

# APPELLATE UPDATE

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PUBLISHED BY THE  
ADMINISTRATIVE OFFICE OF THE COURTS

DECEMBER 2019  
VOLUME 27, NO. 4

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## ANNOUNCEMENTS

The following per curiam orders (December 12, 2019) were published for comment:

- Comment period ends January 31, 2020 for revisions to Administrative Order 10 and Child Support Guidelines
- Comment period ends March 31, 2020 for proposal by Criminal Practice Committee to amend Rule 9.3 of Rules of Criminal Procedure
- Comment period ends June 1, 2020 for proposal to amend rules affecting discovery (Ark. R. Civ. P. 26-37 and 45)

Supreme Court issued orders on December 12, 2019 regarding administrative plans submitted by circuit and district courts.

## CRIMINAL

*Ransom v. State*, 2019 Ark. App. 563 [**judgments**] When there is a conflict between the sentencing order and a pronouncement of sentence, the entered sentencing order controls. (Clawson, C.; CR-19-186; 12-4-19; Harrison, B.)

*Harmon v. State*, 2019 Ark. App. 572 [**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 affirmative duty to obtain the video footage that was taken during the search and turn it over to appellant. [**jury instructions**] Nonmodel jury instructions should be given only when the court finds that the model instructions do not accurately state the law or do not contain a necessary instruction. In appellant’s case, because AMI 2d 64.44 was an accurate statement of the law, it was an abuse of discretion for the trial court to give a nonAMI instruction. (Clawson, C.; CR-18-1057; 12-4-19; Vaught, L.)

*Reid v. State*, 2019 Ark. 363 [**voir dire**] Voir dire is conducted to identify and eliminate unqualified jurors; those who are not able to impartially follow the court’s instructions and evaluate the evidence. The judge shall initiate voir dire by identifying the parties and their respective counsel, revealing any names of prospective witnesses, and briefly outlining the nature of the case. Beyond these four requirements, counsel may only ask additional questions “as the judge deems reasonable and proper.” In appellant’s case, the circuit court did not abuse its discretion in limiting appellant’s use of emotionally charged hypotheticals—such as those involving school shootings—during voir dire. [**admission of evidence**] The circuit court in appellant’s case ruled that the 911 tape from immediately after the shooting was relevant under the doctrine of res gestae. Under res gestae, the State can introduce evidence showing all the circumstances surrounding the charged act. The doctrine provides context to the crime and places the jury in possession of the entire transaction. Res gestae evidence is presumptively admissible. The 911 tape, which described the victim’s final moments before death, as well as appellant’s unusually calm demeanor after the shooting was relevant under the res gestae doctrine. [**aggravating circumstances**] Aggravating circumstances are limited to the circumstances enumerated in Arkansas Code Annotated § 5-4-604. [**victim-impact evidence**] Victim-impact evidence is not an aggravating circumstance. Rather, it is evidence presented during the sentencing phase of a trial that is designed to inform the jury of the toll the crime has taken on a victim’s family. It is both relevant and admissible so long as it assists the jury in imposing a sentence. Most often, the State employs victim-impact evidence to counteract mitigating evidence. This is an accepted, relevant use for victim-impact evidence. The jury is permitted to consider victim-impact evidence at the same time it considers mitigating evidence introduced by the defendant. In appellant’s case, the circuit court did not abuse its discretion when during the State’s closing argument, it allowed the State to urge the jury to weigh appellant’s emotional

distress against the emotional distress that he inflicted on the victim's family. (Wright, J.; CR-18-517; 12-5-9; Wood, R.)

*Vasquez-Ramirez v. State*, 2019 Ark. App. 599 [**double jeopardy**] The trial court in appellant's case declared a mistrial based upon an overruling necessity. Specifically, the trial court identified nine unexpected and uncontrollable events that occurred on the day of appellant's trial that led it to conclude that the trial would not be completed in one day as planned and that a mistrial was necessary. The events included: the victim passing out and vomiting in the witness box; the parties' plea negotiations that occurred in the middle of the trial; the defense's surprise disclosure of a recording that required translation and transcription; the unexpected notification that no interpreter was available the following day; seven witnesses were expected to testify, and at 2:30 p.m., the parties were still questioning the first witness; three of the seven witnesses required interpreter services, which extended testimony time; the docket was full the rest of the week and the next week, and the trial judge would be on vacation the following week; the defense's "eleventh-hour" motion to suppress, which required a hearing on the morning of trial; and the defense's extended length of voir dire. Based upon the foregoing facts, the trial court did not abuse its discretion when it declared a mistrial due to an overruling necessity. Thus, double jeopardy would not prevent appellant from being brought to trial again. (Tabor, S.; CR-19-394; 12-11-19; Vaught, L.)

