court, the order of protection had expired. The Court held that the appeal is not moot "because of the collateral consequences that attend a finding of domestic abuse," quoting the Court in a previous opinion that "although the issuance of an order of protection is not a criminal matter, 'criminal or not,

there is and should be a degree of opprobrium attached to a finding that a person has committed acts of domestic abuse.'" The Court said that a case generally becomes moot when a controversy ceases to exist between the parties at any time in the case, including on appeal. Two recognized exceptions to the mootness doctrine involve issues capable of repetition that evade review and issues that raise consideration of substantial public interest which, if addressed, would prevent future litigation. In this case, the court introduced a third exception, collateral consequences, which had been adopted in a previous criminal felony case in which the sentence was served before the appeal was submitted. The plurality noted that expired orders of protection may have ongoing collateral legal consequences, such as the requirement to disclose in a future petition any prior filings for an order of protection. It can also have consequences in a child-custody dispute. The Court also found that the evidence was sufficient and affirmed the order of protection. There was a vigorous dissent to this 5-4 decision. (Reif, M., No. CV-16-414; 3-15-17; Hixson, K.)

Wornkey v. Deane, 2017 Ark. Ark 176 **[order of protection—sufficiency of the evidence]** The Court of Appeals found that the victim's testimony, to which the circuit court gave greater weight, is sufficient evidence from which the circuit court could reasonably find that the appellant committed domestic abuse by physically harming and assaulting the appellee and inflicting fear of imminent physical harm, bodily injury or assault on her. The Court held the circuit court's decision to enter a final order of protection was not clearly erroneous, and it affirmed. (Cottrell, G.; No. CV-16-481; 3-15-17; Vaught, L.)

Baker v. Office of Child Support Enforcement, 2017 Ark. App. 173 **[modification of child support--abatement]** The appellant attempted to get an abatement of his child support obligation and child-support arrearages based upon a material change in circumstances. The appellant asserted that he had been incarcerated since November 2013 with no means to pay child support, and that one child had reached majority and graduated from high school. Citing *Reid v. Reid*, 57 Ark. App. 289, 944 S.W.2d 559 (1997), a case in which the payor also requested abatement during his period of incarceration, and in which the Court had relied upon the clean-hands doctrine, the Court noted that the *Reid* Court found that the incarceration was the appellant's own fault and thus that he had come to court with unclean hands. The Court said that although a finding of inability to earn can support a reduction in child support, the circuit court is not required to reduce those obligations, particularly where the obligor is deemed at fault for causing his own inability to work. The decision was affirmed. (Cooper, T.; No. CV-16-613; 3-15-17; Klappenbach, M.)

McCrillis v. Hicks, 2017 Ark. App. 221 **[joint custody; visitation; in loco parentis]** The parties were formerly domestic partners, now engaged in a custody, visitation, and child-support dispute over the appellant's biological child. The circuit court granted the appellee visitation and joint custody pursuant to a finding that she stood in loco parentis to the child; found that appellant was equitably estopped from denying the appellee's visitation with the child; and ordered that child-support payments from appellee be placed in an educational trust. On appeal, the appellant contended the court erred in those findings and orders. The Court of Appeals affirmed the circuit court's finding that the appellee stood in loco parentis to the child, reversed the court's award of joint custody, and affirmed on the issue of visitation. The Court affirmed that appellant is equitably estopped from denying appellee visitation, reversed the order that child support be paid

into an educational trust, and remanded the issue of child support be determined consistent with its opinion. On the constitutional issue of custody, the Court of Appeals cited *Troxel v. Granville*, 530 U.S. 57 (2000), for the point that the Due Process Clause of the Fourteenth Amendment protects the rights of parents to direct and govern the care, custody, and control of their children. There was no finding of parental unfitness on the part of the appellant. In fact, the appellee made no finding that the appellant was unfit and praised her capability as a mother. The circuit court found her to be fit. Therefore, in accordance with caselaw, the Court of Appeals held that the circuit court's decision to award custody to the appellee was in error, prompting the reversal on that point. The issue of visitation, however, was another matter. The Court based its decision on the circuit court's finding that the appellee stood in loco parentis to the child and determined that visitation was appropriate, citing *Bethany v. Jones*, 2011 Ark. 67, 378 S.W.3d 731. The Court noted that the appellant urged it to reverse *Bethany*, but noted that the Court of Appeals "is not at liberty to overturn a decision of the Arkansas Supreme Court." (Compton, C.; No. CV-16-612; 4-12-17; Virden, B.)

