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ANNOUNCEMENTS

On December 19, 2019, amendments to the Rule and Regulations governing Court Reporters were published for comment. The comment period expires on March 31, 2020.

CRIMINAL

Harper v. State, 2020 Ark. App. 4 [Ark. Code Ann. § 16-89-115] Appellant sought disclosure and review of notes taken by the prosecutor during an interview with the victim. After conducting an in camera review, the circuit court concluded that: (1) the prosecutor's notes were not a statement as defined by Arkansas Code Annotated § 16-89-115; (2) the notes contained no information that probably would have changed the outcome of the trial; and (3) the nondisclosure of the notes is harmless beyond a reasonable doubt because the information in the notes was readily available through other discovery provided in the case by the State. Arkansas Code Annotated § 16-89-115(b) provides that after a witness called by the State has testified on direct examination, the court on motion of the defendant shall order the State to produce any statement of the witness in the possession of the State that relates to the subject matter about which the

witness has testified. If the entire contents of the statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his or her examination and use. A “statement” includes “[a] stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the state and recorded contemporaneously with the making of the oral statement.” Factors to consider when determining if a statement is substantially verbatim are the extent to which it conforms to the language of the witness, the length of the written statement in comparison to the length of the interview, whether quotations may be out of context, and the lapse of time between the interview and the transcription,” which need only be made contemporaneously, not simultaneously. In appellant’s case, because the prosecutor’s notes from her interview with the victim were not “substantially verbatim,” the circuit court was not required to order the State to disclose the notes to appellant. [**Brady violation**] Appellant also argued that the prosecutor’s nondisclosure of her interview notes constituted a *Brady* violation. There are three elements of a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State; and (3) prejudice must have ensued. To assess the prejudice component of the *Brady* test, courts consider whether the withheld evidence is material. Evidence is material—and its suppression prejudicial—if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” The reasonable-probability standard is applied collectively, not item by item, such that the cumulative effect of the suppressed evidence, and not necessarily each piece separately, must be material. After reviewing portions from the prosecutor’s notes, the appellate court concluded that their contents were not exculpatory and were available to appellant from other sources. The Court of Appeals also concluded that there was no reasonable probability that the result of appellant’s trial would have been different had the prosecutor’s notes been disclosed to him. (Haltom, B.; CR-19-419; 1-15-2020; Abramson, R.)

Chambers v. State, 2020 Ark. App. 54 [**waiver of right to counsel; self-representation**] A criminal defendant may waive his right to counsel when: (1) the request to waive is unequivocal and timely asserted; (2) the waiver is knowingly and intelligently made; and (3) the defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. In appellant’s case, he requested to represent himself because he did not want to be represented by the public defender and he could not afford to hire a private attorney. Appellant stated that he would represent himself “if [he had] to.” However, after discussions with the circuit court, appellant advised that he did not want to represent himself, but he did not feel he had any other option. Because appellant’s statements indicated that his requests to waive his right to counsel were not unequivocal, the circuit court correctly denied appellant’s request to represent himself at trial. (Batson, B.; CR-19-623; 1-29-2020; Switzer, M.)

Reed v. State, 2020 Ark. App. 49 [**Ark. R. Evid. 201**] The trial court did not abuse its discretion when it refused to take judicial notice of estimated driving times from Goggle Maps, an internet website. (Johnson, L.; CR-19-330; 1-29-2020; Harrison, B.)

Grubbs v. State, 2020 Ark. 45 [**jury instructions**] Because the instruction that was given in appellant's resentencing case correctly informed the jury on the state of the law following *Miller v. Alabama*, 567 U.S. 460 (2012), the circuit court did not abuse its discretion when it rejected appellant's proffered instruction, which would have informed the jury that a sentence of life imprisonment for a juvenile should be "uncommon." Additionally, the circuit court did not abuse its discretion when it refused to give a modified version of AMCI Crim.2d 1008 because there was no possibility of a sentence of death in appellant's case. (Edwards, R.; CR-19-377; 1-30-2020; Wood, R.)

