

## APPELLATE UPDATE

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### CRIMINAL

*Fernandez v. State*: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. (Williams, C.; CR 09-1102; 4-1-10; Corbin).

*Polivka v. State*: [**Rule 37**] Appellant failed to establish that his attorney provided ineffective assistance of counsel. Thus, the trial court did not err when it denied appellant's petition for post-conviction relief pursuant to Rule 37.1 of the Arkansas Rules of Criminal Procedure. (Wright, J.; CR 08-431; 4-1-10; Sheffield).

*Diggins v. State*: [**hearsay**] The trial court did not abuse its discretion when it admitted testimony pursuant to the excited-utterance exception to the hearsay rule. (Jones, B.; CACR 09-1178; 4-7-10; Baker).

*Lowe v. State*: [**revocation of suspended imposition of sentence**] There was sufficient evidence to establish that appellant violated the terms and conditions of his suspended sentence. (Tabor, S.; CACR 09-772; 4-7-10; Vaught).

*Byrd v. State*: [**void for vagueness**] A person challenging the constitutionality of a statute on grounds of vagueness must be one of the "entrapped innocent," who has not received fair warning. If, by his action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. (Clinger, D.; CACR 09-1113; 4-7-10; Pittman).

*Forrest v. State*: [**probation**] The trial court did not err in revoking appellant's probation. (Wyatt, R.; CACR 09-1104; 4-7-10; Hart).

*Otter v. Sex Offender Assessment Committee*: [**Administrative Procedure Act**] Appellant's petition to review the findings of fact, conclusions of law, and final community notification level issued by the Arkansas Sex Offender Assessment Committee, which was filed thirty-one days after he was served with copies of the Committee's final decision, was untimely. Thus, the trial court did not err in dismissing appellant's petition. (Wyatt, R.; CA 09-1033; 4-7-10; Vaught).

*Craig v. State*: [**revocation of probation**] The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. (Simes, L.T.; CACR 09-669; 4-14-10; Hart).

*Hagen v. State*: [**withdrawal of a guilty plea**] The trial court did not abuse its discretion when it denied appellant's motion to withdraw his guilty plea. (Hearnberger, M.; CACR 08-1477; 4-14-10; Henry).

*Stewart v. State*: [**sufficiency of the evidence; perjury**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] Neither Rule 25.4 of the Arkansas Rules of Criminal Procedure nor Rule 410 of the Arkansas Rules of Evidence were applicable to appellant's case. Thus, the circuit court did not abuse its discretion by admitting the transcript from appellant's plea hearing in federal court into evidence in appellant's state court trial. [**plea agreement**] The trial court did not err when it concluded that appellant's plea agreement did not include a prohibition against the filing of future charges. (Pope, S.; CACR 09-29; 4-14-10; Henry).

*Jones v. State*: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court did not abuse its discretion when it permitted a doctor to testify that an eleven-year-old witness, who was also a victim in a separate case against appellant, was infected with a sexually-transmitted disease. (Wright, H.; CACR 09-990; 4-14-10; Baker).

*Adkins v. State*: [**motion to suppress**] The trial court's decision to deny appellant's motion to suppress the victim's pretrial identification and in-court identification was not clearly erroneous. (Humphrey, M.; CACR 09-994; 4-14-10; Brown).

*State v. Parker*: [**appellate review**] An order allowing admission of evidence under the rape-shield statute is automatically appealable by the State. [**rape-shield statute**] Because consent was not an issue in appellee's prosecution, any evidence of the victim's alleged prior sexual encounters with appellee was irrelevant. Thus, the circuit court abused its discretion in admitting this type of evidence. (Wright, H.; CR 09-982; 4-15-10; Gunter).

*Bloodman v. State*: [**contempt**] Because appellant did not receive proper notice of the nature of the proceedings against her or of the potential consequences resulting therefrom, it was error for the circuit court to enter an order holding appellant in criminal contempt and fining her \$1,500. (Hill, V.; 09-657; 4-15-10; Corbin).

