

APPELLATE UPDATE

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 (<http://courts.state.ar.us/opinions/opinions.html>).

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ANNOUNCEMENTS

REMINDER: Administrative Plans are to be submitted by July 1, 2009.

Comments solicited: On March 5th, the Supreme Court published two per curiam orders requesting comments on proposed rules changes: New Ark. R. Civ. P. 26.1 on electronic discovery and recommendations of the Civil Practice Committee for various rules changes. Both per curiam orders were included in the weekly mailout. The Supreme Court extended the comment period to June 30, 2009.

On April 9th, the Supreme Court adopted amendments to Administrative Order Number 4 and Rules 28.1 and 24.3 of the Rules of Criminal Procedure. The amendments are effective June 1, 2009. The per curiam order was included in the weekly mailout.

On April 23rd, the Supreme Court adopted a new Code of Judicial Conduct, effective July 1, 2009. The per curiam order was included in the weekly mailout.

CRIMINAL

Green v. State: **[plea agreement]** Appellant entered into a written plea agreement with the State. The agreement provided that appellant would “fully cooperate with the prosecution of [his father] concerning all charges to be filed against him . . . and to testify at trial in the State’s case against [his father].” In exchange for his cooperation, appellant received a reduced sentence. Pursuant to the terms of the agreement, appellant testified at his father’s trial and appellant was sentenced according to the agreement. Thereafter, appellant’s father’s conviction was reversed and the case was remanded for a new trial. In preparation for the new trial, the State sought to re-interview appellant and he refused. The State filed a motion to vacate appellant’s judgment and commitment order and to reinstate the original charges against him. The trial court found that appellant breached the terms of the agreement and granted the State’s motion to vacate. On appeal, appellant argued that the trial court erred in finding that he breached the terms of the plea agreement. Appellant asserted that he fulfilled his obligations under the plea agreement by testifying at his father’s first trial and that he was not required to testify at the second trial. The Supreme Court, noting that the agreement did not limit appellant’s participation to “the original trial” or to “one trial only,” concluded that the intent of the parties was for appellant to testify truthfully in a trial ending in a final judgement against his father. The Supreme Court further concluded that appellant breached the terms of the agreement by refusing to cooperate with the State in preparation for trial. **[remedy for breach of plea agreement]** The appropriate remedy for breaching the terms of a plea agreement is to vacate the agreement and to restore the parties to their respective positions before the plea agreement was entered. **[double jeopardy]** The appellant waived his double-jeopardy defense by entering into a

plea agreement that provided that he would be subject to the full range of punishment for his original charges in the event of a breach of the agreement. (Erwin, H.; CR 08-903; 3-5-09; Gunter).

Page v. State: [**sufficiency of the evidence; capital murder**] There was substantial evidence to support appellant's conviction of capital murder. (Humphrey, M.; CR 08-322; 3-5-09; Gunter).

Frye v. State: [**Ark. R. Evid. 802; excited utterance**] Appellant asserted that the trial court erred in admitting the hearsay testimony of the child-victim's mother concerning statements the child made to her about the crime. The trial court allowed the testimony as an excited utterance. On review, the Supreme Court noted that it has recognized several factors for a trial court to consider when determining if a statement falls under the excited-utterance exception. Specifically, the court should consider: the lapse of time, the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statement. The declarant in appellant's case was his nine-year-old niece, who was raped in the middle of the night. The morning after the rape, the victim and her family were evicted. Less than twenty-four hours later, upon finding a new home, the victim was crying, upset, and not her normal self. When her mother inquired as to her condition, the child told her about the rape, which led to the statement that was the subject of the challenged testimony. Based upon the foregoing facts, the Supreme Court concluded that the trial court did not abuse its discretion in allowing the testimony. [**Ark. R. Evid. 405**] During direct examination, appellant's wife testified as a character witness. On cross-examination, the State introduced evidence of appellant's prior convictions. Appellant argued that the evidence was inadmissible. Rule 405 of the Arkansas Rules of Evidence provides that once character evidence is admitted, on cross-examination, inquiry is allowable into relevant specific instances of conduct. Because appellant opened the door to character evidence during his wife's testimony, the trial court did not abuse its discretion when it permitted the State to rebut that testimony through admission of appellant's prior convictions. (Clinger, D.; CR 08-635; 3-5-09; Corbin).

Mathis v. State: [**sufficiency of the evidence; residential burglary; theft of property**] There was substantial evidence to support appellant's convictions of residential burglary and theft of property. (Henry, D.; CACR 08-634; 3-11-09; Brown).

McCullough v. State: [**404(b)**] Appellant was convicted of rape, kidnapping, and residential burglary. At his trial, the State introduced evidence that appellant had previously been convicted of residential burglary and that he had attempted to escape from the county detention facility within days of his arrest. On appeal, appellant argued that the circuit court should have excluded the evidence based upon Rule 404(b) of the Arkansas Rules of Evidence. The Supreme Court concluded that the circuit court did not abuse its discretion when it admitted the evidence of the prior convictions because the evidence was independently relevant, and because the prior incidents were sufficiently similar to the facts in the pending case. The Supreme Court further concluded that the trial court did not abuse its discretion when it admitted the evidence of appellant's attempted escape from the detention facility because the evidence reflected a consciousness of appellant's guilt. (Storey, W.; CR 08-590; 3-12-09; Brown).

State v. Stites: [**searches, Ark. R. Crim. P. 13.3**] When a legitimate search of a residence is under way and its purpose and its limits have been precisely defined, police officers need not obtain a second warrant to search containers found during the search. A lawful search of a vehicle or a home does not, however, warrant a search of every part of the vehicle or home. Pursuant to Ark. R. Crim. P. 13.3(d), the scope of the search shall be only as is authorized by the warrant and as is reasonably necessary to discover the persons or things specified therein. (Fitzhugh, M.; CR 08-1186; 3-19-09; Imber).

