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ANNOUNCEMENTS

REMINDER: Administrative Plans. 2017 is a year that all circuits are required to submit administrative plans to the Supreme Court. Plans are to be submitted by July 1st to be effective January 1, 2018.

CRIMINAL

Baney v. State, 2017 Ark. App. 20 **[probation revocation]** The circuit court's decision to revoke appellant's probation was clearly against the preponderance of the evidence. (Erwin, H.; CR-16-38; 1-18-17; Hixson, K.)

Haley v. State, 2017 Ark. App. 18 **[motion to suppress]** Although the officer, who was requesting a search warrant, failed to establish the veracity and basis of knowledge of his confidential informant, that error was not fatal because the affidavit, which was attached to the request for the search warrant, viewed as a whole, provided a substantial basis for a finding of reasonable cause to believe that things subject to seizure would be found in appellant's apartment. Thus, the circuit court did not err when it denied appellant's motion to suppress. (Clawson, C.; CR-16-610; 1-18-17; Vaught, L.)

Hartman v. State, 2017 Ark. 7 **[Rule 37]** The trial court properly denied appellant's Rule 37 petition in which he alleged that his trial counsel was ineffective because: (1) he made disparaging

remarks about appellant during closing arguments; and (2) he failed to object to certain trial testimony as hearsay. **[motion for reconsideration]** Pursuant to Arkansas Rule of Criminal Procedure 37.2(d), rehearing of a circuit court's decision on a petition filed pursuant to Rule 37 is not permitted. (Pearson, W.; CR-16-420; 1-19-17; Wynne, R.)

Moore v. State, 2017 Ark. App. 39 **[rebuttal testimony]** Because appellant failed to disclose his witness during discovery, and because the witness's proposed testimony would not have qualified as rebuttal evidence, the trial court did not abuse its discretion when it refused to allow the witness to testify. (Cox, J.; CR-16-518; 1-25-17; Vaught, L.)

Bynum v. State, 2017 Ark. App. 41 **[statute of limitations]** A statute-of-limitations challenge may be considered for the first time on appeal because it implicates the appellate court's jurisdiction to hear the case and that issue cannot be waived. In appellant's case, the State failed to file charges for fourth-degree sexual assault against appellant until more than five years after the applicable statute of limitations had expired. Because the State did not file charges in a timely manner, appellant's convictions for fourth-degree sexual assault must be reversed and dismissed. (Ramey, J.; CR-16-329; 1-25-17; Hixson, K.)

Stockstill v. State, 2017 Ark. App. 29 **[sufficiency of the evidence; first-degree terroristic threatening]** There was substantial evidence to support appellant's conviction. **[witness testimony; opinion evidence]** The trial court did not abuse its discretion when it permitted a law enforcement official to testify that in his opinion appellant was the aggressor in the altercation because his opinion was based upon his own perception of the crime scene and the testimony did not require the jury to reach a particular result. (Sims, B.; CR-16-461; 1-25-17; Abramson, R.)

Schnarr v. State, 2017 Ark. 10 **[public trial]** When determining whether a courtroom closure is so *de minimus* or trivial that it does not abridge a defendant's Sixth Amendment right to a public trial, a court should consider the following factors: (1) the length of the closure; (2) the significance of the proceedings that took place while the courtroom was closed; and (3) the "scope of the closure" or whether it was a total or partial closure of the courtroom. In appellant's case, three members of his family were excluded from the majority of the jury-selection process for an entire morning of appellant's trial. The appellate court concluded that such a closure was not trivial and deprived appellant of his constitutional right to a public trial. **[jury instructions]** Based upon the facts of the case, there was no rational basis for the trial court to instruct the jury on negligent homicide or imperfect self-defense. (Johnson, L.; CR-16-165; 1-26-17; Goodson, C).