*Marbley v. State*, 2019 Ark. App. 583 [**inconsistent verdicts**] The jury could have reasonably found appellant guilty of robbery and misdemeanor theft without the verdicts being inconsistent. (Griffen, W.; CR-19-432; 12-11-19; Abramson, R.)

*Gonzales v. State*, 2019 Ark. App. 600 [**Ark. R. Evid. 404(b)**] During appellant's trial, the State introduced evidence from his former girlfriend that a few years prior to the trial he had choked her to the point of unconsciousness. The State asserted that this evidence was admissible pursuant to Ark. R. Evid. 404(b) because it showed evidence of "knowledge." The victim in the case for which appellant was on trial, was murdered by strangulation. On review, the Court of Appeals determined that the trial court abused its discretion by admitting the evidence because the evidence from appellant's former girlfriend that appellant had choked her into temporary unconsciousness was not independently relevant to show intent, knowledge, or absence of mistake or accident pursuant to Ark. R. Evid. 404(b). Specifically, the Court of Appeals explained that the evidence that appellant had previously choked a person did not establish that appellant had knowledge of how to strangle a person to death. The Court of Appeals also noted that the evidence could not be offered to show appellant's intent because his intent in choking his former girlfriend was unknown. The appellate court further pointed out that the intent during the choking episode with his former girlfriend is not similar enough to show the same intent of strangling another person to death. [**Ark. R. Evid. 403**] The testimony regarding appellant choking his former girlfriend had little or no probative value related to the issues that were

presented to the jury. Specifically, the appellate court explained that the State's attempt to convince the jury that appellant must be guilty of strangulation based on the evidence that appellant previously choked his former girlfriend in an unrelated domestic dispute is the embodiment of the danger of unfair prejudice contemplated by Rule 403. Therefore, the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Accordingly, the testimony should have also been excluded under Rule 403, and the trial court abused its discretion in failing to do so. (Sims, B.; CR-19-250; 12-11-19; Hixson, K.)

*State v. Brown*, 2019 Ark. 395 [**expungement**] Appellant pleaded guilty to theft and was placed on probation pursuant to Act 531, the Community Punishment Act. Thereafter, her probation was revoked, and she was resentenced to probation. Neither the new sentencing order nor the conditions of her probation indicated that appellant was sentenced pursuant to the Community Punishment Act. After completion of her probation, appellant petitioned and was granted an order expunging her conviction under Act 531. According to the Community Punishment Act, the circuit court has the authority to expunge an offender's record if the offender: (1) has successfully completed a sentence under the Act, (2) for a target offense, and (3) has no more than one previous felony conviction, provided the previous conviction is not among the enumerated list of disqualifying felonies. On appeal, the Supreme Court concluded that the circuit court lacked authority to expunge appellant's conviction because appellant failed to successfully complete probation under Act 531 and thus was ineligible for expungement under the Act's provisions. (Wright, H.; CR-18-860; 12-12-19; Womack, S.)

*Johnson v. State*, 2019 Ark. 391 [**habeas corpus; new scientific evidence**] Appellant failed to meet the requirements of Ark. Code Ann. § 16-112-201 *et seq.* Specifically, appellant did not establish that the proposed testing would advance his claim of actual innocence or that it would raise a reasonable probability that appellant did not commit the crime for which he was convicted. Thus, the trial court did not err when it denied appellant's request for postconviction DNA testing. (Yeagan, C.; CR-18-700; 12-12-19; Womack, S.)

