

APPELLATE UPDATE

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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On September 15th, the Supreme Court announced the following:

- Revisions to the Rules and Regulations of the Board of Certified Court Reporter Examiners, effective immediately;
- Revisions to the Pilot Project for electronic filing in the appellate courts, including amendments to Rule 2-1 of the Rule of the Supreme Court and Court of Appeals, effective September 21, 2016;
- Revision to Child Support Affidavit of Financial Means, effective October 10, 2016.

CRIMINAL

Jones v. State, 2016 Ark. App. 354 [**motion to suppress; Ark. R. Crim. P. 13.1**] Because the application requesting a search warrant for appellant's home was accompanied by a sworn affidavit, recorded testimony in support of the application was not required. (Fergus, L.; CR-15-812; 8-24-16; Glover, D.)

Shreck v. State, 2016 Ark. App. 374 [**sentencing phase; admission of evidence**] The trial court did not abuse its discretion when it admitted on-line chats and photographs depicting certain sexual acts during the sentencing phase of appellant's trial because the evidence assisted the jury in gauging the veracity of appellant's attempts to downplay his activities. Additionally, once appellant opened the door to character and reputation evidence, the on-line chats and photographs was relevant rebuttal evidence. (Clawson, C.; CR-15-1035; 9-7-16; Gladwin, R.)

Bragg v. State, 2016 Ark. App. 378 [**affidavit; search warrant**] To uphold the validity of an affidavit made in support of a search warrant, it is not necessary that the affidavit be completely without inaccuracy as long as the inaccuracies are relatively minor when viewed in the context of the totality of the circumstances, including the affidavit taken as a whole and the weight of the testimony of the participants who procured and executed the search warrant. (Putman, J. CR-15-926; 9-7-16; Virden, B.)

Neal v. State, 2016 Ark. App. 384 [**sufficiency of the evidence; second degree domestic battery**] There was substantial evidence to support appellant's conviction. [**mistrial**] The trial court did not abuse its discretion when it denied appellant's requests for a mistrial, which were based upon comments made by the prosecutor during the direct examination of the victim and the State's closing argument. (Johnson, L.; CR-15-1073; 9-7-16; Hixson, K.)

Cain v. State, 2016 Ark. App. 398 [**motion to suppress; 5th Amendment**] Although appellant was required to answer several questions from law enforcement officials after he was involved in an automobile accident, he was not in custody for purposes of *Miranda* and it was not necessary for the law enforcement officials to administer the *Miranda* warnings to appellant prior to speaking to him. (Lindsey, M.; CR-15-802; 9-14-16; Gruber, R.)

Duke v. State, 2016 Ark. App. 402 [**motion to suppress**] Because the law enforcement official developed reasonable, articulable suspicion before the legitimate purpose of the traffic stop was over, it was lawful for him to continue to detain appellant while a dog sniff of appellant's vehicle was performed. (Pearson, B.; CR-16-34; 9-14-16; Whiteaker, P.)

Boyd v. State, 2016 Ark. App. 407 [**sufficiency of the evidence; aggravated robbery; theft of property**] There was substantial evidence to support appellant's convictions. [**motion to suppress**] The totality of the circumstances established that: (1) appellant freely waived his *Miranda* rights; (2) law enforcement officials did not make false promises to appellant; (3) appellant had extensive experience with the criminal justice system; and (4) the interview of appellant was not unduly long. Accordingly, the trial court's decision not to suppress appellant's confession was not clearly against the preponderance of the evidence. The fact that the law enforcement official may have misrepresented some of the facts surrounding the case did not change the voluntariness of appellant's confession. [**witness identification**] When deciding

whether a witness's identification is reliable, a court should consider: (1) the prior opportunity of the witness to observe the alleged act; (2) the accuracy of the prior description of the accused; (3) any identification of another person prior to the pretrial identification procedure; (4) the level of certainty demonstrated at the confrontation; (5) the failure of the witness to identify the defendant on a prior occasion; and (6) the lapse of time between the alleged act and the pretrial identification procedure. (Wright, H.; CR-15-259; 9-14-16; Hoofman, C.)

Brooks v. State, 2016 Ark. 305 [**sufficiency of the evidence; capital murder**] There was substantial evidence to support appellant's conviction. (Wright, H.; CR-15-997; 9-15-16; Goodson, C.)

Jones v. State, 2016 Ark. 304 [**Rule 37**] Appellant failed to establish that his counsel performed deficiently or that he would not have entered a guilty plea but for his counsel's performance. Thus, the trial court correctly denied appellant's request for postconviction relief. (Johnson, J.; CR-16-61; 9-15-16; Baker, K.)

Cartwright v. State, 2016 Ark. App. 425 [**sufficiency of the evidence; robbery**] There was substantial evidence to support appellant's conviction. [**jury instruction; lesser-included offense**] Theft is not a lesser-included offense of robbery pursuant to Ark. Code Ann. § 5-1-110(b). (Glover, D.; CR-15-1059; 9-21-16; Vaught, L.)

Fricks v. State, 2016 Ark. App. 415 [**motion to suppress**] The evidence that was seized in appellant's case was obtained in connection with a proper inventory search of appellant's vehicle that was conducted after appellant was arrested and the vehicle was impounded. Thus, the trial court's denial of appellant's motion to suppress was not clearly against the preponderance of the evidence. (Wright, R.; CR-16-208; 9-21-16; Virden, B.)

Ferguson v. State, 2016 Ark. 319 [**recusal; Ark. Code Jud. Conduct Rule 2.11**] Because the judge's impartiality could reasonably have been questioned, the judge should have recused from appellant's case. (Elmore, B.; CR-15-1061; 9-22-16; Hart, J.)