Eubanks v. State: [**404(b); pedophile exception**] For the pedophile exception to apply, the Supreme Court requires that there be a sufficient degree of similarity between the evidence to be introduced

and the sexual conduct of the defendant. The Court also requires that there be an “intimate relationship” between the perpetrator and the victim of the prior act. The witness, who testified about appellant’s prior sexual misconduct, was a friend of appellant’s child and frequently spent the night at appellant’s house. During the overnight visits, the witness was under appellant’s care. The Supreme Court determined that the witness’s relationship with appellant was sufficient for purposes of testifying under the pedophile exception. Additionally, the nature of the witness’s testimony was similar to the pending charges and was probative on the issue of the appellant’s deviate sexual impulses. Accordingly, the trial court properly admitted the testimony. **[401; relevancy]** On appeal, appellant asserted that the trial court should have excluded evidence of his hitting his wife as irrelevant in his rape trial. The testimony was introduced in response to an issue that was raised by appellant. Because appellant opened the door to the unfavorable testimony, and the State only further developed the testimony, the trial court properly admitted the evidence. (Kennedy, J.; CR 08-953; 4-2-09; Danielson).

Joyner v. State: **[introduction of prior sexual conduct]** For evidence of a child victim’s prior sexual conduct to be admissible to prove that there was an alternate source of the victim’s injury, the defendant must offer proof that: (1) the prior act clearly occurred; (2) the acts closely resembled those of the present case; (3) the prior act is clearly relevant to a material issue; (4) the evidence is necessary to the defendant’s case; and (5) the probative value of the evidence outweighs its prejudicial effect. Because appellant failed to meet the foregoing factors, it was not an abuse of discretion for the trial court to exclude such evidence. **[rape-shield statute; hearing]** There is no requirement that the victim present herself for questioning by the accused during a hearing on a rape-shield motion. The rape-shield statute, as applied to appellant’s case, did not violate his constitutional right to present a defense. **[mistrial]** Appellant’s motion for a mistrial, which was not made at the first opportunity, was untimely. **[jury instructions]** Sexual assault is not a lesser-included offense of rape. (Kemp, J.; CR 08-824; 4-2-09; Gunter).

Goodman v. State: **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant’s rape conviction. (Langston, J.; CACR 08-967; 4-8-09; Baker).

Neely v. McCastlain: **[post-conviction relief]** A petition for post-conviction relief attacking a judgment, regardless of the label placed on it by the petitioner, is considered pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. Because appellant was on probation, and not in custody, he was not entitled to post-conviction relief pursuant to Rule 37. **[habeas corpus]** A circuit court does not have jurisdiction to release a prisoner not in custody in that court’s jurisdiction on a writ of habeas corpus. (Hanshaw, L.; 08-973; 4-9-09; Gunter).

State v. Brown: **[post-conviction relief]** Because the trial court failed to consider all of the evidence and applied an improper standard when it was considering Brown’s Rule 37 petition, the matter was remanded for further consideration. (Phillips, G.; CR 08-826; 4-16-09; Imber).

Gaye v. State: **[post-conviction relief]** The trial court properly concluded that the decision of appellant’s trial counsel not to seek a continuance or an order to procure a defense witness’s presence at trial or to proffer the witness’s testimony, was a matter of trial strategy and not cognizable as a claim of ineffective assistance of counsel pursuant to Rule 37. (Langston, J.; CR 08-479; 4-16-09; Corbin).

Parkman v. Sex Offender Screening and Risk Assessment Committee: **[due process]** Appellant’s procedural due-process rights were not violated when he was denied a second face-to-face interview before the Sex Offender Screening and Risk Assessment Committee. **[Sex Offender Registration Act]** Assessment and classification of a sex offender pursuant to the Sex Offender Registration Act is a process that is civil rather than criminal in nature. Thus, appellant was not entitled to the protection of the Fifth Amendment right against self-incrimination during the assessment and classification process and his *ex post facto* argument was without merit. The Committee’s

assessment of appellant as a level four offender was supported by substantial evidence. (Fox, T.; 08-1165; 4-16-09; Danielson).

State v. Richardson: [**appellate review**] Appellant's attorney made an oral motion for a new trial after the jury returned with a guilty verdict but before a sentence was imposed or a judgment and commitment order was entered. The circuit court granted the motion and the State appealed. On review, the Supreme Court held that the appeal was improper because a judgment and commitment order was never entered. The Court explained that because a judgment was not entered, appellant's motion was premature and ineffective. The Court further explained that because the motion for a new trial was ineffective, the circuit court's order granting the motion was a nullity. The Court also noted that the Rules of Criminal Procedure do not permit a circuit court to grant a new trial *sua sponte*. (Simes, L.T.; CR 08-1021; 4-16-09; Wills).

CIVIL

Cesna v. Gray: [**outrage**] Conduct alleged is not sufficiently extreme and outrageous to support the tort of outrage. (Gray, A.; CA 08-830; 3-4-09; Hart)

Rooke v. Spickelmier: [**restrictive covenant**] Restrictions contained in deed were enforceable because they were contained in the deed when the property was purchased. (McCormack, D.; CA 08-833; 3-4-09; Henry)

Asbury Automotive v. Brosh: [**attorneys fees**] Contract did not provide for the sharing of legal fees and costs. (Gunn, M.; SC 08-526; 3-5-09; Brown)

Sutton v. Sutton: [**deed/mineral rights**] Under the *Duhig* rule, when an owner of a fractional mineral interest executes a deed without limiting the interest in the minerals granted, the grant and reservation cannot both be given effect, the reservation fails, and the risk of title is on the grantor. (McCormack, D.; SC 08-613; 3-5-09; Hannah)

Griffin v. Ark. Dept. Health and Human Services: [**soldiers and sailors relief act/ child maltreatment registry**] Soldiers and Sailors Relief Act applies to National Guard member and the administrative proceeding, but appeal from being placed on the registry was untimely even when the tolling period under the Act is applied. (Anthony, C.; CA 08-674; 3-11-09; Marshall)