Roberts v. State, 2020 Ark. 45 [**Rule 37**] For purposes of a Rule 37 petition, trial counsel's performance must be viewed from counsel's perspective at the time of the trial. Because appellant was not diagnosed with schizophrenia until years after his trial, it was not deficient performance for his trial counsel to fail to investigate or present evidence of appellant's schizophrenia during the guilt phase of the trial. [**change of venue**] The decision to seek a change of venue is a matter of trial strategy. To establish that the failure to seek a change in venue amounted to ineffective assistance of counsel, a petitioner must offer some basis on which to conclude that an impartial jury was not empaneled. Appellant failed to offer such a basis. Thus, the trial court properly rejected this allegation in appellant's Rule 37 petition. [**juror misconduct**] Claims of juror misconduct are not cognizable in Rule 37 proceedings. [**death penalty**] A petitioner's claim of incompetency to be executed is not ripe when no date had been set for his execution. (Ryan, J.; CR-18-845; 1-30-2020; Wynne, R.)

CIVIL

Harris v. Hutchinson, 2020 Ark. 3 [**sovereign immunity**]. Sovereign immunity bars Harris's claims against the appellees in their official capacities. Harris also sued them in their individual capacities. The appellees argued that they were entitled to statutory and qualified immunity as to Harris's individual-capacity claims. The circuit court's order, however, relied upon sovereign immunity to dismiss all the claims. In their individual capacities, the appellees do not enjoy the immunity granted to the State under article 5, section 20 of the Arkansas Constitution. The circuit court erred when it found that sovereign immunity barred Harris's claims against the appellees in their individual capacities. (Fox, T.; CV-18-826; 1-9-20; Hudson, C.)

Bedrock Ventures, Inc v. Truman Press, Inc., 2020 Ark. App. 5 [**amend default judgment**] On appeal, Bedrock first argues that the circuit court did not have jurisdiction to modify the default-

judgment amount pursuant to Arkansas Rule of Civil Procedure 60 because more than ninety days had elapsed since its entry. However, pursuant to the 1990 amendment, Rule 60 is no longer applicable to default judgments; therefore, the time limitations imposed by Rule 60 are no longer applicable. (Schrantz, D.; CV-19-157; 1-15-20; Abramson, R.)

Stap, Inc. v. Sutterfield, 2020 Ark. App. 18 [**arbitration**] The facility did not sign the arbitration agreement. At the hearing on the motion to compel and dismiss, no testimony or other evidence was presented. The arbitration agreement was an optional separate agreement, and St. Andrew Place's assent to the admission agreement did not, in and of itself, constitute assent to the separate arbitration agreement. The admission agreement itself conditions incorporation of the arbitration agreement "upon execution" of the arbitration agreement, and the arbitration agreement contained signature blocks for both the facility and the resident. The admission agreement also provided: "No modification of the terms and conditions of this Agreement shall be valid unless in writing and signed by both parties to this Agreement." (Clawson, C.; CV-19-234; 1-15-20; Switzer, M.)

City of Little Rock v. Alexander Apts., LLC, 2020 Ark. 12 [**due process/ closing apartments**] The City violated Alexander Apartments' due-process rights under the Arkansas Constitution because it failed to provide a pre-or post-deprivation mechanism for challenging the closure of the apartments. Alexander Apartments was deprived of its property interest by the fire chief's order that it cease its operations there and that its tenants vacate the property, and by the City not providing any mechanism—either before or after the fire chief issued his order—for Alexander Apartments to challenge the closure. Even assuming that an emergency justified a delayed hearing, the City offered no post deprivation opportunity for a hearing or panel to review the closure decision despite a provision in the Fire Code providing for the establishment of such a panel. The City also violated the tenants' due-process rights. The tenants had a property interest in the exclusive possession of their apartments. The letter and notice instructing them to vacate by, and that utilities would be turned off on, December 28, 2015, interfered with that exclusive possession. The tenants were not provided with any pre-or post-deprivation mechanism for challenging their apartments' closure. The damages awarded to the apartment were supported by the evidence, but the damages awarded the tenants erroneously considered events and circumstances unrelated to the City's December 2015 due-process violations. Much of the evidence recounted by the circuit court lacked a causal connection to the violations. (Gray, A.; CV-18-1034; 1-16-20; Kemp, J.)

Harmon v. Payne, 2020 Ark. 17 [**inmate civil litigation/strike**] Harmon sued Arkansas prison officials under the Arkansas Civil Rights Act and state tort law for allegedly depriving him of a nutritionally adequate diet that is safe for consumption. He filed suit against Appellees in their official and individual capacities. The circuit court found that Harmon's complaint was barred by sovereign and statutory immunity and failed to state facts upon which relief could be granted.