Mitchell v. State, 2016 Ark. App. 436 [**speedy trial**] Appellant's speedy-trial period did not begin to run when a warrant for his arrest was issued or when a detainer was placed on him instead the speedy-trial period began to run when appellant was arrested. (Wright, J.; CR-16-232; 9-28-16; Gruber, R.)

Bathrick v. State, 2016 Ark. App. 444 [**motion to suppress; affidavit**] The trial court erred when it concluded that probable cause existed to issue a search warrant for appellant's property because the information that was included in the affidavit in support of the request for the search warrant

occurred nine months after the affidavit was sworn out. (Erwin, H.; CR-16-286; 9-28-16; Hixson, K.)

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

Childers v. State, 2016 Ark. App. 371 (delivery of methamphetamine, possession of drug paraphernalia, unauthorized use of another person's property to facilitate a crime, sentencing enhancement for delivering a controlled substance within 1000 feet of a school or church) CR-15-880; 8-31-16; Hixson, K.

Donaldson v. State, 2016 Ark. App. 391 (third-degree domestic battery; felony fleeing) CR-15-981; 9-14-16; Abramson, R.

Wright v. State, 2016 Ark. App. 404 (aggravated assault upon a certified law-enforcement officer; first-degree terroristic threatening) CR-15-984; 9-14-16; Vaught, L.

Lowe v. State, 2016 Ark. App. 389 (rape) CR-15-1071; 9-14-16; Gladwin, R.

Johnson v. State, 2016 Ark. App. 400 (contempt) CR-16-101; 9-14-16; Glover, D.

Smith v. State, 2016 Ark. App. 421 (robbery) CR-16-147; 9-21-16; Glover, D.

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:

Mosley v. State, 2016 Ark. App. 353 (suspended sentence) CR-15-831; 8-24-16; Gruber, R.

Varner v. State, 2016 Ark. App. 373 (suspended sentence) CR-15-930; 8-31-16; Brown, W.

Clark v. State, 2016 Ark. App. 383 (probation) CR-16-3; 9-7-16; Vaught, L.

Robertson v. State, 2016 Ark. App. 379 (suspended sentence) CR-15-1043; 9-7-16; Kinard, M.

Brown v. State, 2016 Ark. App. 403 (probation) CR-15-691; 9-14-16; Vaught, L.

Siddiq v. State, 2016 Ark. App. 422 (probation) CR-16-166; 9-21-16; Whiteaker, P.

CIVIL

Razorback Cab v. Amon, 2016 Ark. App. 352 [**“send-a-message statement”**] Counsel did not make an improper “send-a-message” statement to the jury during trial. A send-a-message statement is one in which the plaintiff in a civil trial asks the jury to award damages for purposes of punishment and deterrence rather than compensation. [**evidence rulings**] The circuit court did not abuse its discretion in redacting the psychiatric and drug-seeking references in Dr. Collins’s notes. The evidence showed that Amon had a chronic anxiety issue and presented to Dr. Collins solely for treatment of that issue. Amon sought no compensation from Razorback for her visit to Dr. Collins or for any anxiety problems or other psychiatric problems. Thus, the circuit court may well have reasoned that Dr. Collins’s redacted notations bore little, if any, relevance to Amon’s case against Razorback. Moreover, for various reasons, there was no abuse of discretion in the court’s decision to exclude a doctor’s deposition testimony. [**discovery sanctions**] A court may impose discovery sanctions when a party fails to supplement its discovery responses. Here, the circuit court apparently determined that, in fairness, Razorback should have provided the documents to Amon so that she could prepare Dr. Silver for cross-examination and possible impeachment. The court’s concern was reasonable considering that Amon’s discovery asked for this particular type of document. Due to Razorback’s discovery violation, Amon was left unaware that Razorback would use the documents at trial; therefore, there was no abuse of discretion in the court’s ruling. (Fitzhugh, M.; CV-15-946; 8-24-16; Kinard, M.)

Bales v. City of Fort Smith, 2016 Ark. App. 356 [**summary judgment—whistle blower litigation**] When evaluating evidence in a motion for summary judgment, the appellate court must resolve all doubts and inferences in the nonmoving party’s favor. With this standard in mind, it is clear that reasonable minds could determine that there is evidence connecting whistle-blowing communication to the adverse actions ultimately incurred. Accordingly, summary judgment was improper. With respect to Plaintiff Sampson’s claim, he failed to offer any evidence linking his formal reprimand to his whistle-blowing communication, and without any evidence of causation, Sampson failed to meet proof with proof. Accordingly, his whistle-blower claim necessarily fails. (Cox, J.; CV-15-873; 8-24-16; Vaught, L.)

Carthel Hodges Trust v. Gravel Hill Cemetery, 2016 Ark. App. 360 [**boundary**] The trial court, upon making credibility decisions within its discretion, did not err in determining that the fence line that has been the boundary by acquiescence for many years should be declared to be the legal boundary for all purposes. (Hannah, C.; CV-15-1052; 8-31-16; Gladwin, R.)

Chandler v. Wal-Mart, 2016 Ark. App. 372 [**summary judgment**] Plaintiff failed to meet proof with proof on issue of causation with respect to strict product liability claim. While appellants responded to the motion for summary judgment by attaching additional material such as deposition excerpts, the serum’s label and safety certificate, and documentation of other adverse

effects from consumers following use of the serum, none of this additional material rebutted appellees' proof regarding appellants' failure to adequately establish proximate cause. Even when viewed in the light most favorable to appellants, their evidence merely established that there were several possible sources of ignition of Davis's hair during the incident, and causation may not be based on mere conjecture or speculation. Because appellants failed to meet proof with proof and show that the alleged propensity of the serum to ignite was the more probable cause of Davis's injuries, the circuit court was correct in granting summary judgment as to appellants' strict-liability claims. (Proctor, R.; CV-15-445; 8-31-16; Hoofman, C.)