Montez v. Trujillo, 2017 Ark. App. 220 **[change of custody—material change in circumstances; modification of child support]** The circuit court denied the appellant father's motion to change custody of his children and granted the appellee mother's motion to modify child support. Both parties filed motions to modify custody. At the time of the divorce, the parties entered into a property-settlement and child-custody agreement, agreeing to joint custody of their two children. At the hearing on the motions, both parties testified in detail, recounting, among other things, their inability to communicate with each other or to get along. They testified about difficulties with the daughter's behavior when living with her mother and about the fragility of their son, whose demeanor had changed since the divorce. Both children were in counseling. After the hearing, the circuit court found that neither party had established a material change in circumstances warranting a change in custody and that it was in the children's best interests for joint custody to remain in place. On the issue of child support, the court imputed income to the appellant and, considering the appellee's income, found that the appellant father should pay the mother $6,279 per month. The Court of Appeals said that when parties have fallen into such discord that they are unable to cooperate in sharing physical care of their children, this constitutes a material change in circumstances affecting the children's best interests. The Court held the circuit court clearly erred in finding that the appellant failed to establish a material change in circumstances warranting a change in custody. The Court reversed the award of joint custody and remanded to the circuit court for a custody award consistent with its opinion. The Court did not consider the appellant's argument concerning modification of child support, remanding that issue, also, to the circuit court. (Taylor, J.; No. CV-16-818; 4-12-17; Abramson, R.)

Li v. Ding, 2017 Ark. App. 244 **[child custody; child support]** The appellant appealed from appellant's petition to modify custody. The circuit court awarded joint custody and the appellant alleged error. He also alleged error in the amount of child support he was ordered to pay. The Court of Appeals said that an award of joint custody was improper. Even though joint custody is favored in Arkansas under Arkansas Code Annotated sec. 9-13-101, the Court said "our law remains that the mutual ability of the parties to cooperate in reaching shared decisions in matters affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and such an award is reversible error when cooperation between the parties is lacking."

The circuit court found disagreements between the parties on school choice, different parenting skills, poor communication, and rigid thinking in both. The Court held that the finding that joint custody was in the children's best interest was clearly erroneous and reversed the custody award, making the appellant's child support argument moot. (Bryan, B.; No. CV-16-922; 4-19-17; Brown, W.)

Fitzgerald v. Calhoun, 2017 Ark. App. 235 **[child custody]** When the parties divorced, they were awarded Joint Legal Custody with the appellant mother being the "primary custodial parent." On appeal, her sole argument on appeal is that the circuit court, which ordered that the minor child should continue to attend the Monticello public schools, had divested her of her "educational decision-making authority." Her arguments were based upon the fact that she had moved from Monticello to Crossett with her new husband. She must drive the child about 45 minutes to school in Monticello each day and then drive farther to her job in McGehee, a total of three hours on the road each day. If he could attend school in Crossett, her husband and her family who lived there could help get him to and from school. Also, she was looking for a job in Crossett. The attorney ad litem recommended that the child remain in Monticello School. He is quiet and socially awkward. She was concerned that he had not made friends in Crossett. She was worried about a school change. She recommended that he spend equal time with both parents. "Because of the parents' deadlock, the circuit court resolved the impasse and decided that C.C. should remain in the Monticello public schools." The Court of Appeals said that, although inconvenient for the appellant mother, the decision is not clearly erroneous, especially given the fact that the child was quiet, socially awkward, and had difficulty making friends. The circuit court had the benefit of viewing the child's testimony about which school he preferred, and the Court of Appeals deferred to the circuit court's consideration of his best interest. It found no reversible error and affirmed the court's decision that he should remain in the Monticello Public Schools. (Johnson, K.; No. CV-16-913; 4-19-17; Harrison, B.)

Troutman v. Troutman, 2017 Ark. 139 **[child support]** This case was heard by the Supreme Court on a petition for review from the Arkansas Court of Appeals. The Supreme Court said that the calculations of the Court of Appeals conflicted with prior decisions of that court, granted the petition and considered the appeal as though it had been originally filed in the Supreme Court. The circuit court had reduced the appellee father's monthly child support, finding a material change in circumstances, based upon the appellant's business's treatment of retained earnings of a closely held Subchapter S corporation. The appellant is a general contractor, has a business in which he owns all the stock, and he testified that he used "completed projects" for his accounting method. Under Administrative Order No. 10, the appellant was a "self-employed payor" for purposes of determining his income. Both parties' accountants testified in the circuit court hearing about the appellant's income for the years in question. The Supreme Court held that the circuit court erred in finding a material change in circumstances and reversed and dismissed the "circuit court's...order changing...[appellant's]...monthly child supports payments retroactive to the filing of his petition." (Lindsay, M.; No. CV-16-144; 4-20-17; Hart, J.)