*Norris v. State*: [**sufficiency of the evidence; capital murder; aggravated robbery**] There was substantial evidence to support appellant's convictions. [**jury instruction**] Because there was no rational basis for submitting the imperfect self-defense instruction or the proffered negligent homicide instruction to the jury, the trial court did not abuse its discretion in refusing to give those instructions. (Phillips, G.; CR 09-1016; 4-15-10; Wills).

*Brown v. State*: [**revocation of suspended imposition of sentence**] The circuit court's decision to revoke appellant's suspended sentences was not clearly against the preponderance of the evidence. (Tabor, S.; CACR 09-1010; 4-21-10; Hart).

*Barringer v. State*: [**revocation of probation**] The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. (Jones, B.; CACR 08-1460; 4-28-10; Baker).

*Casey v. State*: [**exclusion of testimony**] The trial court did not abuse its discretion when it excluded certain character witnesses from testifying during appellant's trial. (Reynolds, D.; CACR 09-1247; 4-28-10; Vaught).

*Campbell v. State*: **[motion for mistrial]** The trial court did not err in denying appellant's request for a mistrial. (Looney, J.; CACR 09-729; 4-28-10; Hart).

*Klines v. State*: **[cross-examination]** The circuit court did not abuse its discretion when it limited appellant's cross-examination of various witnesses or when it instructed appellant's attorney to refrain from arguing with certain witnesses during cross-examination. (Pope, S.; CACR 09-1207; 4-28-10; Robbins).

*Arendall v. State*: **[sufficiency of the evidence; second-degree sexual abuse]** There was substantial evidence to support appellant's conviction. **[severance]** The two charges against appellant were for the same crime, which occurred in the same locations, in the same manner, and within a one-day period. Additionally, the victims' narratives of the events were virtually identical. Based upon the foregoing facts, the Court of Appeals concluded that the trial court did not abuse its discretion when it denied appellant's request to sever the charges against him. **[404(b)]** The trial court did not abuse its discretion when it permitted nine witnesses to testify pursuant to Rule 404(b) because the witnesses' testimony provided additional proof of appellant's motive, opportunity, intent, plan, knowledge, and absence of mistake or accident. Additionally, the testimony was independently relevant to rebut appellant's argument that no inappropriate or criminal conduct occurred. **[Rules 608 and 609]** At trial, appellant attempted to introduce evidence that related to a felony hot-check charge pending against one of his victims. The request was denied. On appeal, the Court of Appeals concluded that the trial court correctly denied appellant's request to admit the evidence pursuant to Rules 608 and 609 of the Arkansas Rules of Evidence because at the time of appellant's trial the charge was still pending and the victim had not been convicted of the crime. (Cottrell, G.; CACR 09-743; 4-28-10; Gladwin).

*Jackson v. State*: **[suppression]** Appellant was detained during a reasonable and proper investigatory stop. During the investigation, appellant gave consent to search his buttocks for narcotics. Accordingly, the trial court did not err in denying appellant's motion to suppress evidence that was obtained during the search. **[chain of custody]** The circuit court did not abuse its discretion when it admitted evidence over appellant's chain-of-custody objection because the witnesses were able to explain the discrepancies in their testimony and the court was satisfied within a reasonable probability that no one had tampered with the evidence. (Wright, H.; CACR 09-881; 4-28-10; Gladwin).

*Witcher v. State*: **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant's conviction. (Chandler, L.; CR 09-1131; 4-29-10; Wills).

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

*Brown v. State*: (Possession of controlled substance with intent to deliver) CACR 09-1136; 4-7-10; Brown.

*Skomp v. State*: (abuse of an impaired person) CACR 09-1185; 4-14-10; Kinard.

*Golden v. State*: (theft of property) CACR 09-865; 4-21-10; Brown.

*Hinton v. State* (aggravated robbery; aggravated burglary) CACR 09-1029; 4-21-10; Robbins.

*Washington v. State*: (breaking or entering; theft of property; battery in the second degree) CACR 09-1017; 4-21-10; Gladwin.

*Watson v. State*: (sexual assault in the fourth degree) CACR 09-805; 4-28-10; Pittman.

*Stephens v. State*: (residential burglary; first-degree criminal mischief) CACR 09-1190; 4-28-10; Gruber.