Coots v. Bandera, 2016 Ark. App. 388 [**summons**] Amendment to Rule of Civil Procedure 4 (i) [extensions to perfect service beyond the 120-day period from filing the suit so long as the motion for the same was filed before expiration of the time granted on a previous extension] applies retroactively. (Duncan, X.; CV-15-764; 9-7-16; Brown, W.)

Florida Oil Investment LLC v. Goodwin, Inc., 2016 Ark. App. 380 [**attorney fees**] Arkansas Code Ann. section 18-44-128(b) authorizes Florida Oil to recover attorney's fees in this case. The statute does not limit recovery to those owners who received notice of the intent to file lien, to those who owned at the time the lien was filed, or to those who owned the property before the lawsuit was filed. It applies to an "owner" who is a "prevailing party." (Cox, J.; CV-16-68; 9-7-16; Gruber, R.)

Scott v. Scott, 2016 Ark. App. 390 [**requests for admission**] The trial court's finding that Walter had complied with the Arkansas Rules of Civil Procedure was not an abuse of discretion. The trial court duly considered that Greg had an opportunity to cross-examine Walter regarding the requests for admissions; the trial court stated in a footnote "that the bulk of the Requests have been admitted by the Plaintiff"; and the trial court considered that Walter's notice of submission of responses filed on April 2, 2012, alerted the court and opposing counsel that responses had been served on all counsel of record. [**trust- in terrorem clause**] The trial court's finding regarding the in terrorem clause is not clearly erroneous. Greg's actions in contesting the request for an accounting, and the characteristics of the lawsuit that were conveyed in the pleadings and during the trial, support the trial court's determination that neither Walter nor Greg abided by their mother's wishes or the terms of the Trust. (Compton, C.; CV-15-1002; 9-14-16; Gladwin, R.)

Eifling v. Southbend, Inc., 2016 Ark. App. 393 [**boundary line**] The issues arise from a boundary dispute involving a parcel of land located on the east side of Lake Dian in Lincoln County. Eifling argues that the boundary of the property should have been determined by the "top bank" of Lake Dian. The circuit court correctly found that the boundary of Lake Dian is determined by the "ordinary high water mark." (Wyatt, R.; CV-15-941; 9-14-16; Virden, B.)

Ford Motor Credit v. First National Bank, 2016 Ark. App. 408 [**summary judgment**] Because material questions of fact remain as to whether Murphy acted in good faith and whether he and FMCC would qualify as buyers in the ordinary course under the circumstances in this case, the circuit court erred in granting summary judgment to FNBC. Additionally, FMCC is not entitled to judgment as a matter of law pursuant to section 4-9-315. Material questions of fact remain on the issue of whether Crossett Ford was authorized to sell the vehicles at issue in this case. (Glover, D.; CV-16-124; 9-14-16; Hoofman, C.)

Peck v. Peck, 2016 Ark. App. 423 [**trust**] Appellant contends that the circuit court erred in dismissing her first amended complaint based on the share-cancellation provision. The circuit court abused its discretion when it granted the motion to dismiss. The judge did not look at the factual allegations contained in Alison's amended complaint or consider Alison's arguments concerning whether the share-cancellation provision was unenforceable under section 28-73-1008. Instead, the court took the view that the *Peterson* case held that the mere filing of a lawsuit challenging the trustee's actions triggered the share-cancellation provision without regard to whether the trustee was acting in bad faith or with reckless indifference. *Peterson* is not dispositive of this case because *Peterson* was concerned with ownership of the Calder artwork. The circuit court erred in granting Finley's motion to dismiss. On remand, the court is to determine whether the amended complaint states sufficient facts showing that Finley acted in bad faith or with reckless disregard of the trust's purposes or of Alison's interests as a contingent beneficiary. (Fox, T.; CV-15-588; 9-21-16; Whiteaker, P.)

Watkins v. Paragould Light and Water, 2016 Ark. App. 432. In this pro se appeal, appellants argue that several errors occurred over the lengthy history of the case, which saw four separate circuit judges presiding. There is no merit in appellants' arguments. (Richardson, M.; CV-15-523; 9-28-16; Gladwin, R.)

Brazeal v. Cooper, 2016 Ark. App. 442 [**peremptory challenges**] On appeal, Brazeal argues that the trial court erred in refusing to strike for cause the three jurors to whom he had objected, who were ultimately seated on the jury. This court cannot address the merits of Brazeal's objections to the three jurors because Brazeal admittedly chose not to use all of his peremptory challenges. The failure to exhaust these challenges waives the right to challenge the court's refusal to strike jurors for cause. [**medical expert**] Brazeal sought to strike expert testimony by arguing that the locality rule should apply equally to all experts, including defense experts. The trial court did not err in refusing to strike Dr. Griffin's testimony because, even if the locality rule is applicable to defense experts, Dr. Griffin's testimony was sufficient to satisfy the rule. Dr. Griffin's testimony was sufficient to establish his familiarity with the standard of practice in Rogers/Bentonville. As such, this court need not address whether the locality rule applies to defense experts, either directly or through application of Rule 402 of the Arkansas Rules of Evidence, because even if

applicable, the requirement was satisfied in this case. (Duncan, X.; CV-15-1044; 9-28-16; Vaught, L.)