The court dismissed the action and issued a strike. The circuit court did not abuse its discretion in dismissing Harmon's complaint. The trial court is affirmed except with regard to the strike. A strike is warranted when an incarcerated plaintiff brings an action that is frivolous, malicious, or failed to state a claim on which relief may be granted. The circuit court imposed a strike on the basis that Harmon failed to state a claim. As noted above, the underlying complaint set out a claim but failed to provide sufficient facts supporting a constitutional violation as required by fact-pleading rules. Indeed, the circuit court implicitly agreed that Harmon stated a colorable cause of action by granting his application to proceed in forma pauperis. The strike was accordingly unwarranted and is reversed. (Dennis, J.; CV-18-721; 1-16-20; Womack, S.)

Lewis v. Johnson, 2020 Ark. App. 34 [**service by warning order/default judgment**] The default judgment is void due to insufficient service of process since the affidavit for warning order does not meet the requirements of Rule 4(f) of the Arkansas Rules of Civil Procedure. Diligent inquiry was not made as to Lewis's whereabouts. The affidavit for warning order merely states, "I hired Myers Attorney's Service, to make diligent inquiry as to the whereabouts of the Defendant and I have made a diligent effort to locate the Defendant." The affidavit for warning order then states that an affidavit of non-service from Myers Attorney's Service, attached to the affidavit for warning order as an exhibit, outlines the process server's attempts to locate Lewis. As set forth in detail above, the affidavit of non-service establishes that the process server went to 2717 Bishop Street, Little Rock, Arkansas, to attempt service. The process server noted boards over the windows at the residence, that someone who claimed to live on the street for fourteen years had never seen anyone at the house except to pick up mail, and another neighbor told the process server that the house was vacant. The affidavit for warning order does not set out any actions taken personally to determine the whereabouts of Lewis with the exception of hiring a process server and giving him an address where Lewis has not resided in forty years. Despite having an email address for Lewis from which Lewis had recently emailed Johnson's attorney, Johnson's counsel did not attempt to email Lewis to determine a good address or a place where Lewis could be served. Despite having Lewis's telephone number and fax number, Johnson's attorney did not attempt to telephone or fax Lewis to obtain a good address or a place where Lewis could be served. The affidavit for warning order only makes the conclusory statement that diligent inquiry was made and that Lewis could not be located. (Piazza, C.; CV-19-177; 1-22-20; Abramson, R.)

O'Neal v. Love, 2020 Ark. App. 40 [**adverse possession**] Adrienne argues that the trial court erred in finding that Ethel adversely possessed the property upon Herbert's death. However, the court's rulings on the following are supported by the evidence: (1) Ethel's initial entry onto the property was hostile and not permissive; (2) Ethel's possession of the property after the death of Herbert was hostile and not permissive; and (3) Gloria had notice of Ethel's intent to adversely possess the property. (Fox, T.; CV-19-372; 1-22-20; Whiteaker, P.)

DHS v. Newcity, 2020 Ark. App. 32 [**placement on child maltreatment registry**] The administrative law judge upheld the investigative determination of true. The two bases for the determination of true in this case were abuse (threat of harm) and neglect (inadequate supervision). Arkansas Code Annotated section 12-18-103(3)(A)(ii) defines abuse as a parent's "[e]ngaging in conduct creating a realistic and serious threat of death, permanent or temporary disfigurement, or impairment of any bodily organ." Arkansas Code Annotated section 12-18-103(14)(A)(viii)(a)–(b) defines neglect as those acts or omissions of a parent which constitute "[f]ailure to appropriately supervise the child that results in the child's being placed in: (a) Inappropriate circumstances creating a dangerous situation; or (b) A situation that puts the child at risk of harm." The administrative law judge entered detailed findings of fact and conclusions of law, finding that Dr. Newcity's act of driving while he was impaired by alcohol at twice the legal limit with his then six-year-old son in the car constituted inadequate supervision and a threat of harm as outlined in the above statutes. The statutes do not require that actual injury occur for findings of abuse or neglect, merely that the conduct create a "serious threat" of the listed harm or that the failure to appropriately supervise creates a "dangerous situation" or puts the child "at risk of harm." Substantial evidence supports the agency's decision, and the circuit court's reversal of the administrative finding was in error. (Cox, J.; CV-19-131; 1-22-20; Gruber, R.)