L.F. Brands Marketing v. Dillard's: [**contract/ucc**]. Under the UCC's parol evidence rule, a final written expression of an agreement may not be contradicted by evidence of a prior agreement, but it may be explained or supplemented by evidence of the parties' course of dealing. (Gray, A.; CA 07-1210; 3-11-09; Gruber)

T-1 Construction, Inc v. Tannenbaum Development Company: [**contract/mistake**] Party's unilateral mistake as to the purchase price (\$70,000) for five lots versus the price per lot was unconscionable, and rescission of the contract was proper relief. It would be inequitable to enforce the contract. (Weaver, T.; CA 08-889; 3-11-09; Gladwin)

Whiteside v. Russellville Newspapers, Inc.: [**libel/defamation**] Witness reports, which newspaper properly obtained from police department, constituted official documents and are covered by the fair-report privilege. (Sutterfield, D.; SC 08-313; 3-12-09; Danielson)

Ford v. Howard: [**adverse possession**] Evidence did not support claim that possession of the property was adverse. Improvements that were made to the property were not permanent in nature. (Scott, J.; CA 08-451; 3-18-09; Kinard)

Thompson v. Sparks Regional Med. Ctr.: **[emergency medical treatment act]** Plaintiff did not state a claim under the Emergency Medical Treatment and Labor Act. The patient must actually come to the hospital to trigger the anti-dumping provision in the Act. Here, the patient was advised not to come by phone, but she did not actually come to the hospital. Likewise, no claim was stated under the Medical Malpractice Act because the plaintiff was never a patient at the hospital, and the hospital never provided any professional services. (Cox, J.; CA 08-1050; 3-18-09; Hart)

Mortgage Electronic Registration System v. Southwest Homes of Arkansas: **[foreclosure]** The appellant (MERS) provides electronic tracking of ownership interests in real property security instruments, and contracts with lenders to provide its services. At most, it is an agent of the lender, but in this case, it held no property interest in the realty and was not a necessary party to the foreclosure action. (Clinger, D.; SC 08-1299; 3-19-09; Hannah)

Advance America v. McGinnis: **[class certification]** Class representative can adequately represent the class. It was not shown that her untreated mental illness rendered her incapable of making decisions in the best interest of the class, or that she was not familiar with the facts of the case, or that she did not comprehend the nature and extent of her duties. (Thomas, J.; SC 08-992; 3-19-09; Hannah)

Baldwin v. Eberle: **[revivor]** In third process to revive judgment, the judgment debtor objected based on statute of limitations grounds that should have been raised when judgment was revived the second time. Raising the defense in this subsequent revivor was barred by the doctrine of res judicata. (Langston, J.; CA 08-963; 4-1-09; Hart)

Rausch Coleman Homes v. Brech: **[bill of assurance]** Court properly construed bill of assurance as to the date when the owners would be entitled to amend the covenants. (Whiteaker, P, J.; CA 08-1113; 4-1-09; Gladwin)

Rees v. Smith: **[attorney/client;torts]** Plaintiff failed to show any quantifiable economic loss, and such is a necessary element in a claim for recovery for emotional damages in contract-based actions such as breach of fiduciary duties. Plaintiff alleged a claim for outrage that should be submitted to the jury. (Lineberger, J., SC 08-293; 4-2-09; Gunter)

CEI Engineering Assoc. v. Elder Constr. Co. **[arbitration]** Claims in one count of complaint were ordinary breach of contract claims -- not violations of Deceptive Trade Practices Act. As such, they were subject to arbitration, as were claims in several other counts, that were in the nature of claims for breach of contract rather than sounding in tort. (Smith, K.; CA 08-601; 4-8-09; Henry)

Ark. Beverage Retailers Assoc. v. Langley: **[retail liquor license]** Board's decision to permit the transfer of a liquor license to Sam's West was supported by the evidence. The term "premises" in the statute was construed to refer to the site where the liquor is sold. Since Sam's West liquor sales were limited to the separate premises of the store, the permit was granted even though Sam's West is a subsidiary of Sam's Club, which sells a host of non-liquor products in an adjoining store. (Brantley, E.; SC 08-287; 4-9-09; Hannah)

Holifield v. Mullenax Financial: **[contempt]** Before one can be held in contempt for violating a court order, the order must be definite in its terms and clear as to what duties it imposes. (Brantley, E.; CA 08-955; 4-15-09; Robbins)

South Flag Lake, Inc. v. Gordon: **[water/ reasonable use theory]** Court properly applied the reasonable-use theory because the supreme court has permitted its application to subterranean and percolating waters. It does not have the limited application argued by the appellant. Court properly denied an injunction against defendant's actions in pumping and maintaining water level of lake. (Henry, D.; CA 08-623; 4-15-09; Gladwin)

W. E. Pender v. Lee: **[new trial]** Court erred in granting new trial because alleged newly discovered evidence was merely impeaching or cumulative. Such proof does not satisfy a moving party's burden of establishing that there is evidence that would justify a new trial. Deposition testimony was properly excluded because it invaded the jury's province. Testimony about fault violated Rule 701

as it raised the possibility that it would mandate a legal conclusion. (Fox, T.; CA 08-403; 4-15-09; Glover)

Southern Development Corp. v. Freightliner of New Hampshire: **[notary]** Fact that the notary was never served did not prevent judgment on her bond against the surety who was served. Fact question remained as to whether notary recognized the signature of the signer by virtue of her familiarity with the signature, which is a proper basis to notarize a signature. Liability on the bond was fixed at the amount stated when issued. Fact that statutory amount for such bonds was since raised by statute did not automatically cause the amount of this bond to raise. Moreover the amount cannot be stacked based upon the number of forged documents that were notarized. The express terms of the bond was \$4000 not that amount multiplied. (Hearnsberger, M.; CA 08-595; 4-15-09; Marshall)