Lockhart v. State, 2017 Ark. 13 **[sufficiency of the evidence; driving while intoxicated; failure to submit to a chemical test]** There was substantial evidence to support appellant's convictions. **[motion to suppress]** The testimony from the law enforcement official combined with the footage from his dashboard camera established probable cause that appellant had violated Ark. Code Ann. § 27-51-301(a). Thus, the traffic stop was legal and the trial court's denial of appellant's motion to suppress was proper. **[appellate review; postconviction motion]** By waiting to raise an argument based upon the jury's failure to consider a presentence report for the first time in a posttrial motion, the appellant was precluded from having the issue considered on appeal. (Phillips, G.; CR-14-990; 1-26-17; Wood, R.)

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

Ealy v. State, 2017 Ark. App. 35 (committing a terroristic act) CR-16-322; 1-25-17; Klappenbach, N.

Szczerba v. State, 2017 Ark. App. 27 (possessing methamphetamine with purpose to deliver; possessing drug paraphernalia, maintaining a premises for drug activity; possessing hydrocodone) CR-16-382; 1-25-17; Gruber, R.

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:

Kidwell v. State, 2017 Ark. App. 4 (probation) CR-16-548; 1-18-17; Virden, B.

CIVIL

Barry Jones dba Borderline Farms v. Dozier Land Trust, 2017 Ark. App. 23 **[business record hearsay exception]** Appellee failed to present any admissible testimony whatsoever from the custodian or other qualified witness as to whether the business-record requirements were met. Among other things, there was no admissible evidence that the estimate was made at or near the time of the occurrence, that it was made by a person with knowledge, and whether it was, in fact, a document kept in the regular course of business. (Proctor, R.; CV-16-378; 1-18-17; Hixson, K.)

Johnson v. State Farm Ins. Co., 2017 Ark. App. 26 **[insurance]** It is clear from a plain reading of the language of the policy's "Insured's Duties" section that the section is not an exclusion, but an outline of the requirements by which an insured must abide when making a claim. The section provides that the insurer may request an independent medical exam if necessary to substantiate an insured's claim. Such a request is not prohibited by statute. It was not unreasonable for appellee to request an IME for the purpose of determining if the injuries for which appellant was treated were caused by the accident. (Fogleman, J.; CV-16-326; 1-18-17; Brown, W.)

Lawson v. Simmons Sporting Goods, Inc., 2017 Ark. App. 44 **[personal jurisdiction]** The contacts between Lawson and Simmons are sufficient to warrant personal jurisdiction over Simmons. Simmons should not have been surprised to be hauled into court in Arkansas because it anticipated and, in fact, wanted Arkansas residents to patronize its store, and obviously the residents would return home to Arkansas afterward. Under such circumstances, the assertion of personal jurisdiction is to be anticipated. (Glover, D.; CV-16-83; 1-25-17; Murphy, M.)

One Bank v. Lenderman, 2017 Ark. App. 42 **[interpleader]** Attorney's fees are discretionary in an interpleader action. There was no abuse of discretion in the trial court's declining to award such fees. (McGowan, M.; CV-16-526; 1-25-17; Hixson, K.)

Collins v. Leuholt, 2017 Ark. App. 33 **[summary judgment]** There remain to be answered genuine issues of material fact. The receipt, signed by Ava Leutholt and purported to evidence proof that Collins paid for the insurance coverage prescribed by the contract, was never

acknowledged or addressed by the trial court. Whether Collins was entitled to the insurance proceeds must be resolved by the trial court's determination of some material questions of fact that remain unanswered in light of the receipt. Remand for a determination of whether the signed receipt entitled Collins to the insurance proceeds as set forth in the contract between the parties. (Erwin, H.; CV-16-392; 1-25-17; Gladwin, R.)

Williams v. Allstate Ins. Co., 2017 Ark. App. 45 **[insurance]** Appellants contend that since Carl was using his vehicle at the time he was shot by someone in an uninsured vehicle in use, the UM portion of the policy with Allstate should have covered his injuries and property damages. Carl's injuries and property damages did not arise out of the use of the vehicle. Although both vehicles were in use at the time of the shooting, the shooting could have just as easily taken place outside of the vehicles. Thus, there is no causal connection between the vehicles' use and the shooting. Additionally, the shooting of Carl was an intentional act, not an accident as contemplated by the policy. The trial court properly granted Allstate's summary-judgment motion as there were no material issues of fact needing to be resolved. (Pope, S.; CV-16-512; 1-25-17; Brown, W.)