DOMESTIC RELATIONS

Emis v. Emis, 2016 Ark. App. 369 [**modification of child custody; attorneys' fees; recusal**]

The Court of Appeals found that the appellant's failure to properly designate the August 27, 2015 final custody order in her initial notice of appeal divested the Court of jurisdiction to decide the issues she raised on the custody hearing or the trial court's custody determination. She designated a previous order, dated August 14, 2015, which the Court said was more akin to a letter opinion, which the Court previously has found is not a final order for purposes on appeal and, even if it were, it was superseded by the August 27 order. The other issues she raised also have procedural difficulties. On the issue of the circuit court's failure to recuse, the record indicates that she filed the motion to recuse after the final order was entered. She never requested that the custody award be vacated or set aside for bias, so any discussion of recusal would have no effect on the custody determination and would be an advisory opinion, which the Court does not render. On her issue concerning fees for opposing counsel and the attorney ad litem, the order striking her affidavit in support of the recusal motion, and the order denying her request to vacate the ad litem appointment, she cited no facts or authority to support her arguments, and made no independent argument in her brief. She attempted to incorporate her trial motions and briefs by reference, which the Supreme Court has specifically stated is not proper. The decision was affirmed. (Welch, M., No. CV-15-993; 8-31-16; Whiteaker, P.)

Sanders v. Passmore, 2016 Ark. App. 370 [**division of property**] This property-division dispute involves the parties' interest in an account the appellee wife held jointly with her mother, an alleged loan the wife made to the appellant husband for \$40,991.50, and the division of personal property. On cross-appeal, the wife contends that if the court reversed the trial court's distribution she owned with her mother, then the court clearly erred in distributing the parties' six retirement accounts. On direct appeal, the Court of Appeals affirmed the circuit court's finding that the account the appellee held jointly with her mother was to be awarded to her in full; it divided various items of personal property; and it determined that the appellant owed the appellee \$40,991.50 in loans, ordering that he repay her. In addition, the Court affirmed the division of the contested personal property. The Court of Appeals reversed that portion of the order about the loan, finding that the appellee failed to prove by clear and convincing evidence that she rebutted the presumption that her payments to the appellant were gifts. The Court reversed the order directing the appellant to repay that amount. The Court found that, based upon the holdings the Court made in the direct appeal, the cross-appeal was moot. (Cox, J.; No. CV-16-64; 8-31-16; Vaught, L.)

Gibson v. Keener, 2016 Ark. App. 363 [**paternity; child custody; visitation**] This case began as a paternity case initiated by the Office of Child Support Enforcement, which resulted in an agreed-order establishing the appellee as the father of the parties' child, granting a judgment for retroactive child support, and recognizing the appellant mother as the sole custodian. A subsequent order established the father's visitation rights. The parties, who were never married, subsequently moved in together and lived together as a family, and a later agreed order abated the father's obligation to pay child support. The parties then separated, abiding by the earlier visitation order for the father's every-other-weekend visitation. This appeal results from a later court order finding a material change in circumstances and an order for "joint legal custody" but not physical custody. The father's visitation was expanded and summer visitation was changed. On its de novo review, the Court of Appeals found there was a material change in circumstances and that the court did not err in awarding joint custody. The court also created a sensible visitation schedule given the facts presented to the court. The decision was affirmed. (Womack, S.; No. CV-15-879; 8-31-16; Harrison, B.)

Cummings v. Cummings, 2016 Ark. App. 375 [**divorce—contempt; alimony; jurisdiction**] The Court of Appeals considered a preliminary, jurisdictional issue. Two notices of appeal were filed in the instant case. One followed the trial court's order of October 2, 2014, which gave the appellee wife a judgment on the appellant husband's retirement benefits, modified alimony, and held the husband in contempt of court. The second notice of appeal was filed on December 19, 2014, and challenged only the trial court's order denying the motion to vacate. The appellant filed his record on appeal on January 21, 2015, without requesting any extensions for filing. The Court of Appeals noted that the timely filing of a record on appeal is a jurisdictional issue for the court, and strict compliance is required. The failure to strictly comply robs the court of jurisdiction to hear the appeal. Here, the record was lodged more than ninety days after the first notice of appeal was filed, so the Court has no jurisdiction to hear the appeal of the September 2014 order. However, the record was timely filed with respect to the second notice of appeal challenging the circuit court's order denying the motion to vacate its decisions regarding the contempt findings against the appellant and its award of alimony to the appellee. The appellant based his argument for reversal on the premise that the trial court abused its discretion in holding him in contempt for failure to pay alimony. However, the trial court's judgment gave two reasons for its contempt finding—failure to comply with discovery requests and failure to pay alimony as directed. When a court gives two alternative reasons for its decision and an appellant attacks only one, the appellate court must affirm, so the contempt finding was affirmed without further discussion. His second point is that the trial court erred in awarding appellee alimony based upon his retirement benefits. The Court considered the factors in awarding alimony and the facts of this case and found that the trial court did not abuse its discretion in its alimony award. The decision was affirmed. (Looney, J.; No. CV-15-54; 9-7-16; Gladwin, R.)