## CIVIL

*Stanley v. Ozark Electric Coop.*, 2019 Ark. App. 560 [**PSC jurisdiction**] The circuit court granted Ozarks Electric's motion to dismiss because it found that the PSC had primary jurisdiction over the matter. This was in error. The complaint identifies appellants as landowners, not consumers of the utility company. The gist of their complaint is a taking of private property without just compensation. Appellants do not dispute that Ozarks Electric has a right to use its own existing lines to transmit broadband services. Appellants' issue is with Ozarks Electric's entry onto their land to install completely new lines for broadband services without just compensation or an assessment of damages for the increased interference. Generally,

condemnation proceedings are within the exclusive jurisdiction of the circuit court. The particular claims raised by these appellants do not involve public rights or the provision of broadband services. The circuit court has exclusive, original jurisdiction to adjudicate a dispute involving private-property rights and damages for inverse condemnation and increased interference. (Martin, D.; CV-18-1036; 12-4-19; Virden, B.)

*McCabe v. Wal-Mart*, 2019 Ark. App. 566 [**employment termination**] McCabe's at-will employment status was stated in pertinent Walmart documents. McCabe's allegation that Walmart violated its open-door policy related to her boyfriend, not her. McCabe did not allege that she herself engaged in some open-door communication and was retaliated against by Walmart for doing so. Given the record before us, McCabe had no actionable contractual right or reliance interest that insulated her from being terminated "for reading the disciplinary records to her boyfriend." Purdy's complaint did not invoke exceptions to the at-will employment doctrine. She alleged that she was wrongfully discharged; but the at-will doctrine generally sinks that claim, absent an exception. This is true in Purdy's case because all of Walmart's policies and documents at issue expressly refer to the at-will doctrine and state that Walmart may terminate any employment relationship, unilaterally, at will. Also, Walmart's express disclaimers in its policies and ethics statement prevent those documents from being employment contracts. Because no document in the record purports to guarantee job security or establish employment for a particular period of time, Purdy's complaint does not fall within the implied-contract exception to the at-will employment doctrine. Nor, did Purdy expressly plead a public-policy exception to the at-will doctrine in her complaint and state what public policy was implicated and how Walmart breached it. Purdy's claim for promissory estoppel (justifiable reliance) also falls short. Here, Purdy's employment was at will, so there was no reasonable basis to believe that she was promised employment for some (unstated) time period. There is no "promissory estoppel exception" to the at-will doctrine. [**attorney's fees**] The circuit court abused its discretion when it awarded a substantial attorney fee in Walmart's favor before receiving any evidence regarding the work Walmart's counsel had performed and before giving the plaintiffs a meaningful opportunity to challenge the fee. The circuit court received no exhibits, affidavits, deposition testimony, or live testimony under oath to support the fee request. (Scott, J.; CV-18-939; 12-4-19; Harrison, B.)

*Faughn v. Kennedy*, 2019 Ark. App. 570 [**ACRA**] Summary judgment was not proper on some of the claims as factual issues related to qualified immunity exist. (Proctor, R. CV-18-934; 12-4-19; Switzer, M.)

*Blackley v. Arkansas Children's Hosp.*, 2019 Ark. App. 568 [**Illegal exaction**] Suit for illegal exaction related to ACH's treatment of Pulaski County patients was without merit. (Fox, T.; CV-17-619; 12-4-19; Klappenbach, M.)

*Ellis v. Thompson*, 2019 Ark. App. 579. This is a dispute between siblings over their late father's estate. Appellant Margaret Ellis sued her brother and sister-in-law for an accounting, to set aside certain gifts allegedly made to Roger, and for various torts arising out of Roger's alleged mishandling of the property of Edward Thompson, the now deceased father of Margaret and Roger, as a signatory on Edward's bank accounts, and under a power of attorney granted to Roger. After a bench trial, the circuit court ruled that the statute of limitations barred some of Ellis's claims, that she lacked standing to bring other claims, that the alleged gifts would not be set aside, and that Roger's accounting was adequate. **[fiduciary duty]** Limitations period is three years and does not begin to run upon termination of the relationship. **[gifts]** Essentially, Ellis's argument is that the circuit court should have weighed the evidence in her favor by giving more weight to the medical evidence. The circuit court noted the contradictory evidence as to Edward's competency but did not make an explicit finding as to competency. Instead, the court found that although Edward took medication for mental conditions, his mental condition was not severe, and his medications were not mind altering. The court's declining to set aside the gifts is an implicit finding of competency. (Mitchell, C.; CV-17-893; 12-4-19; Brown, W.)