Riley v. Town of Higginson.: **[closing street]** Street was closed in reliance on Ark. Code Ann. Section 14-54-303, which permits closure when street is no longer needed for the town's purposes. This power is independent of authority to close streets founded in other statutes, and other statutes do not limit or restrict power based on 14-54-303. (Mills, W.; CA 08-1041; 4-14-09; Brown)

Warmack v. Adcock: **[banking]** In dispute over the exchange of bank shares and amount owed to dissenting shareholders, the Bank Commissioner did not award interest for the period between the date the surviving bank shareholders tender an offer of the fair value of the shares until the final determination of the value after the appraisal process. The Commissioner's interpretation is affirmed because the statute does not provide for the payment of interest. (Humphrey, M.; SC 08-119; 4-16-09; Wills)

Trusclair v. McGowan Working Partners: **[summons]** Complaint was properly dismissed because court lacked jurisdiction as service was improper when summons stated that the defendant had 20 days to answer, but the defendant was a non-resident, and the proper time was 30 days. The summons was defective. Since timely and proper service was never made, the court had no jurisdiction to consider the request to amend the summons. (Guthrie, D.; SC 08-769; 4-16-09; Imber)

McCuthen v. Arkansas State Police: **[venue]** In illegal exaction suit against State Police involving the printing of driver's manuals, venue was not proper in Sebastian County. The State Police is not a business enterprise which maintains a place of business in Sebastian County; rather, venue for the action is in Pulaski County which is the seat of government. (Fitzhugh, M.; SC 08-972; 4-16-09; Gunter)

Jarsew, LLC v. Green Tree Servicing: **[tax sale/priority]** Summary judgment was reversed on issue as to whether the notice statute requires "interested parties" to have actual notice of a tax sale. (Medlock, M.; CA 08-1016 ; 4-22-09; Brown)

Carder Buick v. Wooten: **[scire facias]** Although party made a tender of payment to satisfy a judgment, the tender was refused. Therefore, the judgment remains unsatisfied. Court remanded with instructions as to how the judgment could be satisfied. (Mills W.; CA 08-898; 4-22-09; Robbins)

Slaughter v. Capitol Supply Co. **[proximate cause]** Evidence supported verdict that defect in product was not the proximate cause of decedent's death. **[AMI 106A]** Party failed to show that AMI 106 A (negative inference) was in order because no relevant evidence in the possession of the witness who did not testify was identified. (Guthrie, D.; SC 08-534; 4-23-09; Hannah)

Bell v. Misenheimer: **[no ruling by trial court]** Argument regarding the giving of the comparative fault instruction was not preserved on appeal. (Anthony, C.; SC 08-731; 4-23-09; Corbin)

Foscue v. McDaniel: **[summary judgment]** Summary judgment should not have been granted. (Gibson, B.; SC 08-1145; 4-23-09; Brown)

Brock v. Townsell: **[ordinances/cemetery]** (Appellant abandoned appeal of City Council decision to circuit court and filed circuit action on statutory issues.) The City's land-use ordinances do not conflict with the statutory authority of the Department of Health. Three different statutes are applicable and none were impliedly repealed nor or they irreconcilably in conflict (20-17-903; 14-

54-802; 14-56-401). City properly denied request to build a family cemetery within the city. (Reynolds, D.; SC 08-807; 4-23-09; Imber)

Mobley v. Evans: **[quiet title]** Commissioner's deed's title description was void because it was vague and indefinite. (Smith, P.; CA 08-850; 4-29-09; Baker)

RWR Properties, Inc. v. Young: **[tax sale]** Notice was deficient as only a single unclaimed letter sent by certified mail was attempted. An additional step reasonably calculated to give notice was required. (Dennis, J.; CA 08-1013; 4-29-09; Gladwin)

Johnson v. Rockwell Automation, Inc. **[certified question/ 16-55-201 and 212]** Section 16-55-202 is unconstitutional in requiring a fact finder to consider or assess the negligence or fault of nonparties. Section 16-55-212 is unconstitutional because rules regarding the admissibility of evidence are within the court's province. The medical-costs provision limits the evidence that may be introduced. (Judge Leon Holmes; SC 08-1440; 4-30-09; Danielson)

Hagenbaugh v. Perry County Sheriff: **[grand jury]** In determining whether to convene a grand jury, circuit did not err in considering a state police report; court was not limited to the contents of the complaint. (Piazza, C.; SC 08-1440; 4-30-09; Corbin)

DOMESTIC RELATIONS

Mills v. Mills: **[child support--interest]** The amount of interest due on unpaid child support is governed by statute. Ark. Code Ann. 9-14-233(a) provides that child support that becomes due and remains unpaid shall accrue interest at the rate of 10% per year unless the owner of the judgment or the owner's counsel of record requests before the accrual of the interest that the judgment shall not accrue interest (which did not occur in this case). The interest begins to run at the time of the actual child-support arrearage—when the child support becomes due and remains unpaid. Therefore, the statute required the circuit court to award interest on the unpaid child support from the time it became due and remained unpaid, not from the date the petition was filed. **[attorney's fee]** Appellant contended the trial court abused its discretion by awarding the statutory minimum in attorney fees and that it violated his right to due process because he was not given a hearing on this issue. He made no convincing argument or cited no authority on the due process argument, so the argument was not considered. On the statutory minimum in fees issue, the court awarded 10%, of the statutory amount, which the court said was not an abuse of discretion. (McCormick, D.; No. CA 08-555; 3-11-09; Gruber)

Guffey v. Counts, et al.: **[child support]** A noncustodial parent may not get the benefit of years of voluntary overpayments against four months of unpaid child support. The Court of Appeals' opinion was based on the voluntariness of the overpayments and a promissory estoppel analysis. The court said that estoppel principles have been applied in child support cases, although it found no case in which that particular "variety" of estoppel had been used. The father voluntarily paid more than the court-ordered amount of support for seven years and the custodial mother relied upon the money by spending it every month for their children. Therefore, the father was barred from getting credit after the fact for his payment of support that exceeded the ordered amount. (Lindsay, M.; No. CA 08-736; 3-11-09; Marshall)