Henson v. Craddock, 2020 Ark. 24 [**wrongful death/limitations**] The original pro se complaint is the only complaint that was filed within the three-year limitations period. Appellant's pro se complaint constituted the unauthorized practice of law and was a nullity. Therefore, it could not subsequently be amended. The first complaint filed by an attorney was filed on November 16, 2015. By the time an attorney filed a complaint, more than three years had passed since David's death, and appellant's claims were barred by the three-year statute of limitations. The circuit court did not abuse its discretion when it dismissed the complaint as being untimely filed. (Pierce, M.; CV-19-341; 1-23-20; Hudson, C.)

Wyatt v. Carr; 2020 Ark. 21 [**candidate eligibility/disqualification**] The circuit court's application of the preponderance-of-the-evidence standard in its determination of whether Wyatt had been convicted of hot-check violations was correct. Wyatt argues that the circuit court erred in finding that Wyatt was the person charged with, and who pleaded guilty to, the offenses. Wyatt contends that the contemporaneous dockets and later-created judgment, when considered as a whole, do not support the conclusion that Wyatt had entered pleas of guilty or been convicted of anything. The circuit court did not clearly err in its determination that Carr established by a preponderance of the evidence that Wyatt had pleaded guilty to and been convicted of violations of the Arkansas Hot Check Law. (Griffen, W.; CV-19-809; 1-23-20; Baker, K.)

Barrett v. Thurston, 2020 Ark. 36 [**judicial candidate/ballot**] The circuit court found that Lengefeld is a resident of the judicial district; that “Emily White” is an appropriate name to be listed on the ballot; and that, as an appointed district judge and candidate for the Court of Appeals, she may not use the title of “Judge” on the ballot. The circuit court is affirmed. (Fox, T.; CV-19-904; 1-23-20; Womack, S.)

DHS v. Harris, 2020 Ark. 30 [**sovereign immunity**] The complaint against DHS alleged violations of the Arkansas Civil Rights Act, seeking damages and an award of attorney’s fees, costs, and expenses. The Harrises alleged, individually and on behalf of their three minor children, that the entrance of a DHS investigator and law enforcement into their children’s private school for the purpose of investigating possible child maltreatment violated state law and the state and federal constitutions. The circuit court erred in failing to dismiss on the basis of sovereign immunity. (Threet, J.; CV-19-256; 1-23-20; Wynne, R.)

City of Little Rock v. Nelson; 2020 Ark. 34 and 19 (two cases) [**court costs**] This case arises from the Little Rock District Court–Second Division’s illegal assessment of installment fees. Under Arkansas law, defendants who pay a district court fine on an installment basis will be assessed a fee of ten dollars per month. The fee must be collected in full in each month that a defendant makes an installment payment. Rather than charge the defendant by month, the court assessed an aggregate fee for the entirety of the time-pay plan at the outset. As a result, the defendant would pay installment fees for the full plan even if the fine or civil penalty was paid off early. This practice violates due process. The City -- not the judge -- is liable for the damages under the facts and time frame at issue in this case. [**attorney’s fees**] The circuit court considered the *Chrisco* factors in its award of attorneys’ fees. Because of the circuit court’s intimate acquaintance with the record and the quality of counsel’s services rendered, the circuit court had a superior opportunity to assess the critical factors before it, and an award of attorneys’ fees will therefore not be set aside absent an abuse of discretion. (Piazza, C.; CV-19-475 and 293; 1-23-20; Kemp, J.; Womack, S.)

Industrial Iron Works, Inc. v. Hodge, 2020 Ark. App. 56 [**apportionment of fault**] The issue is whether the Uniform Contribution Among Tortfeasors Act allows for the apportionment of fault to a nonparty who is immune from liability, such as an employer under workers’ compensation. The language of the UCATA is clear and unambiguous. According to the UCATA, the right to contribution for the allocation of fault applies only to “joint tortfeasors,” and joint tortfeasor is defined as two or more persons or entities who may have joint liability or several liability for the same injury to person or property, whether or not judgment has been recovered against all or some of them. Generally, an employer who carries workers’ compensation insurance is immune from liability for damages in a tort action brought by an injured employee. As such, an immune employer is not an entity that can have “joint or several liability in tort” and does not fit within the plain and unambiguous definition of a “joint tortfeasor” or fall within the confines of the

allocation of nonparty fault under the UCATA. In short, construing the UCATA just as it reads and giving its words their ordinary and usually accepted meaning in common language, the UCATA simply does not allow for the apportionment of fault to an immune nonparty employer. (Alexander, T.; CV-18-630; 1-29-20; Whiteaker, P.)