Peace v. Peace (Malin), 2016 Ark. App. 406 [**divorce—property-settlement agreement; contempt**] The parties’ property settlement decree was incorporated into their divorce decree. The agreement provided, in part that the wife agreed to file joint tax returns with the husband for the years 2011 and 2012. If the husband did not submit a joint tax return for the wife’s approval by November 1, 2013, the wife had leave to file a separate tax return for 2011 and 2012. “The Husband accepts full responsibility for any tax liability, including penalties and interest, associated with the 2011 and 2012 tax returns, and indemnifies and holds the Wife harmless from same.” On July 30, 2015, the appellee wife filed a motion for contempt against the appellant alleging that she could not file her separate 2012 and 2013 tax returns until the outstanding 2011 tax debt was paid and that appellant told her he was short \$22,000 for the payment. She stated in her complaint that she loaned him \$22,000 to apply to the 2011 tax debt, but then the IRS claimed an additional tax deficiency of \$5,186.55, so she loaned him another \$2,500 to apply to the tax debt. She said that he had refused her multiple requests to reimburse her these funds, that he was in willful contempt, and that he should be required to appear and show cause for his failure to abide by the terms of the decree. He filed a motion to dismiss, contending the trial court lacked subject-matter jurisdiction to enforce the property-settlement by contempt because she failed to allege that he had violated any part of the agreement, and instead was a separate action for breach of an oral contract that required a separate civil suit. The trial court found that the dispute dealt with the terms of the property-settlement agreement incorporated into the divorce decree and that the appellant had failed to accept full responsibility for the 2011 tax liability, and had failed to indemnify and hold the appellee harmless from the same that the parties’ agreement required. In affirming, the Court of Appeals said that the appellee’s action and the trial court’s order were premised only on appellant’s failure to comply with the provisions of the written property-settlement agreement. The court was not enforcing an oral agreement, but was enforcing its decree and the incorporated property-settlement agreement. (Pierce, M.; No. CV-16-76; 9-14-16; Hixson, K.)

Nelson v. Nelson, 2016 Ark. App. 416 [**divorce—alimony; marital property; marital debt**] The parties were divorced after being married for thirty years. The appellant argued on appeal that the circuit court erred in awarding the appellee permanent alimony of \$2500 a month, in unequally distributing marital property to her, and in ordering him to pay more of the marital debt than she. In affirming, the Court of Appeals noted that the award of “permanent” alimony was another way of saying the court had chosen not to limit the amount of time the appellee should receive alimony, and the Court found no error. On the amount of alimony, the Court said alimony has never been reviewed solely on a mathematical formula, and that a need for flexibility outweighs the need for relative certainty. The circuit court considered the income and earnings of both parties, their assets, needs and obligations, their past standard of living, and the length of the marriage. The amount of alimony awarded was not an abuse of discretion. On the issues of the division of marital property and debt, the Court said marital property must be divided in a way that is equitable, but not necessarily mathematically precise. The court here

considered all of the necessary factors in looking at an unequal division of property; it stated its basis and reasons; and its explanation was not inadequate or insufficient. Finally, on the issue of the division of debt, that is a fact question that will not be reversed unless it is clearly erroneous. Arkansas has no presumption that an equal division of debt must be made. Rather, the circuit court has authority to consider the allocation of debt in the context of the distribution of all of the parties' property. The court considered the facts of the case, and its division of marital debt was not clearly erroneous. (Johnson, K.; No. CV-15-942; 9-21-16; Virden, B.)

Riddick v. Harris, 2016 Ark. App. 426 [**modification of custody; modification of child support**] The appellant father appeals from the trial court's denial of his motion to modify custody and the granting of the appellee mother's motion to modify child support. On cross-appeal, the appellee mother argued that the trial court erred in calculating the appellant's income for child-support purposes, finding her in contempt of the summer visitation schedule, modifying the father's visitation, denying her request to make the father's increased child support obligation retroactive, and denying her request for attorney's fees. The Court of Appeals affirmed the court's denial of the father's request to modify a change in custody from the mother, and the granting of an increase in child support based upon an increase in the father's monthly net income. On cross-appeal, the court reversed and remanded in part and affirmed on part of the five issues the appellee raised. First, on the issue of the calculation of the appellant's income for child support purposes, the Court reversed and remanded for the circuit court to look at what "SIP" and "Other Benefits" were and whether they were "income" for child support purposes. Second, on the issue of contempt, the trial court had found the appellee's behavior with respect to visitation was a willful violation of the decree's summer-visitacion schedule, and the appellate court affirmed, finding that not clearly against the preponderance of the evidence. Third, the trial court increased the appellant's visitation, and the appellate court held that it did not clearly err in doing so. Fourth, on whether the trial court abused its discretion in denying her request to make the increased child-support obligation retroactive, the Court of Appeals found the trial court did not abuse its discretion, that the trial court found the child was well supported during the months after the petition for modification was filed, and that no evidence was presented of a negative impact to the child. The trial court gave reasons for not applying the increase retroactively and its decision was affirmed. Finally, the Court of Appeals found no abuse of discretion in the trial court's denial of attorney's fees to the appellee. (Richardson, M.; No. CV-15-859; 9-21-16; Vaught, L.)

Rodgers v. Rodgers, 2016 Ark. App. 447 [**adoption**] In this stepparent adoption case, the natural mother appealed from an adoption granted to the children's stepmother, based upon the circuit court's finding that the appellant's consent was not required because the petitioner proved that the mother had failed, for a period of at least one year and without justifiable cause, to communicate with her children or to provide for their care and support as required by law or court order. The natural mother of the children had a drug problem and, in an order placing

custody with the father, the circuit court ordered that the mother would have no visitation with the children unless and until she could pass a drug screen and came back to court so the court could look at the situation again. On appeal, the appellant argued that she did not attempt to visit the children because she was following the court's order. The Court of Appeals held that the trial court did not clearly err with regard to the failure to communicate, so it was not necessary to consider the issue of her failure to provide for the care and support of her children. The decision granting the adoption was affirmed. (Hearnsberger, M.; No. CV-15-906; 9-28-16; Hoofman, C.)