Evtimov v. Milanova: **[divorce—residency and separation]** Residency is jurisdictional and must be proven and corroborated in every instance, although corroboration need be only slight when there clearly is no collusion. The evidence sufficiently corroborated residence in this case. The evidence was also adequate on the issue of separation, through the testimony of a witness and through appellant's admission in his answer. **[alimony]** The trial court did not err in not awarding alimony. In mandating a present distribution of appellee's retirement account to be paid over five years, the court dealt with the parties' economic imbalance and the appellant's need for liquid funds. Alimony and property division are complementary devices a court may use to make the dissolution of a marriage as equitable as possible. **[division of marital property]** The trial court did not err in its division of marital property. The distribution balanced in appellant's favor with the property distribution and the allocation of debt. Property must be distributed equitably, and the trial court

is vested with a measure of flexibility in apportioning the total assets held in the marital estate. The critical inquiry is how the assets are divided. (Pierce, M.; No. CA 08-36; 3-18-09; Baker)

Grant v. Richardson: **[grandparent visitation]** The order for a grandmother to have visitation with her two grandchildren was not premature and was supported by findings and competent evidence. Even though the trial court did not make a specific finding that grandparent visitation was in the best interest of the children, there was evidence supporting that finding, which demonstrated that the children would suffer harm if the relationship with their grandmother were discontinued. (VanAusdall, R.; No. CA 08-556; 3-18-09; Vaught)

Office of Child Support Enforcement v. Dickens: **[child support; jurisdiction; Rules of Civil Procedure]** OCSE appealed from the trial court's reduction in the amount of child support arrearage the appellee owed. OCSE argued that its motion for citation against the appellee was a Rule 59(b) motion for a new trial, and the appellee agreed. However, the Court of Appeals said the court's action in reducing the amount of the arrearage was done under Rule 60(a), to correct nonclerical mistakes or errors so as to prevent a miscarriage of justice. Rule 60(a) gives a court ninety days to act under the Rule. In this case the court reduced the amount of the arrearage within eighty-six days of entering its final order. (Sullivan, T.; No. CA 08-1206; 3-18-09; Robbins)

Bryant v. Bryant: **[child custody; visitation]** The Court of Appeals found that the trial court had not erred in ordering that appellant's first three visits with his son be supervised by the appellee mother. The court said the passage of time had rendered the issue moot. The court also found no error in the trial court's refusal to set an initial, written visitation schedule, ordering instead "reasonable visitation rights" until the child reached the age of five. The court said that setting visitation is in the sound discretion of the trial judge and that he or she must have the flexibility to deal with various circumstances in setting appropriate visitation. Appellant demonstrated no abuse of that discretion. The appellant's final contention was that the court erred in denying his request to be the alternative physical custodian of the child should the appellee, a captain in the military, be deployed or incapacitated. The court said that the trial court had deferred action on the request until appellee was actually notified of her deployment, if and when that were to occur. Because appellant failed to get a ruling on that issue, the appellate court was barred procedurally from considering it. The trial court's decision was affirmed. (Gray, A.; No. CA 08-188; 4-1-09; Glover)

Jackson v. Jackson: **[alimony; division of marital property]** The trial court did not err in awarding alimony to appellee or in calculating that alimony. The court found that the appellant had the ability to earn and did earn substantial income, while the appellee had no income, was not in good health, and had virtually no means of support. She was likely unable to earn income. Secondly, the court found that the trial court did not err in not relying upon the chart in Administrative Order No. 10 in making an award of alimony. The court said that a trial court is not required to reference the Family Support Chart of Administrative Order No. 10 in determining an award of alimony, although the court noted that the trial court did reference the Chart in awarding temporary alimony at a temporary hearing. Finally, the court said the trial court did not err in the division of appellant's civil service retirement benefits. Appellant wanted the court to compare how much his social security benefits would have been if he were in that system and to exclude that amount from the division. The court said the benefits are marital property, subject to division, and that the trial court had no obligation to consider the amount the appellant might have drawn if participating in the social security system. The decision was affirmed. (McCormick, D.; No. CA 08-848; 4-1-09; Baker)

Wolfe v. Stevens, et al.: **[paternity]** The trial court dismissed the appellant's complaint, finding that the appellee was the legal father, that the appellant had actual knowledge of his status as the biological father but did not act timely to establish his paternity, and that under the doctrine of laches, the appellant was barred from bringing the action or being afforded relief. In reversing the dismissal, the Court of Appeals noted that, under Ark. Code Ann. 9-10-102(b), an action to establish paternity may be brought at any time. The case was remanded to allow the appellant to pursue his paternity action. (Duncan, X.; No. CA 08-1075; 4-15-09; Glover)

Ransom v. Ransom: **[divorce]** The appellant argued that the appellee failed to prove grounds for divorce and that the circuit court erred in its division of the parties' property. The appellee cross-appealed on the property division but stated that she would not pursue her cross appeal unless the case were reversed on direct appeal. The Court of Appeals said that the circuit court did not err in

granting the divorce. The appellee and her witnesses offered fully developed, narrative accounts of appellant's conduct, citing specific acts and conduct. They testified in detail to the effect of appellant's conduct on appellee. The court noted specific testimony and said that, even if no single incident, standing alone, would constitute grounds for divorce, together they had a cumulative effect that supported the ground of general indignities. The Court of Appeals affirmed the trial court's granting a divorce on the ground of general indignities; the cross-appeal was moot. (Shirron, P.; No. CA 08-1235; 4-15-09; Pittman)