Barnes. v. Ozarks Community Hospital, 2017 Ark. App. 32 **[judgment]** The circuit court did not attack a bankruptcy court judgment setting forth that the malpractice claim was abandoned under 11 U.S.C. section 554(a). In no way did the circuit court modify, overturn, or in any way invalidate the Final Report entered by the bankruptcy court. The circuit court recognized the Final Report as evidence aiding in its determination of the issue of summary judgment. Arkansas Rule of Civil Procedure 17(a) does not apply when the original complaint filed is a nullity. (Where the original complaint is a nullity, Rules 15 and 17 are inapplicable because the original complaint never existed; thus, there is no pleading to amend and nothing to relate back.). The circuit court did not err in finding that, based on the Barnes's' lack of standing, their complaint was a nullity and thus, Rule 17(a) could not be employed in their favor. (Karren, B.; CV-16-290; 1-25-17; Virden, B.)

DOMESTIC RELATIONS

Farrell v. Farrell, 2017 Ark. App. 7 **[divorce—division of marital property]** The appellant wife and appellee husband were divorced after thirty years of marriage and virtually all of their substantial property was marital. This dispute, the third appeal of this case, was over the division of marital property. The major asset is the appellee's minority interest in a conglomerate of closely-held family businesses. After reviewing the properties and the circuit court's division of the property and the award of alimony, the Court of Appeals held that the circuit court erred by allowing the appellee to pay a substantial part of his former wife's share of the marital property over a multi-year period. In reversing and remanding, the Court of Appeals said the circuit court should order an immediate equal division of the stock, in conformity with section 9-12-315(a)'s command that marital property be distributed at the time of the divorce. The appellee former husband is to be given credit against the appellant former wife's share of the marital property for the monthly "alimony" payments he has made since the original decree was entered. The appellate court found no error in the circuit court's not awarding the appellant traditional need-based alimony or in denying her an award of attorney's fees for work done on the second appeal of this case. The circuit court lacked jurisdiction to award fees because that remand was a

limited one, and attorney's fees were not designated as an issue for the circuit court to clarify. (Spears, J.; No. CV-16-436; 1-18-17; Gladwin, R.)

Jordan v. Jordan, 2017 Ark. 13 **[divorce--alimony]** Ten years after the parties were divorced by an "Agreed Divorce Decree," the appellant former wife filed a petition for modification, asking that the appellee's payment of alimony to her be extended beyond the age designated in the decree and made permanent. The appellee former husband filed a motion to dismiss, contending that the court had no jurisdiction to modify the alimony provision because it was agreed to by the parties as part of an independent contract that was announced in open court and was incorporated into the divorce decree. After a hearing on the motion, the trial court granted the motion to dismiss. The Court of Appeals quoted the "Property Settlement Agreement" portion of the decree and quoted case law that explained the "two major types of alimony agreements and...the differences between them." The Court compared the one before it as very similar to the one in *Linehan v. Linehan*, 8 Ark. App. 177, 649 S.W.2d 837 (1983). It was not a separate written agreement signed by the parties, but the "Agreed Divorce Decree" was "approved as to form and substance" by both counsel, and the decree designates the parties' property settlement agreement with a separate heading. One paragraph addresses alimony and the language throughout emphasizes the parties' agreement. The Court said:

> [T]he parties' settlement of property issues is more clearly a negotiated settlement of issues—set forth in a designated "property-settlement agreement" that the parties intended to be binding—than a mere agreement to stipulate to some issues to avoid putting on proof.

The decision was affirmed. (Keaton, E., No. CV-16-265; 1-18-17; Glover, D.)