## CIVIL

*Gruma Corp. v. Morrison*: [**arbitration**] Arbitration clause was enforceable. The clause was governed by the Federal Arbitration Act. Claims under the Arkansas Franchise Practices Act were subject to arbitration. (Wright, J.; SC 09-618; 4-1-10; Wills)

*Doe v. Weiss*: [**anonymous pleadings**] Court did not abuse its discretion by not permitting plaintiff to proceed under pseudonyms. Plaintiff was an undocumented alien and sought to challenge statute establishing requirements to get a driver's license. Status as an undocumented immigrant alone is not enough to permit a party to proceed anonymously. (Green, R.; SC 09-1071; 4-1-10; Danielson)

*Fayetteville Public Schools v. Dial*: [**Teacher Fair Dismissal Act**] In order for the Act to apply and afford a teacher the right to a hearing, it is not necessary that the teacher have a written contract of employment. (Gunn, M.; CA 09-1196; 4-7-10; Gruber)

*Rose v. Etoch*: [**pleading fraud**] Complaint did not sufficiently allege a claim based on fraud. (Proctor, R.; CA 09-1129; 4-7-10; Brown)

*Garringer v. Garringer*: [**easement by implication**] Plaintiff met his burden to establish an easement by implication. (Whiteaker, P.; CA 09-1245; 4-7-10; Glover)

*Thurkill v. Wood*: [**boundary by acquiescence**] An old fence line had become the boundary by acquiescence. The parties and their predecessors had occupied their respective tracts based on their mistaken belief that a marker was the common corner. When a recent survey revealed the mistake, one of the owners objected to the boundary line, but the court quieted title based on the boundary that historically had been accepted. (Guthrie, D.; CA 09-1163; 4-14-10; Gruber)

*Landers v. Dept. of Education*: [**teacher/expunged conviction**] Board properly denied person a waiver request for a certified teacher's license. Although a felony-theft conviction was expunged, the conviction could be used by the Board to deny licensure. Statute provides that one who has pled guilty or nolo contendere to a disqualifying offense may be prohibited from receiving a teaching license regardless of whether the record has been expunged. (Fox, T.; CA 09-1134; 4-14-10; Gladwin)

*Cassinger v. Poinsett County Rice and Grain, Inc.*: [**contract**] Delivery of rice was delayed by flooding. Contract provision allowed for delayed performance because of a force majeure. Rice buyer did not pick up rice during the contractual period because of the flooding, and the rice grower sold rice elsewhere. Force majeure provision was applicable. The delay in performance was beyond the parties' control, the period of delay was reasonable, and the grower would have suffered no undue harm had he allowed the merchant to perform, which included offer of interest and storage costs. (Laser, D.; CA 09-677; 4-14-10; Pittman)

*Johnson v. Brasfield*: [**parties/notice**] In action to quiet title, court had subject matter jurisdiction because all interested parties were before the court. Fact that a statutory notice was not published in the paper did not affect court's subject matter jurisdiction. (Dennis, J.; CA 09-1255; 4-14-10; Glover)

*Durham v. Smith*: [**deed/acreage**] The purchase in question was by land in gross and not by acre. The discrepancy between the acreage listed in the contract and the actual acreage was not sufficient to establish fraud. Absent fraud, the buyer assumes the risk of the quantity. [**conversion**] Tractor was converted and the proper measure of damages is the fair market value at the time and place of conversion. (Weaver, T.; CA09-1085; 4-14-10; Brown)

*Downing v. Lawrence-Hall Nursing Center*: [**charitable immunity**] Merely because the complaint alleged the defendant was a non-profit corporation did not satisfy defendant's burden to establish the affirmative defense of charitable immunity. [**relation back**] When complaint was originally filed, plaintiff named hospital as defendant. As a result of change in the law, the proper party was the insurer, and plaintiff amended her complaint to so reflect. The requirement in Rule 15 of a mistake as to the identity of the proper party was satisfied, and the amended complaint related back to the time of the original filing and was within the limitations period. (Erwin, H.; SC 09-621; 4-15-10; Wills)