McCutcheon v. McCutcheon (Kougl): **[divorce–settlement agreement; contempt]** The trial court found the appellant in contempt for failing to indemnify the appellee, as provided in the parties' settlement agreement incorporated by reference into their divorce decree. In the agreement, the appellant agreed to be responsible for the debt on a Honda 4-Wheeler, to have it refinanced in his own name, and to hold the appellant harmless for debt on the vehicle. Appellee's petition for contempt alleged that he had failed to do those things and that the lienholder was seeking judgment against the appellee for the debt. In a Chapter 7 voluntary bankruptcy petition, the appellant listed the Honda as property subject to a lien and listed appellee a co-debtor. He did not list appellee as a creditor. He signed a statement of intention to retain the Honda and make regular payments. He was subsequently granted a discharge, which did not indicate that he intended to make payments on the vehicle. Appellee had a civil judgment against her in favor of the Honda lienholder and was assessed costs, attorney fees, and interest. She sought these amounts and attorney fees. The circuit court found that the bankruptcy proceeding did not discharge appellant from any obligation to the appellee. The court found him in contempt, ordered him to make payment to the appellee for the items she sought, and ordered him to pay her attorney fees in the civil judgment and in the contempt proceeding. The Court of Appeals affirmed the trial court. The court said that the facts would have indicated to appellee that appellant was not seeking to discharge in bankruptcy his obligations under the settlement agreement. The appellee was deprived of her opportunity to present evidence and legal argument to the bankruptcy court relevant to whether this obligation satisfied one of the two alternative conditions of dischargeability set forth in 11 U.S.C. 523(a)(15). (Duncan, X.; No. CA 08-566; 4-15-09; Hart)

Frost v. Frost: **[divorce; continuance; property division]** The trial court denied the appellant prisoner's request for a continuance. The granting or denial of a continuance is within the discretion of the trial court and will not be reversed absent an abuse of discretion. A trial court has an obligation to manage and control its docket efficiently, a discretion which is crucial to our judicial system. Here, the trial court made arrangements to have the prisoner transported from prison to court for the divorce hearing. However, the prisoner attacked the deputy who was to transport him and was denied the right to leave the prison. His absence at the hearing was directly attributable to his own misconduct and connivance, perhaps even a misguided ploy to delay the proceedings. The trial court did not abuse its discretion in denying the motion for a continuance. On the issue of property division, the court said the trial court did not err in its award of marital property. The appellant had already attempted to divest himself of interest in the marital home by executing a deed to his son. He therefore had no standing to raise an issue regarding property in which he had no interest. Ark. Code Ann. 9-12-315(a)(1)(A) includes a list of factors for the court to consider in distributing marital property. The trial court determined it would be inequitable to evenly divide the marital property after evidence that the appellant had dissipated marital assets by twice setting fire to the marital home and by transferring items of marital property to the parties' son. Appellant attempted to murder the appellee by shooting her four times at close range. Her health was diminished by the shooting and appellee had no ability to earn a living. The judgment was affirmed. (Vittitow, R.; No CA 08-919; 4-15-09; Henry)

Hatch v. Hatch: **[divorce; property settlement agreement–retirement benefits]** The parties' property settlement agreement provided that the appellee husband would give the appellant wife a portion of his retirement benefits when he received them. He was not vested at the time the parties divorced. After the divorce, he was seriously injured and began receiving disability benefits. His former wife moved for contempt, alleging that she was entitled to a portion of the benefits derived from his early retirement status based upon his disability. The trial court found that the word "retirement" in the agreement did not include disability benefits he had received eleven years after the divorce. The Court of Appeals affirmed. (Smith, P.; No. CA 08-1275; 4-29-09; Gruber)

Crane v. Taliaferro: **[marriage]** The circuit court dismissed the appellant's complaint for divorce for lack of subject matter jurisdiction after finding that the parties were not married. The appellant contended on appeal that the parties had a common-law marriage in Texas which would be recognized in Arkansas. The Court of Appeals reviewed the undisputed facts, that the couple had a marriage ceremony in Texas without an Arkansas marriage license or a Texas certificate of marriage. The facts indicated that the parties never resided together in Texas after the ceremony, required for a common law marriage in Texas, but that they continued to live together in Arkansas. Arkansas does not recognize common law marriage created in Arkansas, although our courts do recognize marriages contracted by law in other states. The trial court's finding that no common law marriage existed was not clearly erroneous, and the court's dismissal of the divorce complaint was affirmed. (Clark, D.; No. CA 08-1216; 4-29-09; Gruber)

Davis v. Sheriff: **[child custody]** The trial court's finding that a material change in circumstances existed, and its change of custody from the appellant to the mother to the appellee father, was affirmed. The parties did not request specific findings from the court, and the written order provided no specific findings. Therefore, the appellate court could conclude under its de novo review that there was sufficient evidence from which the trial court could have found a change in circumstances. (Elmore, B.; No. CA 08-247; 4-29-09; Baker)

PROBATE

In Re Adoption of M.K.C.: **[adoption of biological child]** This was the second appeal on a denial of a petition by an unmarried natural mother to adopt her own child. In the first appeal, the trial court denied the adoption on the basis that A.C.A. 9-9-204(3)(Repl. 2002) does not permit an unmarried natural mother to adopt her own child. The Supreme Court reversed that order and remanded for the trial court to consider the adoption on its merits, finding that the statute does permit an unmarried parent to adopt his or her biological child. On remand, the circuit court denied the adoption as not in the best interest of the child, which the Supreme Court affirmed, finding that the circuit court did not err in denying the adoption petition. (McCain, G; No. SC 08-1367; 3-5-09; Gunter)