PROBATE

Navarrete v. Creech, 2016 Ark. App. 414 [**adoption**] The petitioner in this case is the biological, maternal grandmother of the five-year-old child who is the subject matter of the adoption. The adoption was granted on the consent of the petitioner's daughter who is the biological daughter of the petitioner. In affirming the adoption, the Court of Appeals dismissed both of the petitioner's contentions on appeal. The Court found no merit in petitioner's argument that the appellee adoptive mother was guilty of improper conduct in practicing counseling and social work without a license, which she said constituted criminal acts and ethical violations in Arkansas. The Court said no evidence supported that appellee committed any wrongdoing in the scope of her employment and that no convincing argument or citation to authority supported the argument. Her second argument, that since the circuit court allowed her to intervene in the adoption case because she had stood in loco parentis to the child in question, she should be considered the "mother" of the child whose consent was required for the adoption. The Court found the argument unpersuasive, and said the trial court correctly found that all of the required consents had been provided. In this case, the only consent required was the consent of the mother, who had voluntarily terminated her rights to the child with a proper execution of relinquishment and termination documents, had entered her appearance, and had waived all notice of summons for the proceedings. (Brantley, E.; No. CV-16-72; 9-21-16; Abramson, R.)

JUVENILE

Kidd v. Dep't of Human Services, 2016 Ark. App. 450 [**DN Adjudication - jurisdiction**] The court found that appellant sexually abused one of the three children adjudicated dependent-neglected. Appellant argued that the court lacked jurisdiction because other non-custodial parents were not provided notice of the proceedings. Appellant had no standing to raise the issue of proper service on non-custodial parents who did not make the argument themselves. (Wright, R.; CV-16-486; 9-28-20; Brown, W.)

Lansdell v. Ark. Dep't of Human Services, 2016 Ark. App. 435 [**PPH –relative custody**]
The trial court did not err in finding that appellant was not making sufficient and measurable progress to return her child and placing custody of her child with a relative. Appellant's child was removed as a result of her drug use, criminal charges, and additional findings were made concerning domestic violence in the home. Appellant was ordered to demonstrate an ability to protect her child and keep her safe from harm. Evidence showed that appellant still had nine months remaining in the drug court program. She had two recent altercations with her husband, although she testified that she had separated from him and was seeking a divorce, and she had been arrested on an unresolved warrant weeks prior to the hearing. (Zimmerman, S; CV-16-401; 9-28-2016; Abramson, R.)

Wheatley v. Ark. Dep't of Human Service v. Nelson, 2016 Ark. App. 428 [**PPH –relative custody**]
Appellant appealed the court's order placing custody with her father and stepmother, and granting them discretion with visitation. Appellant argued that the court erred based on a mistake of fact that she abused her children, and that she could not remedy an issue she did not commit because she did not physically abuse her children. Appellant was the custodian when her children were physically abused, and she failed to protect her children from abuse. Appellant's children were not safe in her care. [**visitation**] Appellant's argument about visitation is premature. Appellant can petition the court if unreasonably denied visitation. (Arnold, G; CV-16-226; 9-28-2016; Glover, D.)

Little v. Ark. Dep't of Human Service v. Nelson, 2016 Ark. App. 362 [**PPH - guardianship**]
Appellant argued that there was insufficient evidence to support the court's order granting guardianship of her daughter to relatives. The best interest of the child is the paramount consideration. The statutory requirements for guardianship were met and there was evidence that the relatives had a long-standing and positive relationship with the child. (Zuerker, L.; CV-16-92; 8-31-2016; Abramson, R.)

Bell v. Ark. Dep't of Human Services, 2016 Ark. App. 446 [**TPR – adoptability**]
There was sufficient evidence of adoptability where the case worker relied on her professional experience and also testified as to specific characteristics of appellant's child being advantageous for adoption, and that her current placement was interested in adoption. [**potential harm**]
Continued uncertainty is itself potentially harmful to children. The evidence that supported the termination grounds also established potential harm, along with appellant's inability to care for her own needs. [**continuance**] Appellant did not demonstrate an abuse of discretion or resulting prejudice for denying the continuance. (Zuerker, L.; CV-15-603; 9-28-2016; Hoofman, C.)

Dade v. Ark. Dep't of Human Services, 2016 Ark. App. 443 [**TPR – aggravated circumstances**]
There was evidence that supported the court's finding aggravated circumstances that there is little likelihood that services would result in successful reunification. DHS provided services

directed to appellant's mental health, but appellant was unable or unwilling to recognize that she suffered from a mental illness. She denied her erratic behavior, refused to take her medications, and did not attend counseling. **[waiver of counsel]** Appellant argued that the TPR should be reversed because the record failed to demonstrate that her waiver of her right to counsel at the probable cause hearing was knowing and intelligent. Appellant was appointed an attorney in an emergency removal order, but the court relieved counsel at the Probable Cause Hearing when counsel reported on the record that his client did not want an attorney. He was reappointed at the termination hearing. However, this issue was not preserved for appeal. (Keaton, E.; CV-16-425; 9-28-2016; Vaught, L.)

Jackson v. Ark. Dep't of Human Services, 2016 Ark. App. 440 **[TPR – potential harm]** Appellant failed to submit to random drug screens, substituted urine at drugs screens, and still tested positive a year after his child had been removed. Appellant's continued drug use demonstrated potential harm. **[adoptability]** Although Appellant's child was developmentally delayed, the case worker testified that the delays were not severe enough to be a barrier to adoption. She also testified that the child was young and in therapy. Developmental delays do not negate that a child is adoptable. **[grounds]** Appellant's argument that the trial court failed to cite its grounds for termination is factually incorrect. The court's order tracks the statutory language of the subsequent factors ground. Appellant's argument for a specific statutory section or subsection is not supported by any convincing legal authority. (Sullivan, T.; CV-16-361; 9-28-2016; Whiteaker, P.)