*Tucker v. Sullivant*: [**savings statute/amended complaint**] Filing of an amended complaint satisfied the requirement of the savings statute that a new action be commenced within one year. Neither the fact that the case was filed under the previous docket number, nor the fact that a reopening fee rather than a new filing fee was paid militate against satisfaction of the “new action” requirement. (Laser, D.; SC 09-1258; 4-15-10; Corbin)

*Barnett v. Mountain View School District*: [**teacher fair dismissal act**] Teacher’s termination violated the Teacher Fair Dismissal Act. Contract was unambiguous and court erred in considering parol evidence to construe it. Contract only required person certified to teach high school – not a certified high school science teacher. (Harkey, J.; CA 09-976; 4-1-10; Vaught)

*Blankenship v. Kelly*: [**evidence**] Testimony was erroneously excluded on hearsay grounds but the testimony, relating to medical condition, fell within the exception for “then existing mental, or physical condition.” (Kennedy, J.; CA 09-460; 4-21-10; Hart)

*Brooks v. First State Bank*: [**malicious prosecution**] Claim for malicious prosecution against bank failed because there was probable cause for the theft claim and the determination was made by the prosecutor. [**abuse of process**] The claim failed because of a lack of proof of any coercive actions or efforts on the bank’s part to use process for an ulterior purpose, in this case, to extort repayment from the customer. (Clawson, C.; CA 09-767; 4-21-10; Robbins)

*Chiodini v. Lock*: [**discovery disputes**] Trial court did not err in its rulings on various discovery disputes regarding interrogatories, requests for admission, and a protective order relating to the deposition of an elderly witness. [**boundary by acquiescence**] Plaintiff failed to prove a tacit acceptance among the landowners that an old fence line was the boundary of adjoining properties. (Choate, S.; CA 09-297; 4-21-10; Gladwin)

*Poff v. Peedin*: [**quiet title / settlement agreement**] Ten years after parties executed a settlement agreement to resolve disputes in estate administration, additional property interests in the form of mineral rights were discovered that were unknown at the time of the settlement. Agreement terminated children’s rights to subsequently discovered mineral rights not listed in the estate inventory, and the terms of agreement gave widow sole ownership of these rights. (Harkey, A.; CA 09-737; 4-28-10; Glover)

*Booth v. Riverside Marine*: [**contract**] Party did not breach agreement to provide insurance, as agreement did not specify a certain level of health insurance benefits, and insurance was provided. (Fox, T.; CA 09-887; 4-28-10; Glover)

*Presley v. St. Paul Marine Ins. Co.*: [**direct action statute**] In malpractice action, plaintiff was correct in suing insurer of hospital directly. Complaint alleged facts to sufficiently allege that hospital was immune from suit and insurer was proper defendant. (Logan, R.; CA 09-762; 4-28-10; Henry)

*Carpenter v. Layne*: [**undue influence/ conversion**] Payments of money were not the result of undue influence. Although a fiduciary relationship existed, elderly gentleman was not put in a position of fear or overreaching in his financial dealings and was aware of the financial dealings between himself and person who held his power of attorney. Since person had authority to write checks because he held a power of attorney and was a signator on the accounts, he was not liable for conversion when he wrote checks on the accounts. (Cox, J.; CA 09-1236; 4-28-10; Gruber)

*Ellis v. Ark. Highway Commission*: [**condemnation/attorney fees**] Commission did not act in bad faith; therefore, there is no basis for an award of fees in that regard. Attorney’s fees are not a component of just compensation as is compounding interest. (Wilson, R.; SC 09-1002; 4-29-10; Corbin)

*Jewell v. Fletcher*: [**vacate judgment/fraud**] Movant failed to satisfy Rule 60 requirement that judgment was procured via fraud. He failed to assert a valid defense to the underlying action for breach of contract. [**due process/supersedeas bond**] Estate was entitled to a hearing for the court to consider the unwinding of a previous distribution from a judicial-dissolution proceeding even though the estate did not post a bond in connection with an appeal from the order of distribution. Although a hearing was held, court did not consider an appropriate remedy to address the fact that funds were no longer in court’s registry to satisfy estate’s claim. Supersedeas bond is not necessary in this instance because

purpose of bond is to secure the payment of a judgment against party posting the bond. Here, estate did not have a judgment against it; rather, it had a claim against the dissolving entity, and wanted funds to be preserved from which claim could be paid. (Fox, T.; SC 09-313; 4-29-10; Corbin)