Acre v. Tullis, 2017 Ark. App. 249 **[relocation]** After a post-decree custody dispute in which each filed a motion to change custody, the parties entered into an agreed order that once their child entered kindergarten, the appellee mother would be the primary residential custodian during the school year and the appellant father would be the primary residential custodian during

the summer. Another section addressed the child's school district, and if the child should no longer attend school in the city or school district indicated, custody would be changed. The appellant moved for change of custody after learning that the appellee intended to move to Mississippi; she filed a petition to relocate a month later. The appellant also moved for contempt alleging that she owed child support. The circuit court entered a temporary order enforcing the agreed order and denied the parties' respective petitions for relief. In a final order, the court allowed the relocation to Mississippi and did not alter the custodial arrangement set out in the agreement. The court denied the motion for contempt, finding that no child support was owed. The appellant raised four points on appeal, each decided by the Court of Appeals as follows: (1) The circuit court failed to uphold the terms of the agreed order that contemplated a change of custody if the child did not attend certain school districts. The Court of Appeals said that the circuit court did not uphold the terms of the agreed order because the court found such an agreement unenforceable. The circuit court cited *Stills v. Stills*, 2010 Ark. 132, in its order. This is within the circuit court's authority. The Court agreed that the *Stills* case and its analysis applied to the instant case. (2) The circuit court incorrectly applied *Stills*, using the *Hollandsworth* presumption, instead of *Lewellyn v. Lewellyn*, 351 Ark. 346 (2002) and *Singletary v. Singletary*, 2013 Ark. 506, since the parties had joint custody. The Court of Appeals said the parties did not have joint custody. The testimony showed that the appellee was the primary custodian for 41 to 42 weeks per year. The circuit court clearly had the authority to review an agreement to ensure that it does not violate Arkansas law. (3) If the parties did not exercise joint custody, the appellee waived the presumption based upon her actions and the language of the agreed order, and that it was not in the best interest of the child to permit the relocation. The Court of Appeals said that when a contract is ambiguous on its face, the ambiguity may be resolved by looking at other parts of the contract and the parties' intent, as well as their conduct. Initially the parties agreed upon joint custody until their son began kindergarten. Then the mother would be primary residential custodian during the school year and the father the primary residential custodian during the summer. During the school year, the father would have visitation. The Court held that *Lewellyn* and *Singletary* are not applicable to this case. (4) Finally, the circuit court improperly denied the motion for contempt based upon the appellee's failure to pay child support. The Court agreed with the circuit court's finding that the appellant's interpretation and argument were contrary to the agreement, and that the appellee mother paid child support until she became primary custodian for three-quarters of the year when the child began kindergarten. The decision was affirmed. (Foster, H.; No. CV-16-986; 4-26-17; Abramson, R.)

JUVENILE

Salazar v. DHS, 2017 Ark. App. 218 **[termination parental rights]** There was sufficient evidence to support a finding that termination was either in A.M.'s best interest or that the alleged grounds were proven. The DHS supervisor testified that DHS concurred with Texas's concerns with boyfriend's untreated schizophrenia and stated that DHS had an issue from the beginning of the case with appellant's financial deficiencies without the financial support of the boyfriend, her mother, and sex-offender father. Despite her admitted financial shortcomings, appellant testified that she was currently unemployed and pregnant, and will likely require even

more financial subsistence from her mother and father. With these facts, in addition to the fact that child had been in care at the time of the hearing for more than 21 months of her life, termination was in child's best interest proven. Additionally, appellant manifested the incapacity or indifference to remedy, despite the offer of appropriate family services. (Williams, C.; CV-16-1083; 4-5-17; Brown, W.)

Tapp v. DHS, 2017 Ark. App. 216 **[d-n]** Sufficient evidence supported adjudication of dependent-neglected on account of failure to properly supervise, failure to provide adequate shelter, and failure to investigate the home where child was allowed to visit regularly. (Sullivan, T.; CV-16-1081; 4-5-17; Brown, W.)

Martin v. DHS, 2017 Ark. 115 **[termination parental rights]** Brandon contends that DHS failed to prove the subsequent factors ground because he ended his problematic relationship with Megan. After hearing the evidence and determining that Brandon was not credible, the circuit court concluded that DHS had proved by clear and convincing evidence the subsequent-factors ground. The circuit court found that Brandon had chosen Megan over his children, and it expressed concern whether Brandon would protect the children from Megan upon her release from prison. This evidence of potential harm, coupled with the children's adoptability, supports the circuit court's finding that termination of Brandon's parental rights was in the best interest of the children. (King, K.; CV-16-1018; 4-6-17; Kemp, J.)