Abram v. Ark. Dep't of Human Services, 2016 Ark. App. 436 **[DN- reopen]** Appellant argued that the court erred in denying her motion to dismiss her TPR petition because DHS reopened its case from a prior DN case that had been closed. Appellant's reliance on *Young* is misplaced. The prior DN case had been closed for less than a month, when a new petition for emergency custody and DN was filed. The trial court did not err. It was dependency-neglect, not a general custody matter. **[TPR - failure to remedy]** There was sufficient evidence where although appellant resolved her criminal charges and had clean drug screens, she did not complete the psychological evaluation, parenting, failed to obtain stable housing and income and did not attend regular visitation with her children. **[adoptability]** Appellant argued the evidence on adoptability was insufficient because the only testimony was from a worker who had never met the child. There was also a recommendation in the CASA report for adoption. The trial court must consider the likelihood that the child will be adopted. The court's finding that that the children were adoptable was sufficient based on the testimony, history of the case, including that the children were healthy and had no conditions that would bar adoption. **[potential harm]** The trial court was not clearly erroneous where appellant failed to have a stable job or housing, had not complied with the case plan, and failed to visit her children regularly. (Zuerker, L.; CV-16-470; 9-28-2016; Gruber, R.)

Sharks v. Ark. Dep't of Human Services, 2016 Ark. App. 435 [TPR - **adoptability**]

There was sufficient evidence that the court considered the likelihood of adoption, despite a factual error in the court's order. A caseworker's testimony that a child is adoptable is sufficient to support an adoption finding. The caseworker testified as to 359 potential families willing to adopt a child with appellant's child age, race, and characteristics. There was also testimony that the child had medical issues that were being addressed. **[potential harm]** The trial court was not clearly wrong in finding potential harm given appellant's history of mixing prescription medication and alcohol, his arrests for public intoxication, and his lack of stability and sobriety. **[evidence]** The court correctly weighed appellant's compliance throughout the entire case and did not lightly reject his last minute efforts. **[other factors]** The trial court did not err based on evidence Appellant's, positive alcohol screens, missed drug screens, arrests and incarceration for public intoxication, and failure to comply with the court's order for a psychological evaluation and drug and alcohol assessment until days before the TPR hearing. (Williams Warren, J.; CV-16-463; 9-28-2016; Harrison, B.)

Murphey v. Ark. Dep't of Human Services, 2016 Ark. App. 430 [TPR – **aggravated**

circumstances] Appellant's (father) argument of insufficient evidence is without merit. The evidence showed that the children were removed from both parents' custody at least three times, and appellant only recently recognized the need to find a suitable place for his children to live. Appellant (mom) was currently in jail and had no home to return to when released. Her ADA and relative placement arguments were not preserved for appellate review. **[potential harm]** Based on the history, the trial court finding that the children would be subjected to potential was not clearly erroneous. Appellant (mom) admitted that she was not in a position to have her children returned, but argued that they should be returned to their father. However, she lacked standing to argue this issue. (Keaton, E.; CV-16-369; 9-21-2016; Brown, W.)

Yarbrough v. Ark. Dep't of Human Services, 2016 Ark. App. 429 [TPR – **subsequent factors]**

Appellant argued that there was no evidence that DHS offered appropriate family services in a timely fashion. To support this argument, he offered a PPH order in March 2015, where the court found that DHS had not obtained outpatient drug treatment ordered in December 2014. He argued that DHS did not provide any evidence that drug treatment was offered, and had DHS complied it is reasonable to conclude that he would not later have been arrested for methamphetamine delivery. The trial court did find at the next hearing that DHS made reasonable efforts to provide services and in its finding for subsequent factors at the termination hearing. Appellant waived the issue when he did not appeal the reasonable efforts finding or raise the issue at the termination hearing. The appellate court also noted that appellant failed to specify what specific services should have been provided to him other than outpatient drug treatment or what identify what DHS could have or should have done while he was incarcerated. (Coker, K.; CV-16-405; 9-21-2016; Hoofman, C.)

Anderson v. Ark. Dep't of Human Services, 2016 Ark. App. 428 [**TPR – ADA**]

Appellant argued his case plan should have had accommodations for his disability, and DHS's failure to provide accommodations resulted in a premature termination. Appellant failed to sufficiently raise and develop this issue before the trial court. Appellant failed to make a disability claim in his answer to the TPR petition. During his testimony at the termination hearing, he did not identify what type of disability he had. Appellant testified that that he did not read or write well, despite his signature on the case plan representing that he could read and understand English. There was no evidence that had any impairment covered by ADA or that he was regarded as having such an impairment. Further, appellant's counsel never claimed a disability under ADA or mentioned ADA at the termination hearing. The appellate court also noted that even if the ADA argument had been preserved for appeal, appellant failed to challenge two other statutory grounds either of which supported termination of his parental rights. (Bristow Richardson, M. K.; CV-16-395; 9-21-2016; Hixson, K.)

Holder v. Ark. Dep't of Human Services, 2016 Ark. App. 424 [**TPR – evidentiary**]

Appellant's only point for reversal is that the trial court failed to consider all the evidence before rendering a decision, specifically a transcript from the first hearing on the termination petition. However, appellants failed to provide any evidence that the court did not consider the transcript from the previous hearing. In fact, the transcript had been introduced at a prior hearing and was discussed by the judge in the TPR order entered. Further, Appellants were incorrect in labeling their argument as sufficiency. A contemporaneous objection and a subsequent ruling were required to preserve the issue for appeal. (Spears, J.; CV-16-348; 9-21-2016; Whiteaker, P.)