Hickory Heights Health, LLC v. Hines, 2020 Ark. App. 55 [**arbitration**] There is no clear indication anywhere in the agreement to demonstrate whether Mary was signing in an individual capacity or in a representative capacity. The agreement here must also be construed against Hickory Heights as its drafter. Hickory Heights argues that Mary “cannot have it both ways” because by suing for breach of the admission agreement, Mary has conceded its validity and should not be permitted to avoid enforcement of the arbitration agreement, which was an addendum to and incorporated into the admission agreement. Zelma did not agree to arbitrate, and her daughter, Mary, had no authority to make such an agreement on her behalf. The language incorporating the arbitration agreement into the admission agreement is therefore of no consequence. (Gray, A.; CV-19-277; 1-29-20; Switzer, M.)

Lamb and Associates, Inc. v. Best, 2020 Ark. App. 62 [**non-compete agreement**] The company did not take steps to prevent other employees with access to confidential information from using it to compete with Lamb after their employment. None of these employees signed a noncompetition, nonsolicitation, and nondisclosure agreement. There was no restriction that prevented any of these employees from resigning and using some of Lamb’s confidential information to start a digital printing business, or to work for another corrugated-box converter. Consequently, Lamb’s confidential information was not a protectable business interest that warranted enforcing the non-competition agreement. Moreover, a covenant not to compete may be enforced only if the associate is able to use the information to gain an unfair competitive advantage. Information that is readily ascertainable by anyone in the industry is not confidential, and a noncompete agreement that merely prohibits ordinary competition is unenforceable. Finally, the circuit court did not err by denying injunctive relief. Lamb has not demonstrated that disclosure of confidential information will give other corrugated box converters an unfair competitive advantage. There was an absence of proof that James or Precision interfered with Lamb’s business of converting corrugated boxes for Lamb’s customers or that their conduct caused or will cause any irreparable damage to Lamb’s business expectancy. (Griffen, W.; CV-19-376; 1-29-20; Hixson, K.)

Agents Mutual Ins. Co. v. Benham, 2020 Ark. 39[**class certification**] Court’s order fails to comply with the mandatory requirements contained in Rule 23(b) to define the class claims, issues, or defenses. The case is remanded with instructions to enter an order that complies with Rule 23. (Tabor, S.; CV-18-918; 1-30-20; Baker, K.)

DOMESTIC RELATIONS

Maxwell v. Maxwell, 2020 Ark. App. 23 [**child support**] The court's child-support determinations are not moot because they address back child support and because the order provided for support until Mitch either turned eighteen or graduated high school, whichever occurred later, and Mitch has not yet graduated high school. Moreover, while Nate has graduated from high school, he has ongoing medical issues that will likely require him to continue living with Lori for at least the foreseeable future. It is unclear whether the court factored Nate's care into its child-support order. Addam appeals the court's modification of child support, arguing that it was error for the court to require him to pay child support to Lori while their only minor son, Mitch, lives full time with Addam. The court's child-support findings failed to reference the family-support chart found in Administrative Order No. 10 and failed to make key findings necessary for its award. Case law clearly establishes that utilizing the family-support chart contained in Administrative Order No. 10 is mandatory when setting or modifying child support. There is a rebuttable presumption that support awarded pursuant to the chart is the appropriate amount of support and can be modified only upon written findings stating why the application of the amount would be unjust or inappropriate. Here, the circuit court's order fails to reference the family-support chart or state reasons why the application of the chart amount would be unjust or inappropriate. The court's order also fails to make key findings as to which parent had physical custody over one or both of their sons during each of the designated periods of time and whether the court was considering Nate's ongoing medical expenses as a basis for awarding support despite his age. (Duncan, X.; CV-19-570; 1-15-20; Vaught, L.)

Crowe v. Crowe, 2020 Ark. App. 37 [**contempt**] Criminal-contempt findings do not violate an automatic bankruptcy stay. Here, Leona was held in civil contempt in July. She then filed for bankruptcy in August. Robert filed a second petition for contempt asking that she be incarcerated for her refusal to follow court orders. She was then found to be in criminal contempt and given a definite sentence of imprisonment. The circuit court's criminal-contempt finding did not violate the bankruptcy stay. Leona was afforded reasonable notice that she was being charged with a failure to timely pay child support. Leona received notice of the charge and the nature of the relief sought because the petition asks that she be incarcerated for her refusal to follow court orders. There is no merit in Leona's due-process argument. (Karren, B.; CV-19-78; 1-22-20; Gladwin, R.)