*Crockett v. Shelter Ins. Co.*, 2019 Ark. 365 **[insurance]** Appellants' argument regarding ambiguity is rooted in the fact that their counsel negotiated with the medical providers to take less than the full amount of the bills in satisfaction of the debt. They contend that the phrase "the amount for which we can discharge" in the definition of "reasonable charges" could, in addition to Shelter's interpretation of the language, be reasonably interpreted to mean the amount for which Shelter itself was responsible for discharging. Appellants are incorrect in their assertion that the applicable policy language is ambiguous. In the context of a debt, to "discharge" means "to get rid of (as a debt or obligation) by performing an appropriate action (as payment)." [cite omitted] There is no reasonable interpretation of the term "discharge" that could render it applicable to negotiating a lower amount as opposed to paying the amount. Shelter discharged appellants' debts through its payments. The trial court did not err in granting summary judgment on this basis. Next, appellants contend that the language in Shelter's policy is against the public policy of the State of Arkansas, as reflected in Arkansas Code Annotated section 23-89-202. It appears that they are contending that they are entitled under section 23-89-202 to receive payment of the difference between what the providers billed and the amount the providers agreed to accept from Shelter up to \$5000. The clear intention of section 23-89-202 is to afford those covered under an applicable policy of insurance a minimum of \$5000 in available coverage so that their medical expenses can be covered up to that amount. There is nothing in the statute that would permit appellants to receive the difference between what the providers billed and what they accepted as full satisfaction of the debt. Nor would such a decision reflect sound public policy, as it would result in insurers providing benefits in addition to medical benefits, which is neither required by the statute nor contemplated under the insurance policy provisions at issue. (Proctor, R.; CV-18-389; 12-5-19; Wynne, R.)

*Steinbuch v. University of Arkansas*, 2019 Ark. 356 [**sovereign immunity**] Under *Andrews* and its progeny, claims for monetary damages against the state and state employees acting in their official capacities are barred by sovereign immunity. Thus, Steinbuch's official-capacity claims for monetary relief are barred. [**whistle-blower act**] Based on the plain language of the statute, the AWBA does not provide for suit against individuals. Thus, the circuit court did not err in dismissing the individual-capacity claims under the AWBA. [**Civil Rights Act**] Under a plain reading of the ACRA, the circuit court correctly dismissed these claims. The statute makes clear that retaliation and interference claims under the ACRA are available against employers. But claims against individuals are not permitted. The circuit court properly dismissed Steinbuch's individual-capacity claims under the ACRA. (Fox, T.; CV-18-976; 12-5-19; Kemp, J.)

*Moorfield Constr. Inc. v. R. L. Hurst, Inc.*, 2019 Ark. App. 594 [**contract**] Under Arkansas law, there must be additional consideration when the parties to a contract enter into an additional contract. Although mutual promises may be adequate consideration to uphold a contract, the promise must have value to the party agreeing to the change. If, without legal justification, one party to a contract breaks it, or threatens to break it, and to induce performance on his part the adversary party promises to give more than was originally agreed on, no consideration is given for the promise. Here, Moorefield acquired a nearly \$15,000 discount on a contract that had already been fully and satisfactorily completed by Hurst according to the terms of the original contract. Moorefield provided nothing of value to Hurst in exchange for the substantial reduction in price. The circuit court found that this meant Moorefield provided Hurst no consideration for the price reduction. (Hearnsberger, M.; CV-19-216; 12-11-19; Klappenbach, M.)

*Petty v. Louton*, 2019 Ark. App. 590 [**outrage**] The evidence substantially supports the jury's conclusion that David's conduct was outrageous and that the emotional distress Robert suffered is not that which a reasonable person should have to endure. The type of mental distress contemplated by this tort includes "nervous shock to emotional upset, and . . . all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, anger, embarrassment, chagrin, disappointment, worry and nausea." The jury heard, for example, Robert and Deandra testify about the fright, anger, worry, and humiliation that Robert experienced because he and his wife were being monitored constantly. It heard about Robert's mental distress and worry and a lack of sleep because he was concerned that David would break into his house and that he may not be able to protect his wife. That Robert's severe emotional distress was accompanied or followed by a worsening medical condition like rheumatoid arthritis is evidence the jury could have credited, or not. The jury also heard testimony regarding the duration of David's behavior. The jury was tasked to determine, considering all the proof, whether Robert suffered severe emotional distress due to David's outrageous conduct. All these things strung together amply support an outrage claim. (Williams, C.; CV-19-115; 12-11-19; Harrison, B.)