Caruthers v. DHS, 2017 Ark. 230 **[termination parental rights]** Caruthers argues that the trial court erred in denying his motion to dismiss the termination-of-parental-rights petition because it was not heard within ninety days of the date it was filed. His argument fails because, while the applicable statute does provide that a hearing "shall" be held within ninety days, a trial court does not lose jurisdiction in this instance. Furthermore, reversal is not appropriate in the absence of a showing of prejudice resulting from the delay. Nowhere in Caruthers's argument does he discuss how he was harmed in any way by the delay, especially considering one of the continuances was so that his own attorney could be better prepared for the trial. The evidence demonstrated that returning E.C. to the custody of his father was not in the child's best interest. (Halsey, B.; CV-16-1129; 4-12-17; Murphy, M.)

Adkins v. DHS, 2017 Ark. 229 **[termination parental rights]** In the order, the trial court changed the goal of the case to termination of parental rights and adoption. On appeal, appellant generally contends that the trial court erred in changing the goal of the case. Appellant does not dispute the trial court's findings that he was not in full compliance with the case plan. Instead, he argues that the trial court failed to follow the preferential goals in the permanency-planning statute. Here, Matney testified that the children were being cared for by their aunt in provisional foster care, and this testimony was undisputed. In fact, the attorney ad litem confirmed in closing argument at the permanency-planning hearing that the children were living with their aunt and uncle. Furthermore, there was no testimony that this placement needed to change or that the aunt was unwilling to continue to care for the children. Instead, Matney testified that the children

were doing well and that their needs were being met. Despite this undisputed testimony, the trial court specifically found that changing the goal of the case to termination of parental rights and adoption was appropriate because "[t]he juvenile is not being cared for by a relative." That is incorrect; the juveniles were being cared for by a relative—their paternal aunt. The trial court's finding that the children were not being cared for by a relative was clearly erroneous. Even though the trial court could still find that termination of parental rights and adoption is in the children's best interest and appropriate under section 9-27-338(c)(4), the record before us does not indicate that the trial court considered the additional factors enumerated under the section. (Layton, D.; CV-16-1119; 4-12-17; Hixson, K.)

Louton v. Dulaney, 2017 Ark. 222 **[custody]** Custody awards are to be made solely in accordance with the welfare and best interest of the children. Louton does not argue that awarding custody to Dulaney was not in his son's best interest. Joint custody is not mandatory, and the trial court clearly erred in determining that custody with Dulaney was in KL's best interest. **[support]** The trial court erred in imputing income to Louton. He was self-employed. Although there was no evidence that he was ever unemployed or underemployed, the trial court imputed yearly income of $250,000 to Louton. At the same time, the trial court determined that Louton's net monthly pay was $6,044.75. Neither amount, when applied to the family-support chart, corresponds to an award of $1,000 per month in child support. The child-support award is reversed, and remanded for a proper analysis in accordance with Administrative Order No. 10. (King, K.; CV-16-1018; 4-6-17; Kemp, J.)

Romero v. DHS, 2017 Ark. 238 **[termination parental rights]** The intent behind the termination-of-parental-rights statute is to provide permanency in a child's life when it is not possible to return the child to the family home because it is contrary to the child's health, safety, or welfare, and a return to the family home cannot be accomplished in a reasonable period of time as viewed from the child's perspective. This need for permanency overrides a parent's request for additional time to improve circumstances, and courts will not enforce parental rights to the detriment of the well-being of the child. A parent's past behavior is often a good indicator of future behavior. The trial court recited appellant's repetitive criminal behavior, the indefinite nature of his future parole, and the testimony that gave reasons to question the viability of the paternal grandmother's home as an appropriate temporary placement for VR. (Sullivan, T.; CV-16-1112; 4-19-17; Klappenbach, M.)

Robinson v. DHS, 2017 Ark. App. 251 **[termination parental rights-best interests]** The circuit court considered the evidence and found that, looking at the totality of the circumstances, there would be potential harm in returning N.B. to Robinson. The court also found that adoption by means of termination of parental rights was the appropriate permanency plan and in the juvenile's best interest. Because there was sufficient evidence of both adoptability and potential

harm, the circuit court's best-interest finding is not clearly erroneous. (Elmore, B.; CV-17-7; 4-26-17; Abramson, R.)

Duncan v. DHS, 2017 Ark. 252 **[termination parental rights]** The trial court was apparently not convinced that Duncan had "achieved sobriety" given that she could stay sober for only approximately two months at a time. Duncan had failed in her first four attempts to complete drug treatment for reasons that appeared to be within her control. The trial court did not err in determining that more services, given her history of failure with drug treatment, would result in successful reunification. Continued drug use by a parent demonstrates potential harm. The trial court's determination that termination of Duncan's parental rights was in the children's best interest was supported by the evidence. (Zuerker, L.; CV-16-1143; 4-26-17; Virden, B.)