Perry v. Perry, 2020 Ark. App. 63 [**child support**] The decision whether to impute income depends on the circumstances of the case and is a matter that lies within the sound discretion of the circuit court. Even though Shane lost his job at Walmart, given the circumstances in this case, it was not an abuse of discretion for the court to impute an income of \$250,000 to Shane for the benefit of his children. Offsetting the parents' chart-based support obligation like the circuit court did here is consistent with common practice in joint-custody situations. [**property**]

settlement/ unequal distribution] The circuit court did not abuse its discretion in awarding Brandie \$167,236 representing one-half of the parties' marital interest in GKS Properties. The circuit court found that there was some portion of GKS that was marital. Thus, court's awarding Shane all the interest in GKS and awarding Brandie a portion of Shane's 401k was proper. (Schrantz, D.; CV-18-968; 1-29-20; Murphy, M.)

Roberts v. Roberts, 2020 Ark. App. 60 [**change in custody**] The trial court entered an order changing custody from joint custody to primary custody with Kendra. The trial court found that there had been a material change in circumstances due to (1) Stacy's remarriage, which created a tumultuous and unstable environment for the children; (2) Stacy's proneness to fits of anger; and (3) the increasing nature of the discord between the parties. The trial court further found that it was in the children's best interest to be placed in the primary custody of their mother. There was evidence that the parties had reached a level of discord and lack of cooperation to constitute a material change in circumstances sufficient to change the joint-custody arrangement. (Brantley, E.; CV-18-865; 1-29-20; Hixson, K.)

Higdon v. Roberts, 2020 Ark. App. 59 [**material change**] In the context of child-custody modification, a party cannot use the circumstances he created as grounds to modify custody. The circuit court clearly erred in finding Roberts's increased expenses due to his agreement to have primary custody of AR3 is a material change of circumstances. [**retroactive**] Higdon's second point on appeal is that if the child-support modification is affirmed, the circuit court abused its discretion in ordering her to pay Roberts child support retroactively to May 1, 2017. She contends that retroactive child support can be awarded—at the earliest—on July 10, 2018, the date Roberts filed his motion to modify child support. It is an abuse of discretion to impose a retroactive modification of a support order beyond the filing date of a petition to modify. In the case at bar, the circuit court abused its discretion when it awarded retroactive child support to Roberts beyond the filing date of his motion to modify. (Jones, C.; CV-19-289; 1-29-20; Vaught, L.)

PROBATE

Johnson v. Johnson, 2020 Ark. App. 9 [**paternity**] The sole issue is whether the circuit court erred in admitting appellees' reports of DNA test results into evidence when it found substantial compliance with Arkansas Code Annotated section 9-10-108. The circuit court found that the supporting documentation submitted by appellees "substantially complied" with the relevant statutory requirements although they were not in the exact proper affidavit form. In a case in which there is no challenge to the authenticity of the DNA test results or allegations of tampering, substantial compliance is sufficient. The circuit court did not err in admitting the

DNA test results and in issuing the resulting judgment of paternity. (Jamison, L.; CV-19-19; 1-15-20; Gladwin, R.)

JUVENILE

Carpenter v. Ark. Dep't of Human Servs., 2020 Ark. App. 21 [TPR—best interest] The appellant was barred from arguing that the department failed to make reasonable efforts to provide her with appropriate services because she failed to appeal the previous orders in the case finding that the department made reasonable efforts. Termination was in the child's best interest where the mother failed to obtain and maintain appropriate housing throughout the case, continued using an illegal substance throughout the case, and allowed sex offenders to live in her home. The appellate court found no clear error in the trial court's determination that termination was in the child's best interest considering the likelihood she would be adopted and the potential harm if she were returned to her mother. (Wilson, R.; JV-17-126; January 15, 2020; Whiteaker, P.)

Dominguez v. Ark. Dep't of Human Servs., 2020 Ark. App. 2 [TPR—best interest] Mother appealed termination order, arguing that because relatives were available to take custody of the child, relative placement should have been preferred over termination. The appellate court disagreed and affirmed termination, explaining that the relatives waited too long to express an interest in adopting the child and that termination was in the child's best interest. The case was remanded, however, to resolve paternity issues that remained outstanding. (Zimmerman, S.; JV-18-142; January 15, 2020; Gruber, R.)