*Proctor v. Daniels, Secretary of State*: **[judicial discipline]** Amendment 66 authorizes the sanction of removal, which entails not only removal from office, but also a permanent bar from holding a judicial office in the future. (Pierce, M.; SC 10-384; 4-30-10; Hannah)

## DOMESTIC RELATIONS

*Erickson v. Erickson* **[child custody; Rule 52(a), ARCP]** The circuit court did not err in finding a substantial change in circumstances and that it was in the best interests of the parties' minor children to change custody to their mother. The appellant did not request specific findings under Ark. R. Civ. P. Rule 52(a). The failure to make a timely request for separate findings constitutes a waiver of that right. (Pierce, M.; No. CA 09-907; 4-7-10; Baker).

*Lipps v. Lipps*: **[child custody]** The circuit court's decision awarding custody of the child was not clearly erroneous. The appellant also alleged on appeal that the trial court was biased against her, but because she did not raise the issue of bias in the trial court or ask the judge to recuse, the issue was not preserved for appeal. (Singleton, H.; No. CA 09-1108; 4-7-10; Gruber).

*Ullrich v. Walsh*: **[Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA); Parental Kidnapping Prevention Act (PKPA)]** The Court of Appeals affirmed the circuit court's findings(1) that the decision of a Texas court was an "initial child-custody determination" under the UCCJEA and the PKPA; (2) that the Texas decision was entitled to full faith and credit; (3) that the Arkansas court could assume jurisdiction only under conditions set out in Ark. Code Ann. §9-19-203; and (4) that it followed the formula set out in the UCCJEA. (McCormick, D.; No. CA 09-1114; 4-7-10; Gladwin).

*Mainerich v. Wilson*: **[child support]** The Court of Appeals was unable to determine facts essential to the disposition of an issue regarding a child-support arrearage and reversed and remanded for the court to make additional factual determinations. In addition the court reversed and remanded on the appellee's asserted financial assistance to the parties' adult daughter and on the court's method of calculating child support. (Guthrie, D.; No. CA 09-544; 4-14-10; Baker).

*Courdin v. Courdin*: **[child custody; jurisdiction]** This case was filed under the International Child Abduction Remedies Act (ICARA), which implements the Hague Convention on the Civil Aspects of International Child Abduction. The issue under ICARA was whether the United States or Brazil was the appropriate forum to determine custody of the parties' child. A custody case was already filed and pending in Missouri. The circuit court determined that the Missouri court could proceed in determining custody, and the Court of Appeals affirmed that determination. (Lindsay M.; No. CA 09-780; 4-14-10; Kinard).

*York v. York*: **[divorce; declaratory judgment; summary judgment]** This case involved the interpretation of a divorce decree entered into by the parties. The parties disagreed over the meaning and effect of the decree. The appellee filed a petition for declaratory judgment and specific performance of the portion of the decree that he be awarded the business and the real property on which it is located. The appellant responded that they owned the property jointly, that they never had an agreement about the disposition of the business, and that the divorce decree did not award the business to the appellee as he claimed. The trial court entered a letter opinion reflecting that the appellee's petition for declaratory judgment was in the nature of a summary judgment. After a hearing, the court granted summary judgment, awarding the appellee all of the real property pursuant to the divorce decree, including the parcel of land where the company is located. On appeal, the appellant argued error in the court's granting summary judgment on the issue of ownership of the corporate shares of the business.

The Court of Appeals reversed on the issue of the corporate shares and remanded on that issue. The Court affirmed the trial court's finding that the decree awarded all of the real property to the appellee. (Sullivan, T.; No. CA 09-1145; 4-21-10; Robbins).