Hudspeth v. Hudspeth, 2017 Ark. App. 30 **[proceeds of life insurance policy]** The appellant former wife and her husband were divorced in 2011. He died intestate in 2015. Appellant was the named beneficiary on his life insurance policy and the insurance company paid her the policy limits of about $60,000. The appellee, the administrator of the decedent's estate, filed a motion to enforce the divorce decree and for a temporary injunction, alleging that the property-settlement agreement precluded the appellant from receiving life-insurance proceeds. The circuit court found that she had waived her right to the proceeds and awarded the appellee estate the life insurance proceeds. The appellee contended the circuit court had erred and the Court of Appeals reversed the circuit court's order. The Court said the provisions in the property-settlement agreement upon which the circuit court based its rulings did not specifically address the parties' life insurance policies. Paragraph 4 refers only to the cash value of the life insurance policy, and paragraph 8 refers to retirement accounts and pension plans as appellant's only benefits as a survivor of her former husband. The appellant was paid the insurance proceeds of the policy as the named beneficiary—not as a former spouse or survivor. The decedent did not change the named beneficiary on his life insurance policy at the time of the divorce or at any time before he died, although he could have. The Court cited *Allen v. First National Bank of Fort Smith*, 261 Ark. 230, 547 S.W.2d 118 (1977), in which the Supreme Court held that when insurance policies are not addressed in a divorce decree, "the rights of the designated beneficiaries of the contracts of insurance are determined in accordance with contractual law 'without regard to the effect of a divorce between the insured and the beneficiary.' Nowhere in the divorce decree or settlement agreement is there any specific mention of the Met Life policy. Because Brad Hudspeth never

changed the beneficiary of that policy from the appellant, she remains the designated beneficiary." (Morledge, C.; No. CV-16-653; 1-25-17; Abramson, R.)

Klenakis v. Klenakis, 2017 Ark. App. 36 **[divorce--alimony]** In connection with the parties' 2013 divorce, their property-settlement agreement, which was approved by the trial court, included a provision that the appellant wife's alimony would terminate upon her death, remarriage, or cohabitation with a man to whom she was not married or related. The appellant former husband petitioned in 2015 to terminate alimony, alleging that the appellee was cohabiting with her boyfriend. After a hearing, the circuit court denied the appellant's petition, finding that the appellee was not cohabiting with her boyfriend. The Court of Appeals reviewed the facts of the case and discussed the issue of cohabitation, citing *Collins v. Collins*, 2015 Ark. App. 525, 471 S.W.3d 665, which dealt with that issue. In *Collins*, the Court of Appeals affirmed the trial court's finding that the ex-wife was cohabiting with her boyfriend, and in this case before the Court, the Court said the evidence was even more compelling than in *Collins* to qualify as cohabitation for purposes of terminating alimony. The decision was reversed and remanded. (Taylor, J.; No. CV-16-407; 1-25-17; Klappenbach, N.)

JUVENILE

Ritter v. Ark. Dep't of Human Services, 2017 Ark. 9 **[TPR – ICWA]** Appellant's argument that DHS failed to plead that it was seeking to terminate parental rights under ICWA and to prove the required ICWA grounds was not preserved for review. However, the court also noted that ICWA establishes a higher burden of proof for termination not termination grounds. **[active efforts]** The Choctaw Nation representative reviewed the case and presented written documents for the court that were admitted into evidence without objection. She also testified that active efforts to prevent the breakup of the Indian family had been provided to appellant and had failed. Appellant did not rebut this testimony. The circuit court was within its authority to rely on the expert's testimony in making its finding that active efforts had been made. (Spears, J.; CV-16-760; 1-18-2017; Harrison, B.)

> ***Note: New Federal ICWA Regulations at 25 CFR 23.*** *Active efforts are affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child to his or her family. See 25 CFS §23.2 for definition and examples.*

Fuls v. Ark. Dep't of Human Services, 2017 Ark. App. 46 **[TPR – best interest]** Appellant argued that termination was not his in his children's best interest because their close relationship with their paternal grandparents. The Court affirmed the termination and found that to fail to terminate was contrary to the need for permanency for his children based on the evidence. The mother had relinquished her parental rights. There was also evidence that appellant was incapable or indifferent to remedying his situation so he could regain custody of his children solely to have his children continue a relationship with their grandparents, who were unable to care for them. (Putman, J.; CV-16-859; 1-25-2017; Brown, W.)