Hamilton v. Ark. Dep't of Human Services, 2016 Ark. App. 420 [**TPR - potential harm**]

The appellate court did not find that the court clearly erred in finding that Appellant's children would be subject to potential harm if returned to Appellant. The trial court had found that Appellant could not meet her children's needs, and she had not remedied the issues that caused her children to come into care. [**failure to remedy**] Appellant argued that her children were removed due to severe drug use, but there was no evidence of continuing drug use in the home, and DHS agreed that appellant could keep her youngest child in her home. However, the trial court found that Appellant did not submit to weekly drug screens and missed all (19) of the drug screens since the last hearing, indicating that the issue had not been remedied. The appellate court held that the trial court did not clearly err in terminating Appellant's parental rights based on the failure to remedy ground. (Zimmerman, S; CV-16-399; 9-21-2016; Gruber, R.)

Helvey v. Ark. Dep't of Human Services, 2016 Ark. App. 418 [**TPR – aggravated**

circumstances] The trial court did not clearly err in finding aggravated circumstances that there was little likelihood that services would result in successful reunification. Appellant had been provided drug treatment and his children had been removed multiple times. There was evidence that appellant continued to use drugs and was incarcerated multiple times for drug use.

[potential harm] Past behavior is a predictor of potential harm. While there was evidence that Appellant was in a drug court program, he had a history of drug abuse and drug related crimes. **[relative custody]** Appellant's argued that since his children where in their grandparent's custody his rights should not be terminated. The maternal grandmother who had custody of appellant's children testified that termination was in the children's best interest. (Zimmerman, S; CV-16-330; 9-21-2016; Virden, B.)

Johnson v. Ark. Dep't of Human Services, 2016 Ark. App. 412 **[TPR –grounds]**
Appellant argued that DHS failed to plead the TPR ground that the court relied on, and that the termination should be reversed. Upon de novo review, the appellate court can affirm the circuit court's termination on any ground that was alleged and proved. **[subsequent factors]**
Appellant's failure to follow the court's orders and Appellant's drug use supported a subsequent factors finding. **[ADA]** Appellant argued that there was no evidence that DHS offered appropriate family services and that DHS did not comply with ADA. Yet, Appellant failed to challenge any reasonable efforts findings by the court that he received appropriate services. Appellant also never argued what appropriate services DHS should have been provided. (Wilson, R; CV-16-424; 9-21-2016; Gladwin, R.)

Garrett v. Ark. Dep't of Human Services, 2016 Ark. App. 401 **[TPR – failure to remedy/subsequent factors]** The trial court did not make a mistake as to either ground. Appellant refused to take drug screens from July 2014, after her children were removed until October 2015, when the termination petition had been filed. Drug screens that are refused are deemed positive. There was evidence that Appellant only recently began to address her mental health and drug issues, and would need at least six more months to demonstrate stability. **[ADA]** Appellant argued that the trial court refused to provide adequate accommodations by allowing her more time to complete services. However, this argument was not preserved for review because Appellant failed to develop the argument and did not receive a ruling from the trial court. (Arnold, G.; CV-16-205; 9-14-2016; Glover, D.)

Gulley v. Ark. Dep't of Human Services, 2016 Ark. App. 367 **[TPR – failure to remedy]**
The trial court did not clearly err in finding that Appellant failed to remedy the conditions that caused her children's removal. When appellant started to participate in her child's medical visits, there was no indication that Appellant would be able to manage her medical condition. The trial court further found Appellant was not credible and that she continued to live a chaotic lifestyle. **[potential harm]** The appellate court noted that the same facts that supported the terminated ground supported the potential harm factor. Evidence included appellant's lifestyle, poor decision-making, and inability to properly manage her child's serious medical needs. (Branton, W.; CV-16-237; 8-31-2016; Glover, D.)

King v. Ark. Dep't of Human Services, 2016 Ark. App. 368 [**No Merit TPR – aggravated circumstances**] The trial court did not clearly err in finding aggravated circumstances that there was little likelihood that services would result in successful reunification. Appellant had an admitted drug addiction, yet refused services and would not commit to a time frame to undergo treatment. (Smith, T.; CV-16-288; 8-31-2016; Glover, D.)

Duckery v. Ark. Dep't of Human Services, 2016 Ark. App. 358 [**TPR – adoptability**] A case worker's testimony that a child is adoptable is sufficient to support an adoptability finding. There was sufficient evidence of adoptability where the case worker did not make a blanket statement that all children were adoptable, but concentrated on the children's specific circumstances in giving her opinion that Appellant's children were adoptable. (James, P.; CV-16-212; 8-24-2016; Hoofman, C.)

Gilliam v. State, 2016 Ark App. 434 [**Transfer**] Appellant argued that evidence of his prior history should have been excluded under Ark. Code Ann. 9-27-309(k) that involved an allegation of sexual misconduct that resulted in a juvenile court proceeding that was dismissed by nolle pro sequi. The appellate court found that this statute did not apply, because the testimony that was provided at the transfer hearing was not evidence of the arrest, detention, or juvenile proceeding. The trial court did not err in admitting testimony and denying the motion to transfer. (Johnson, L; CV 15-985; 9-28-2016; Harrison, B)

Lindsey v. State, 2016 Ark App. 355 [**Transfer**] Appellant did not challenge the factual findings concerning the statutory factors, only that the court needed to explain its findings. The court has discretion in deciding the weight of the factors. [**EJJ**] An EJJ designation is only available if the case is in juvenile division or transferred to juvenile division. Appellant's motion to transfer to juvenile division was denied and his argument for EJJ designation is without merit. (Piazza, C.; CV 16-14; 8-24-2016; Whiteaker, P.)