*Williams v. Williams*: [**divorce decree; specific performance; reformation of contract**] An agreed divorce decree provided for the appellee husband, a military retiree, to pay the appellant wife \$5,000 for her either to reinstate or to enroll herself in the Spousal Benefit Plan (SBP) offered to spouses of military personnel. Appellee made the payment but the appellant was not eligible to participate in the plan because there was no longer an opportunity for her to reinstate or enroll in the plan. She filed a motion to enforce, interpret, and clarify the divorce decree or, in the alternative, to set aside the decree based upon fraud. It is undisputed between the parties that appellant's enrollment in the SBP as contemplated was impossible. Specific performance will not lie when performance is impossible. Impossibility means in the nature of the thing to be done, not in the inability of the party to do it. The burden of showing that the thing required under the contract cannot be accomplished is upon the defendant. Here, there was no dispute that appellant's enrollment was not possible; therefore, the trial court could not enforce the decree as written. In asking the trial court to redraft the decree to award a value for what the SBP was worth, the appellant presented no testimony from which the court could determine what amount would compensate her for the value of the benefit of her bargain. A party seeking reformation of a written contract and specific performance of the contract as reformed has the burden of proving the contract claimed by clear, unequivocal, and decisive evidence. Here, there was no evidence from which the trial court could reform the parties' agreement. (McCormick, D.; No. CA 09-796; 4-21-10; Baker).

*Oates v. Oates*: [**order of protection**] The circuit court denied the appellant wife's petition for a protective order on behalf of herself and her three minor children. In affirming, the Court of Appeals set out the testimony of the parties' and their witnesses, including two psychologists. At the crux of the decision was the circuit court's determinations of the credibility of the parties and their witnesses. An issue about allowing testimony on the psychological theory of Parental Alienation Syndrome (PAS) was not considered because it was not raised timely to the trial court. A motion to exclude evidence of the syndrome was made over three months after the hearing in the case. (Kilgore, C.; No. CA 09-496; 4-21-10; Gruber).

*Oates v. Oates*: [**divorce**] This was a companion case to the one above, which involved an order of protection. This case involved the same parties' divorce. The appellant wife was granted a divorce and the appellee husband was granted custody of the parties' three sons. The Court of Appeals affirmed. The appellant also argued that the trial court erred in finding that her husband did not engage in a pattern of domestic abuse under the Arkansas Code when he had undisputedly committed domestic abuse against her on two occasions. In affirming on this point, the court noted that Arkansas statutes do not define "pattern of domestic abuse." Finally, appellant argued that evidence concerning the psychological theory of parental alienation syndrome (PAS) should have been excluded as unreliable. Because the appellant did not object at trial to the testimony, the issue was not preserved for appeal. (Kilgore, C.; No. CA 09-498; 4-21-10; Glover).

*Stuhe, As Administrator of the Estate of Stuhr, Deceased v. Oliver*: [**annulment; substitution of party; standing**] The appellant's decedent and the appellee were married on May 22, 2009 and separated on May 23, 2009. The appellee filed a complaint for annulment on May 27, 2009. The husband died July 7, 2009. Without knowledge of the death of the husband, the circuit court held a hearing and denied the petition for insufficient testimony. The appellee filed a motion to dismiss the annulment action on July 16, 2009. The Administrator filed a motion to be substituted as a party to the annulment action that same day. He stated that an estate had not yet been opened, but he would petition to open an estate and be appointed administrator as soon as a death certificate was issued. After a hearing on the motion to substitute, the court denied the motion and granted the appellee's motion to dismiss, finding, among other things, that death abates a divorce suit and that death during a suit for annulment should be treated the same. The Supreme Court found that the Administrator was not a party to the action at the time of the decision. The circuit court denied his motion to be substituted as a party, so he was never a party.

Therefore, he had no standing to appeal any determination relating to the annulment. The court held that an annulment action in Arkansas abates upon the death of one of the parties to the action. Since the action abated upon the decedent's death, the circuit court lost jurisdiction and did not abuse its discretion in denying the Administrator's motion to substitute. (Schrantz, D.; No SC 09-1383; 4-22-10; Danielson).