*Reynolds v. Ark. Appraiser Licensing Bd.*, 2019 Ark. App. 587 [**administrative appeal**] This is an administrative appeal arising out of the Arkansas Appraiser Licensing and Certification Board's order sanctioning Reynolds on the basis of his alleged failure to comply with the Uniform Standards of Professional Appraisal Practices. Reynolds on appeal argues generally that the Board's decision is not supported by substantial evidence, is arbitrary and capricious, and lacks sufficient findings of fact. The Board's decision is affirmed. (Guthrie, D.; CV-18-785; 12-11-19; Virden, B.)

*Heritage Properties Partnership v. Walt Keenihan Foundation, Inc.* 2019 Ark. 371 [**Fraudulent Transfers Act/ Transfer on Death**] The circuit court has jurisdiction under the Fraudulent Transfers Act to hear claims to pursue assets from a transferee that received assets pursuant to a payable-on-death clause. Claims do not have to be brought within a probate estate proceeding. The Foundation, as the beneficiary of the TOD account, received the money on transfer. The transfer did not become an asset of the Estate and passed directly from the TOD account to the Foundation. While there are procedures within the probate code that would allow for the challenge of an alleged fraudulent conveyance, Arkansas law provides that a creditor may also pursue its claim under the Act. Heritage is a creditor as defined in the Fraudulent Transfer Act and it has standing to bring a claim against the Foundation. (Fox, T.; CV-18-566; 12-12-19; Baker, K.)

*Tilley v. Malvern National Bank*, 2019 Ark. 376 [**mandate/waiver jury trial**] In earlier appeal, the trial court enforced a waiver of jury trial that was contained in the agreement. The supreme court reversed holding that a pre-dispute jury-waiver was unconstitutional. Before, the case could be retried, the General Assembly passed Act 13 of 2018 that jury-waivers were enforceable. The trial court applied the new law to the case on remand and denied a jury trial. The holding in *Tilley I* was that there is no provision in the law for a pre-dispute jury-waiver clause to divest a litigant of this constitutional right. *Tilley I* recognized that the procedure for waiving the right to a jury trial was limited to the provisions of Rules 38 and 39 of the Arkansas Rules of Civil Procedure. The opinion in *Tilley I* also recognized that Tilley had a constitutional right to a jury trial and ordered that he receive a jury trial upon remand. Pursuant to our mandate rule and the law-of-the-case doctrine, this holding was binding on all future proceedings in this case. The circuit court had no jurisdiction to even entertain the question of whether Act 13 could have retroactively breathed life into the pre-dispute jury-waiver clause. (Wright, J.; CV-18-1002; 12-12-19; Hart, J.)

*Parnell v. Fanduel, Inc.*, 2019 Ark. 412 [**ADTPA/dismissal**] Parnell deposited \$200 into his FanDuel account for the ability to enter that money into fantasy sports games. This was Parnell's actual "benefit of the bargain," and he does not argue that he was denied this benefit. Instead, he claims his FanDuel account had less economic value than represented by FanDuel. A speculative injury is not cognizable under the ADTPA. Moreover, Parnell failed to plead that he suffered

injury or loss as a result of opening a FanDuel account or that he was in any way prevented from spending or withdrawing the \$200 he had deposited. **[unjust-enrichment]** This claim fails because Parnell has not actually alleged FanDuel was unjustly enriched. Unjust enrichment is an equitable doctrine that stands for the principle that one party should not be permitted to unjustly enrich themselves at the expense of another but should be required to make restitution for the benefits received. Parnell makes no allegation that he was ever prevented from withdrawing his initial deposit from his FanDuel account and thus cannot demonstrate that FanDuel was unjustly enriched. Because Parnell's complaint is devoid of any facts upon which he may be entitled to relief, the circuit court did not err in dismissing it. (Williams, L.; CV-18-928; 12-19-19; Womack, S.)