Hoffarth v. Harp: **[guardianship]** The trial court did not err in removing the appellant father as the guardian of the person and the estate of his adult son who suffers a genetic disorder, affecting him physically and also his mental capacity. The appellant argued that the Court of Appeals erred in relying upon *In re Guardianship of Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995), for the definition of "unsuitable," contending that the definition applied to a guardian of the estate, not the guardian of the person. The Court of Appeals said that the probate code does not distinguish between guardians of the person and guardians of the estate. The circuit court did not err in relying on *Vesa* for a definition of "unsuitable" and in applying that definition to its decision on whether to substitute the appellee mother as the guardian of her son. The court also reviewed whether the circuit court erred in its substitution of the appellee for the appellant as guardian. The record included instances when the appellant delayed or denied medical attention to his son, a major issue given the son's genetic disorder, which required special care. The court did not err in considering the appellant's "ambivalence" toward the son's relationship with his mother. The court was acting within its discretion in considering the appellant's failure to facilitate a relationship between the son and his mother. Added together, the trial court did not err in substituting the appellee as guardian. (Scott, J.; No. CA 08-681; 4-1-09; Brown)

Tissing v. Arkansas Department of Human Services: **[appellate procedure]** The Supreme Court dismissed the appellant's appeal because her notice of appeal was untimely. The court discussed Appellate Rule 4(b)(3) that makes it mandatory for a trial court to grant an extension of time for filing a notice of appeal. However, the rule, as amended, has a specific requirement of "a showing of diligence by counsel." The court said that counsel showed a lack of diligence by failing to monitor the case to know the status of a written order reflecting the circuit court's findings. (Webb, G.; No. SC 08-1208; 4-2-09; Corbin)

Allen v. Circuit Court of Pulaski County, Ninth Division: **[writ of prohibition]** Because the Ninth Division of Pulaski County Circuit Court first took jurisdiction over matters that formed the heart of this dispute, first in a guardianship case, then in a constructive trust case, then in a civil action, the circuit judge did not commit a plain, manifest, clear, and gross abuse of discretion in her actions with regard to a Family Settlement Agreement involved in the civil case before her or in any other proceedings involving the same Family Settlement Agreement (in another division of the Pulaski County Circuit Court). An appeal was not an adequate remedy in this case because of the immediate need to avoid a dangerous conflict between separate divisions of circuit court over which division had subject-matter jurisdiction. The writ of prohibition was denied. (No. SC 08-1236; 4-2-09; Brown)

JUVENILE

Lofton v. State: **[juvenile transfer]** The circuit court was affirmed in denying appellant's transfer from criminal division to juvenile division and denying his request for extended juvenile jurisdiction. The juvenile was 17 at the time of the alleged offense and was charged with capital murder and aggravated robbery. Appellant argued that his case should be transferred because he did not have a significant juvenile record and there were rehabilitation programs available through the juvenile division.

The circuit court must consider all the factors in Ark. Code Ann. 9-27-318(g). The circuit court found one of the factors in appellant's favor that indicated that there were facilities and programs that would likely rehabilitate the juvenile. The court was not required to give equal weight to each factor. Since the transfer was denied, extended juvenile jurisdiction is not applicable. (Proctor, W.; CR 08-693; 4-30-2009; Gunter)

Childress v. Arkansas Dept. of Human Servs.: **[TPR]** Termination of parental rights was affirmed as to appellant's three children. Appellant argued that the circuit court erred by failing to obtain the two older children's consent to adoption and to finding that the termination was in the children's best interest. Appellant argued that the court erred in not seeking the consent of the two older children regarding adoption pursuant to Ark. Code Ann. § 9-9-206(a)(5). The appellate court found that Ark. Code Ann. § 9-9-206(a)(5) does not apply in termination proceedings in dependency-neglect cases. The court noted that even when this statute is applicable, the court has the authority to dispense with the minor's consent if the court finds the adoption is in the child's best interest.

The circuit court did not err in finding that appellant's conduct posed a potential harm to the children and that the termination was in the children's best interest. Appellant admitted her inability to regain custody of her children at the termination hearing and could not predict when her situation would improve. (Elmore, B.; 08-1429; 4-22-2009; Henry)

Krass v. Arkansas Dept. of Human Servs.: **[No-Merit TPR]** This an appeal from an order terminating appellant's rights to her two children and a motion to be relieved as counsel pursuant to *Linker-Flores*. Circuit court affirmed and counsel's motion granted. The children were removed in November 2006 and a finding of dependency-neglect based on sexual abuse by the step-father was in January 2007. The adjudication order was never appealed, although the step-father denied his abuse and the mother said the accusations were unfounded and she "dogmatically" supported her husband, causing continued harm to her daughter. (Cook, V.; 08-1005;4-8-2009; Pittman)

Dean and Dean. v. Arkansas Dept. of Human Servs.: **[No-Merit TPR]** This an appeal from an order terminating appellants' rights to J.D. and K.D. and a motion to be relieved as counsel pursuant to *Linker-Flores*. Circuit court affirmed and counsel's motion granted. Appellants remained on drugs

throughout the case, including when they were in a drug rehabilitation facility and a few days before the termination hearing. They failed to obtain stable housing, complete drug rehabilitation, counseling, and parenting as ordered by the court.

The court noted that DHS failed to provide evidence to the court on the likelihood of the childrens' adoption in assessing the children's best interest. Yet the trial court made the statutorily required finding without the benefit of a knowledgeable witness. The appellate court cautioned DHS that it has the burden of proof to present evidence on the statutorily-mandated findings, but noted that an appeal on this point would not be supported. (Hewett, M.; 08-1005; 3-18-2009; Kindard)

Prows v. Arkansas Dept. of Human Servs.: [TPR] This original termination case was reversed and remanded to the circuit court with instructions to consider appellant's recent stability. Circuit court affirmed. The appellate court noted that the circuit court followed the appellate court's instructions and found no compelling evidence that appellant's recent mental health improvements were anything but "cyclic improvement [that appellant] had not progressed to provide stability in all other aspects of her life necessary to keep [her child] out of danger." (Wood, R.; 08-1131; 3-18-2009; Marshall)

Dowdy and Dowdy. v. Arkansas Dept. of Human Servs.: [TPR] Circuit court affirmed. This an appeal from an termination order of a S.D., who was removed in February 2007 when she was two months old in response to a hotline call by her father that she was not properly being fed by her mother. In March 2007 the child was adjudicated dependent-neglected due to neglect. Psychological evaluations revealed that appellants functioned with diminished mental capacity.