## **PROBATE**

*Minton v. Minton, et al.*: **[wills; holographic codicil--testamentary intent]** Appellant alleged on appeal that the circuit court erred in admitting two handwritten documents to probate as codicils to appellee's decedent's formal will. He argued that the handwriting and signature were not established by three credible, disinterested witnesses, and that the alleged holographic codicil lacked testamentary intent. The trial court had found that the two separate documents constituted a single codicil. The Court of Appeals found that three credible, disinterested witnesses did establish that the handwriting and signature were those of the decedent. One of those three was the appellant himself, who had reluctantly testified that the codicil appeared to be written in the decedent's handwriting. The court also found that the codicil reflected testamentary intent. The decedent stated in the codicil his intent to give certain items of property in a way that modified the percentages to some beneficiaries from his formal will. The fact that a writing references a future intention to incorporate changes into a new formal will is not dispositive of the case. The Court said that is the nature of codicils, which are, in effect, postscripts to wills. (Looney, J.; No. CA 09-883; 4-14-10; Hart).

## **JUVENILE**

*K.C. v. Arkansas Dept. of Human Servs.* **[TPR]** TPR reversed and remanded. The trial court's best interest finding lacked evidence supporting the required consideration of potential harm. The third element of the ground for termination, that the parent failed to remedy the conditions that caused removal, was also without evidence. The appellate court noted that it was impossible for the minor mother to remedy the problems that caused removal when she was not the cause for removal. The AAL offered another ground to support termination. However, this ground was not alleged in the petition, argued at the hearing, nor did the trial court base its decision upon this ground. The appellate court cannot now create grounds that were not plead or proven, such would be a violation of due process. (Branton, W.; CA09-1383; 4-28-2010; Vaught)

*Taylor v. Arkansas Dept. of Human Servs.* **[TPR]** TPR affirmed. Appellant argued that DHS did not make meaningful efforts to rehabilitate her and correct the conditions that caused removal. Although DHS did not provide adequate services resulting in the court's denial of a TPR in February of 2008, the trial court found that it provided services a full year before terminating parental rights in the case now on appeal. Services included a psychological evaluation and drug and alcohol assessment, counseling, drug treatment, medication management, drug screens, and visitation. (Branton, W.; CA09-1382; 4-28-2010; Robbins)

*Armstrong v. Arkansas Dept. of Human Servs.* **[TPR]** TPR affirmed. Appellant argued that the trial court erred in finding that there was little likelihood that further services would result in reunification because she was making progress at the time of the termination hearing. However, evidence revealed that appellant was financially dependent on a married man who was physically abusive and a drug user. This continued to demonstrate a lack of judgment in matters affecting her children and putting her desires above the well-being of her children. (Arnold, G.; CA09-1350; 4-28-2010; Pittman)

*Thorne v. Arkansas Dept. of Human Servs.; Myers v. Arkansas Dept. of Human Servs.; Parish v. Arkansas Dept. of Human Servs.; Krantz v. Arkansas Dept. Of Human Servs.*: **[D-N Adjudication]** Affirmed four cases involving children removed and adjudicated dependent-neglected from the Tony Alamo Ministries. The *Thorne* opinion includes all the facts and evidence in all hearings common to all four appeals, including underage marriages, physical abuse, medical and educational neglect.

The trial court specifically found that the Thornes had failed to protect their children against physical abuse; that they were aware of the pattern and practice of abuse; that they endorsed and facilitated illegal marriages of underage females to adult males; and that they neglected their children's educational and medical needs. Thorne's argument that his children are not dependent-neglected because there was no evidence that they personally suffered abuse is without merit. A child may be adjudicated dependent-neglected even if he or she has not suffered abuse. There was also evidence that Kolbeck had spanked one of their children at a parent's request and that they had given his 12 year-old daughter in marriage to an adult man. Thorne also argue that the case plan that required him to obtain safe and stable housing apart from the ministry violated his right to freely exercise his religion. The trial court was affirmed in finding that the most pressing potential danger facing the children was simply living on the ministry property and responded with a narrowly tailored solution. "The state's interest in preventing potential harm to the children outweighed Thorne's conscientious choice to live on the ministry property and work for the ministry and depend on the ministry for his family's every need. There is no constitutional infirmity." (Griffin, J.; CA09-583; 4-14-2010; Gruber)

*Krantz* (Griffin, J.; CA09-579; 4-14-2010; Gruber); *Parish* (Griffin, J.; CA09-571; 4-14-2010; Baker) *Myers* (Griffin, J.; CA09-569; 4-14-2010; Baker); Adjudications affirmed. On appeal all parents made the same arguments as in *Thorne*, with the exception that *Myers* did not raise the free-exercise of religion argument.