## **DOMESTIC RELATIONS**

*Deline v. Deline*, 2019 Ark. App. 562 **[continuance]** The trial court did not abuse its discretion by denying Michael's continuance motion. Michael chose not to appear on July 26, and his counsel presented evidence and witnesses on Michael's behalf. The trial court heard testimony from Michael and Michael's witnesses on many occasions prior to the final hearing, and the trial court observed Michael on the first day of trial. Given the extended nature of the proceedings and the trial court's finding that Michael was not credible in his request for a continuance, noting that Michael's motion had been predicted, the trial court's denial was not done thoughtlessly or without due consideration. **[visitation]** The trial court properly considered the child's best interest, relying on the evidence before it of Michael's behavior, which included violations of court orders placed, in part, for the child's protection. **[child support]** Child support was set at the temporary hearing, where Michael testified about his income. The trial court found that Michael's income was \$5,000 a month and that since the temporary hearing, he showed no diligence in proving his income otherwise. **[spousal support]** The trial court did not clearly err in setting spousal support based on the evidence in the record. **[attorney's fees]** The trial court did not abuse its discretion. The award of attorney's fees in a domestic-relations case is a matter within the trial court's discretion, and there is no fixed formula for determining what constitutes a reasonable amount. Here, the trial court had before it the evidence of Michael's income from the temporary hearing, the parties' bank records, and the testimony of his mother and Jaime from the final hearing, who both stated that Michael was not working. The trial court specifically found that Michael's mother was not credible. Further, the trial court was familiar with the protracted nature of the litigation, which included several contempt motions against Michael and continuance motions filed by him. The trial court had evidence of the relative financial abilities of the parties and did not abuse its discretion in awarding \$10,800 in attorney's fees to Jaime. (Philhours, R.; CV-19-6; 12-4-19; Gladwin, R.)

*Jones v. Jones*, 2019 Ark. App. 596 [**Set aside custody award**] The circuit court abused its discretion by denying her request to set aside the custody award pursuant to Rule 55(c)(4) because the need to consider the best interest of the child in this child custody case constituted an “other reason justifying relief.” One of the reasons offered to justify relief was an allegation of domestic abuse. Statutes mandate that the court must consider the effect of the abuse on the best interest of the child when child custody is at issue. Statutes even create a rebuttable presumption that it is not in the best interest of a child to be placed in the custody of an abusive parent if there is a pattern of domestic abuse. The record does not indicate that the circuit court considered Angela’s abuse allegations when evaluating her motion to set aside the default judgment. The court was not required to determine the truthfulness of the domestic-abuse claims at the hearing on the motion to set aside. Rather, the court was simply required to consider whether the allegations constituted “other reasons justifying relief.” Here, the court failed to do so, which was error. (Webb, G.; CV-18-1062; 12-11-19; Whiteaker, P.)

*Parker v. Parker*, 2019 Ark. App. 607 [**alimony**] The parties’ agreement in this case is unambiguous. Therefore, the parties’ actions and conduct following their child’s death were irrelevant as was testimony concerning their intent at the time of the agreement when introduced as parol evidence. It is a well-settled rule in construing a contract that the intent of the parties is to be gathered, not from particular words and phrases, but from the whole context of the agreement. Based on the four corners of the agreement, it is clear that the parties intended for appellant’s alimony to increase when child support terminated. The fact that child support terminated in a way unforeseen by the parties does not change appellant’s obligation to pay appellee the increased alimony amount called for in the agreement. (Scott, J.; CV-18-819; 12-11-19; Brown, W.)