Guthrey v. Ark. Dep't of Human Service, 2016 Ark. App. 19 **[TPR – sufficiency]** The circuit court erred in defining the reason for removal as "poor judgement" when previous orders indicated removal resulted from parental unfitness and neglect resulting from an arrest and traffic

stop during which drugs and drug paraphernalia were found in the car with her children present. **[failure to remedy]** Further, the appellate court found that there was insufficient evidence to support the court's finding that appellant failed to remedy her "poor judgement." The only finding relied upon by the court to justify its finding was that appellant had been evasive and less than honest throughout the case, which goes to appellant's credibility. "Lack of credibility is not, in and of itself, a condition warranting removal of one's children and therefore does not amount to the failure to remedy such a condition." **[subsequent factors]** The trial court used the same analysis to support its findings as to subsequent factors and there was no evidence that the birth of a new baby would create a risk to her other children's health, safety or welfare. **[aggravated circumstances]** The evidence was insufficient to support the circuit court's finding that there was little likelihood that services would result in successful reunification where there was evidence that that appellant had successfully worked her case plan and utilized all available services, resulting in her remedying her drug problem. **[best interest]** There was insufficient evidence to support the circuit court's finding that returning appellant's children would pose a risk to their health and safety were appellant had successfully remedied her drug problem, completed required services, and maintained stable housing and employment. (James, P.; CV-16-751; 1-18-2017; Vaught, L.)

Shawkey v. Ark. Dep't of Human Service, 2016 Ark. App. 2 **[TPR - aggravated circumstances]** The evidence was sufficient to support the trial court's finding that after over a year appellant had not made even minimal progress in remedying his circumstances. He failed to complete any of the services ordered, had 19 consecutive positive drug screen, failed to submit to a drug and alcohol assessment or complete a drug treatment program, failed to submit to a psychological examination and had not visited his child in eight months. Further appellant failed to attend the PPH or TPR hearing. **[best interest/ potential harm]** There was sufficient evidence to support the court's finding where appellant did nothing to address his addiction or comply with services offered. Appellant failed to maintain contact with his child and there was no evidence that appellant had stable and appropriate housing, a job, or transportation sufficient to care for his child. (Spears, J.; CV-16-761; 1-18-2017; Gruber; R.)

A.W. v. State, 2017 Ark. 2016 Ark. App. 17 **[Delinquency – sufficiency]** Appellant failed to preserve his sufficiency argument because he never asserted to the trial court that a relevant portion of the criminal stature had not been proved. **[Motion to Suppress]** The Arkansas Rules of Criminal Procedure apply in delinquency proceedings. Ark. R. Crim. P. 16.2 provides that absent good cause, a motion to suppress shall be timely filed but not later than ten days before the date set for the trial of the case." Appellant's suppression argument was not sufficient to preserve for appeal, because appellant failed to raise it prior to the hearing, or during the State's case, but waited until after the State had rested. (Medlock, M.; CR-16-340; 1-25-2017; Harrison, B.)

DISTRICT COURT

Barker v. State, 2017 Ark. App. 43 **[District Court Appeal] [Ark. R. Crim. P. 36].** Appellant was convicted of DWI in district court. A notice of appeal was filed with circuit court. No certified

copy of the district court record was ever filed with the circuit clerk. Appellant contends that the circuit court erred in dismissing the appeal for lack of jurisdiction. Appellant argues that his appeal should not have been dismissed because he was under the impression that his appeal was perfected and that the Arkansas Rules of Criminal Procedure and corresponding case law do not provide for what appellant should have done to meet the burden to perfect the appeal. It was held that Rule 36 does expressly state that defendant has the burden to ensure his appeal from district court is timely made and this burden cannot be shifted from the defendant to the clerk's office. It was further held that Rule 36 does adequately provide guidance for what has to be done to perfect the appeal. (Lindsay, J.; CR-16-645; 1/25/2017; Murphy, M.)