Appellants argued that there was insufficient evidence to support a finding of potential harm as to the court's finding of best interest. The trial court was required to consider the potential health and safety of the children that might result from continued contact with the parents. The trial court was not clearly erroneous when it looked at past behavior as a predictor of potential harm and this is one of the many factors that a court considers in a best interest analysis.

Appellants argued that the evidence was not sufficient to support the grounds because they had complied with the case plan. Appellant did not dispute that DHS provided meaningful and abundant services and they recognized that they would always need assistance in caring for their child and with more time and services they will continue to improve as parents.

The court found that the child had been out of the home for more than a year and that despite meaningful efforts the parents had not remedied the circumstances that caused removal. The court found they had an inability to digest and implement necessary skills to care for their child based on incapacity, not indifference. The appellate court affirmed the circuit court citing case law that indicates that compliance with a case plan is not determinative, but rather whether the plan achieves the intended results and the intent to provide permanency in the life of a child. (Thyer; C.; 08-1112; 3-11-2009; Henry)

Jones -Lee. v. Arkansas Dept. of Human Servs.: [TPR] TPR affirmed. Appellant's children came into care when appellant left her three and five year old children unattended while she went to church and thought "God was watching her children." Subsequently her one year old and an infant were also taken into care and all children were adjudicated dependent-neglected. A psychological evaluation revealed that appellant was chronically ill and displayed psychosis secondary to depression, major depression with psychotic features. In addition to other services the circuit court ordered weekly counseling to address the mental health issues. The court held reviews and made findings of partial compliance and at the second review hearing found that appellant had made minimal progress in remedying the cause for removal.

Appellant argued that trial court failed to consider the potential harm if the children were returned to her or alternatively that the evidence did not support that the children would be harmed if

returned, and that the court never specified what clear and convincing evidence supported its order. The appellate court found no merit in any of appellant's arguments and that the termination was in the children's best interest. The appellate court found that the circuit court had summarized its previous findings based on the evidence and that there is no statutory requirement that every factor considered be established by clear and convincing evidence, but that after a review of all the factors the evidence must be clear and convincing that it is in the child's best interest.

Appellant argued that the trial court erred in finding that she failed to remedy the conditions that caused removal although she concedes that she did not prove consistency with her therapy sessions. The appellate court found that the trial court did not error in its finding. Appellant only attended eight of the 48 ordered therapy sessions, three were canceled by the therapist. The trial court found that this failure, her failure to learn anything from the sessions that she did attend, her inability to comprehend that young children can not be left alone unsupervised, or to take responsibility for leaving children alone indicated that the conditions had not been remedied that caused removal.

Appellant argued that DHS did not make meaningful efforts to rehabilitate her home to correct the conditions that caused removal, specifically as to a neurological evaluation and in home parenting. There was conflicting evidence as to the need for the neurological evaluation and appellant waited until the termination proceeding to request it. Appellant never progressed to the point that in home parenting would be productive.

[Continuance] Appellant argued that circuit court erred in denying her motion for continuance because her denial precluded her from presenting evidence supporting that termination was not necessary. In deciding to grant a continuance the court should consider the following factors: the diligence of the movant; the probable effect of the testimony at trial; the likelihood of procuring the witnesses' attendance in the event of postponement; and the filing of an affidavit, stating not only what fact the witness would prove, but also that appellant believes them to be true. The court did not err. Appellant could have subpoenaed the witness in question or deposed the witness upon learning that the DHS witness would not be available. Further, the affidavit did not explain the evidence that appellant would prove to be true. (Warren, J.; 08-1008; 3-4-2009; Brown)

DISTRICT

Arkansas State University v. Professional Credit Management, Inc.: **[District Court Rules]** This appeal was from a circuit court order which denied a motion to set aside a district court order of garnishment. Appellant argued that the garnishment cannot attach to a person's wages when those wages are already subject to a previous garnishment to the maximum extent allowed by federal law. Appellant also argued that the order for payment placed an undue burden on employers to monitor and manage multiple garnishments. The Supreme Court accepted the appeal as an issue of first impression requiring the court's interpretation of garnishment statutes. However, the court could not reach the merits of appellant's argument because the appeal from district court to circuit court was untimely. The record was not filed in circuit court within thirty days of the district court judgment as required by Rule 9 of the Arkansas District Court Rules. Appeal dismissed. (Fogleman, J.; 08-672; 3-19-09; Corbin)

U.S. SUPREME COURT

Arizona v. Gant: **[search/traffic stop]** Respondent Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket. ¹³The Arizona trial court denied his motion to suppress the evidence, and he was convicted of drug offenses. Reversing, the State Supreme Court found that the search was not justified by either the interest in officer safety or the interest in preserving evidence.

Held: Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest.

(# 07-542; April 21, 2009)

Kansas v. Ventris: **[impeachment]** Respondent Ventris was charged with murder and other crimes. Prior to trial, an informant planted in Ventris's cell heard him admit to shooting and robbing the victim, but Ventris testified at trial that a co-defendant committed the crimes. When the State sought to call the informant to testify to his contradictory statement, Ventris objected. The State conceded that Ventris's Sixth Amendment right to counsel had likely been violated, but argued that the statement was admissible for impeachment purposes. The trial court allowed the testimony. The jury convicted Ventris of aggravated burglary and aggravated robbery. Reversing, the Kansas Supreme Court held that the informant's statements were not admissible for any reason, including impeachment.

Held: Ventris's statement to the informant, concededly elicited in violation of the Sixth Amendment, was admissible to impeach his inconsistent testimony at trial.

(No. 07-1356; 4-29-09)