## **PROBATE**

*O.C. v. D.H.S.*, 2019 Ark. App. 581 [**adult maltreatment**] Appellant argues that an adult may not be placed in DHS custody if she needs acute psychiatric or chronic mental-health treatment. Custody under the AMCA is not intended to replace other treatment options for persons in need of chronic mental-health treatment and for whom another solution is appropriate. Furthermore, the Act may apply to cases in which the individual has a diagnosis of a neurocognitive disorder; lacks the capacity to comprehend the nature and consequences of remaining in a situation that presents an imminent danger to her health or safety; is unable to provide for her own protection from maltreatment; and whom the court finds is in need of placement under the AMCA. O.C. has been evicted from her home and does not understand that she has no home to return to, has dementia, and lacks insight regarding her mental-impairment issues. She argues only that Dr. Powell’s testimony that she needs medication for life is a bar to DHS custody. The purpose of the AMCA is to “[p]rotect a maltreated adult . . . who is in imminent danger” and to encourage

“the cooperation of state agencies and private providers in the service delivery system for maltreated adults.” The court made the pertinent findings under the AMCA, and O.C. has not challenged them. To construe section 9-20-108(d)(2) in such a way as to preclude the Act’s application to a maltreated adult who has been diagnosed with a mental impairment and found by a court to be in need of protection under the Act and who has made no challenge to those findings would eviscerate the purpose of the Act. (Reif, M.; CV-18-1058; 12-11-19; Gruber, R.)

*Dawson v. Stoner-Sellers*, 2019 Ark. 410 [**jury trial**] The circuit court erred in denying Ray Jr. a jury trial on his legal claims: breach of fiduciary duty; conversion; fraud and concealment; and conspiracy. He is not entitled to a trial by jury on his equitable claims -- failure to provide an accounting, removal of trustees, and injunctive relief. [**extrinsic evidence**] The circuit court properly considered extrinsic evidence to determine what the settlors meant when using the language “reasonably necessary” for the support and maintenance of the initial beneficiaries. The understanding of the majority of the parties was that the trusts should be used generously to fund the lifestyle to which Luetta was accustomed. (Hill, V.; CV-18-573; 12-19-19; Wynne, R)

## JUVENILE

*Cramer v. Ark. Dep’t of Human Servs.*, 2019 Ark. App. 571 [**ADJUDICATION-sufficiency of the evidence**] Mother whose three children were adjudicated dependent-neglected appealed adjudication based on the sufficiency of the evidence. Mother, who was participating in a protective services case with DHS after concerns over her children arose, allowed the grandmother to babysit the children after DHS had instructed her not to do so in the protective services case due to concerns in that home. Sadly, one of the children died after consuming oxycodone at the grandmother’s home. At that point, DHS took emergency custody of the remaining children and filed a dependency-neglect petition. The appellate court affirmed the adjudication, finding no clear error. (Zimmerman, S.; JV-19-62; December 4, 2019; Switzer, M.)

*Spears v. State*, 2019 Ark. App. 576 [**MOTION TO TRANSFER—findings inconsistent with competent evidence**] Sixteen-year-old charged as an accomplice to first-degree battery with a violent criminal group activity enhancement moved to transfer his criminal case to juvenile court and the trial court refused the transfer. The state’s juvenile ombudsman and a juvenile probation officer both testified that there are services available to rehabilitate the defendant in juvenile court. The trial court made written findings upon each transfer factor and denied the motion. Upon review, the appellate court found that the trial court’s written findings concerning each of the transfer factors contained inaccurate information and findings that were unsupported by the competent evidence. One of the trial court’s findings was based on double hearsay, to which the defendant timely objected at trial, there was a reference to an altercation involving the defendant four days earlier that had actually taken place three months earlier, the court found that the defendant was a member of a gang whereas the evidence on this point was weak. Because

several of the trial court's findings were inconsistent with the evidence, the case was remanded for the trial court to reconsider the motion considering only the competent evidence. (Green, R.; CR-18-1214; December 4, 2019; Hixson, K.)

*D.Q. v. State*, 2019 Ark. App. 593 [**MOTION TO TRANSFER**] Fifteen-year-old appealed after his juvenile case was transferred after he was accused of breaking into a retail store with three other juveniles and stealing more than seventy (70) firearms. The trial court granted the state's motion to transfer, making written findings on each of the transfer factors and citing the seriousness of the offense, the pre-meditated planning involved in the commission of the crime, and the juvenile's lengthy history of criminal behavior. Finding no clear error, the appellate court affirmed. (Zimmerman, S.; JV-19-133; December 11, 2019; Klappenbach, N.)