*Lomontagne v. Arkansas Dept. of Human Servs.*: [**Permanency Planning**] Permanency Planning order of custody of appellant's daughter to her older daughter affirmed. Appellant's argument concerning the preference of permanency outcomes in statute was not raised at trial, and therefore the merits were not addressed by the appellate court. The Court of Appeals certified this case to the Supreme Court to address a perceived inconsistency in the law regarding arguments raised for the first time on appeal. The Supreme Court clarified that a *de novo* review does not mean that the appellate court will entertain new issues on appeal when there was an opportunity to present the issue below and that opportunity was not seized. The court restated it's holding in *Roberts* stating that, "all objections to evidence and witnesses must be made in a timely manner in the trial court, and if not made, such objections will be considered as waived when the case reaches appeal. In keeping with this principle, the extent that *Morrow* and *Jones* cases conflict our previous holdings requiring a contemporaneous objection at trial they are hereby overruled." (Zimmerman, S. ; 09-1390; 4-6-2010; Sheffield).

*Ramsey v. Arkansas Dept. of Human Servs.*: [**TPR**] TPR affirmed. Appellant argued that the evidence was insufficient as to the best interest and statutory grounds supporting the termination. In this case the child came into care because of positive cocaine tests at birth. After over two years of working with the agency and receiving services, the agency filed for termination based on several grounds. The appellate court noted that the harm analysis in the best interest determination is to be analyzed broadly, including the child's lack of stability in a permanent home. The court found that subsequent factors arose that demonstrated that return was contrary to the juvenile's health, safety, or welfare despite the offer of family services and that appellant manifested the incapacity or indifference to remedy the subsequent issues or factors that prevented the child's return, including appellant's incarceration at the time of the termination which left her unable to care for her child or achieve stability within a time frame consistent with her child's needs. (Cook, V.; CA 09-1365; 4-21-2010; Kinard)

*State v. K.H.*: [**EJJ**] The state appealed the trial court's denial of the state's petition to impose an adult sentence and request for an EJJ Review Hearing. Appeal dismissed. Prior to the state's petition and motion for a hearing, the case had been closed without objection. The trial court noted its error in failing to have the required statutory review hearing prior to closing the case, but found that it was without jurisdiction to hear the state's motions. The Supreme Court held that this is not an appeal as required by Rule 3 following a misdemeanor or felony prosecution, but are more analogous to an appeal from the revocation of a suspended sentence, which is an improper state appeal. (Williams Warren, J.; 09-1197; 4-15-2010; Brown)

## **EIGHTH CIRCUIT**

*Blankenship, Jr. v. USA Truck*: **[settlements]** Arkansas cases suggest that the Arkansas Supreme Court would hold that the no-reliance clause in the parties' settlement agreement is not an absolute bar to plaintiff's claim that he was induced to sign the settlement agreement by defendant's fraud; as a result, the district court erred in granting defendant's motion to dismiss. (W.D. Ark.; # 09-1605; 4-15-10)

## **U.S. SUPREME COURT**

*Renico v. Lett*: **[double jeopardy]** After approximately 4 hours of deliberations, the judge was told by the foreperson that the jury was unable to reach a unanimous verdict. The judge then declared a mistrial, dismissed the jury, and scheduled a new trial. At defendant's second trial, after deliberating for only 3 hours and 15 minutes, a new jury found him guilty of second-degree murder. On appeal, defendant argued that because the judge in his first trial had announced a mistrial without any manifest necessity to do so, the Double Jeopardy Clause barred the State from trying him a second time. The Michigan Supreme Court held a defendant may be retried following the discharge of a deadlocked jury so long as the trial court exercised its "sound discretion" in concluding that the jury was deadlocked and thus that there was a "manifest necessity" for a mistrial; and that an appellate court must generally defer to a trial judge's determination that a deadlock has been reached. The Sixth Circuit in a federal habeas petition found a violation of double jeopardy.

*Held*: Because the Michigan Supreme Court's decision in this case was not unreasonable under AEDPA, the Sixth Circuit erred in granting Lett habeas relief. (09-338; 5-3-10)