Dye v. Ark. Dep't of Human Servs., 2020 Ark. App. 10 [TPR—best interest] Mother argued that termination was not in child's best interest because there were less drastic alternatives available, as the child had been placed with relatives and had established permanency there. The court disagreed, finding that "placement" of a child with relatives while still in DHS custody is not as permanent as "custody" with relatives. Due to the mother's failure to resolve her substance abuse issues, failure to obtain employment or housing, her arrest for possession of drug paraphernalia, and failure to complete drug treatment and counseling, the appellate court found no clear error and affirmed termination. (Zimmerman, S.; JV-18-224; January 15, 2020; Gladwin, R.)

Fox v. Ark. Dep't of Human Servs., 2020 Ark. App. 13 [TPR—right to counsel] Putative father appealed termination order, arguing that he should have been appointed counsel upon removal of the children rather than prior to termination. The appellate court disagreed because Fox was the putative father at the time of removal and not the legal father. The court has no duty to research a putative father's parental status. Once Fox established paternity through a DNA test and was found to be the legal father, he could have requested an attorney at that time but he did not do so

until the permanency planning hearing, at which time his request was granted. (Zimmerman, S.; J-17-717; January 15, 2020; Harrison, B.)

Huddleston v. Ark. Dep't of Human Servs., 2020 Ark. App. 24 [**TPR—sufficiency of evidence; best interest**] Termination order entered as to two siblings but denied as to third sibling due to his special needs and bond with mother. Mother appealed termination, arguing that the evidence failed to establish grounds for termination and that termination was not in the children's best interest. The appellate court disagreed, finding no clear error in termination based on the mother's failure to remedy the circumstances that brought the children into care. Despite numerous warnings from the court and others, the mother continued to allow inappropriate persons into her home, including a man with a child-maltreatment history and also continued to use illegal substances well into the case. The appellate court affirmed the trial court's finding that the mother continued making poor decisions to the detriment of her children. (Zimmerman, S.; JV-17-699; January 15, 2020; Vaught, L.)

J.B.G. v. State, 2020 Ark. App. 43 [**TRANSFER**] Defendant was fifteen-years-old when he was arrested for breaking into an Ace Hardware store with three others and stealing seventy-seven firearms. The case was filed in juvenile court but transferred to circuit court pursuant to Ark. Code Ann. § 9-27-318(b) because (1) the defendant was fifteen and armed with a firearm when the offense was committed and (2) the defendant was over age fourteen and was in possession of a handgun at the time of the offense, in violation of Ark. Code Ann. § 5-73-119(a). On appeal, defendant argued that he only obtained possession of a handgun upon commission of the offense and did not possess a firearm prior to the burglary. However, because his accomplice possessed a handgun during the commission of the offense, defendant was held responsible for the actions of his cohort. Thus, transfer from juvenile court to circuit court on the basis of his possession of a firearm or handgun was proper. (Zimmerman, S.; JV-19-131; January 22, 2020; Murphy, M.)

McCormick v. Ark. Dep't of Human Servs., 2020 Ark. App. 44 [**TPR—sufficiency of evidence**] The evidence was sufficiently clear and convincing to support grounds for termination where the mother developed substance abuse issues after the case opened which she failed to resolve, failed to attend visitation regularly, failed to demonstrate appropriate parenting during a visit when the child was hospitalized by hiding her head under a blanket and ignoring the child's calls for help after surgery, failed to obtain and maintain stable housing and employment, and failed to demonstrate her ability to protect the children. Finding no clear error, the termination order was affirmed. (Zimmerman, S.; JV-17-975; January 22, 2020; Murphy, M.)

Day v. Ark. Dep't of Human Servs., 2020 Ark. App. 51 [**ADJUDICATION-reasonable efforts**] First, both parents argued that the dependency-neglect finding should be reversed because the department failed to provide reasonable efforts to prevent removal. However, the appellate court found that reasonable efforts are not required under Ark. Code Ann. § 9-27-335(e)(2)(C)(i)

where a transfer of custody to the department is “necessary to protect the juvenile’s health and safety.” Here, the infant had been hospitalized for failure to thrive and was required to follow a strict dietary regimen, which the trial court found neither of the parents were capable of insuring. Second, the father argued that the evidence was insufficient to support dependency-neglect. However, because the mother conceded the sufficiency of the evidence on this point, the father was barred from making this argument. (Bell, K.; JV-19-571; January 29, 2020; Harrison, B.)