*Heard v. State*, 2019 Ark. App. 586 [**MOTION TO TRANSFER OR FOR EJJ**] Sixteen-year-old charged with capital murder, attempted capital murder, and other related charges after a police officer was killed and another nearly shot. The trial court considered the motion to transfer to juvenile court and made written findings on each of the transfer factors, finding that the charges were of the "utmost seriousness," that Heard acted alone and carried a firearm, and that he had an extensive history of criminal activity and juvenile adjudications. Finding no clear error, the appellate court affirmed. (Erwin, H.; CR-17-109; December 11, 2019; Virden, B.)

*Minor Children v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 588 [**Permanent custody to relatives awarded in dependency-neglect case**] Children were removed from parents' custody and adjudicated dependent-neglected based on parental unfitness due to parents' drug use. By the permanency planning hearing, the parents' situation had not improved and DHS, the attorney ad litem, one of the children, and an aunt and uncle (the Gabbards) all advocated to proceed toward termination of the parents' right but instead the trial court placed permanent custody of the children with the Gabbards and closed the case. The attorney ad litem appealed the order on behalf of the minor children, arguing that terminating the parents' rights and allowing the Gabbards to adopt the children would have provided more permanency for the children and was in their best interest. All parties agreed that the Gabbards were a "stellar" placement for the children and that they were thriving there. The trial court mentioned in its ruling that a petition for adoption could be filed in the future. Under the circumstances and upon review of the trial court's findings, the appellate court affirmed, finding no clear error. (James, P.; JV-17-11; December 11, 2019; Gladwin, R.)

*Smallwood v. Ark. Dep't of Human Servs.*, 2019 Ark. App. 598 [**TPR—sufficiency of the evidence**] The dependency-neglect case was opened after the mother gave birth while in prison and was unable to point to an appropriate caregiver or custodian for the infant. During the course of the DN proceedings, the mother was released from prison but it was revealed that she had significant mental health issues and had lost custody of five other children previously. By the

PPH hearing, the mother had failed to secure a stable and appropriate home and also began exhibiting substance abuse issues. The mother's rights were eventually terminated and she appealed. Termination was affirmed on the ground of factors or issues that arose subsequent to the filing of the original petition. (Smith, T.; JV-18-117; December 11, 2019; Whiteaker, P.)

*Terry v. Ark. Dep't of Human Servs.*, 2019 Ark. App 591 [**TPR—proof of paternity necessary**] Dependency-neglect proceedings were initiated, which eventually led to a termination, all while the father was incarcerated. The father, Terry, appealed the termination and argued that DHS did not prove and the court did not find that he was the father, thus there was insufficient evidence to terminate his rights. There was evidence that Terry was not married to the child's mother, but there was no evidence that he signed the birth certificate or otherwise established paternity, and DHS testing was not ordered. While Terry testified that he believed he was the child's father and acted throughout the proceedings as though he believed he was the father, the belief of a layperson that he is the father is not sufficient and DHS was required to prove by clear and convincing evidence that Terry was the father. Because it did not, the termination order was reversed. (Zimmerman, S.; JV-17-932; December 11, 2019; Harrison, B.)

## **DISTRICT COURT**

*Java's Motorcycle Repair, LLC v. Barth*, 2019 Ark. App. 584, [**Appeals from District Court**] [**Entry of Judgment**] [**Time to Appeal**] Barth sued Java's Motorcycle Repair, LLC in district court. After the trial, the district court sent an email to the parties notifying them of the decision in favor of Barth, but the email was not filed in the district court docket. The next day, the clerk made an entry in the docket referencing the court's email, that judgment was for Barth, and who was to prepare the precedent. Over a month passed before the written judgment against Java was entered on the docket. Java appealed to the circuit court sixteen days later. Barth argued on appeal that Java filed the appeal more than thirty days after the clerk's docket entry awarding judgment to Barth. Java responded that the clerk's docket entry did not include the judgment amount as required by District Court Rule 8; therefore, the time to appeal did not begin to run until the entry of the written judgment containing the amount of the judgment. The circuit court rejected Java's argument and dismissed the appeal. The court of appeals held the clerk's entry on the docket did not initiate the appeal time because it did not include the judgment amount; therefore, it did not comply with the requirements of District Court Rules 8 and 9. Additionally, the court declined to apply the "incorporation-by-reference" doctrine to this case. Reversed and remanded. (Williams, L.; CV-19-98; 12-11-19; Abramson, R.)