

APPELLATE UPDATE

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CRIMINAL

Scott v. State: [**hearsay**] The trial court did not err when it permitted a store owner to testify about the amount of money taken from her business. (Arnold, G.; CACR 09-270; 2-3-10; Brown).

Price v. State: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's convictions. [**pedophile exception**] The trial court properly admitted testimony regarding appellant's prior bad acts pursuant to the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motion for a mistrial. (Cottrell, G.; CACR 09-508; 2-3-10; Baker).

Moss v. State: [**hearsay**] Testimony about the value of stolen property, which was offered from a store employee, was not hearsay. (Reynolds, D.; CACR 09-514; 2-3-10; Pittman).

Rockward v. State: [**suppression of evidence**] Because the law enforcement official had reasonable cause to search the trunk of appellant's car before appellant withdrew his consent to the search, the trial court did not err in failing to suppress the evidence found during the search. (Phillips, G.; CACR 09-346; 2-3-10; Baker).

Hagen v. State: [**motion to withdraw plea**] An oral motion to withdraw a guilty plea, which is made prior to the entry of a judgement, is sufficient under Rule 26.1 of the Arkansas Rules of Criminal Procedure. (Hearnberger, M.; CR 08-1477; 2-4-10; Danielson).

Goodman v. State: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**jurisdiction**] The Saline County Circuit Court had jurisdiction over a crime that occurred in Saline County. (Phillips, G.; CACR 09-899; 2-11-10; Marshall).

Stevenson v. State: [**motion for new trial**] Pursuant to Rule 33.3 of the Arkansas Rules of Criminal Procedure, appellant was entitled to a hearing on his motion requesting a mistrial and the trial court's failure to grant one was reversible error. (Thyer, C.; CACR 09-9; 2-11-10; Pittman).

Tapia v. State: [**motion to suppress**] The trial court did not err in denying appellant's motion to suppress. (Yeagan, C.; CACR 09-341; 2-11-10; Hart).

Buffalo v. State: [**sufficiency of the evidence; internet stalking of a child**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court did not abuse its discretion when it admitted certain computer printouts into evidence because they were properly authenticated and were admissible as duplicates or originals. (Clawson, C.; CACR 09-586; 2-11-10; Robbins).

Johnson v. State: [**appeal from guilty plea**] An appeal may be taken after a guilty plea when it alleges evidentiary errors that arose after the plea and during the sentencing phase, regardless of whether a jury was impaneled for that phase of the trial. (Keith, T.; CR 09-175; 2-12-10; Danielson).

Hood v. State: [**appeal from guilty plea**] An appeal may be taken after a guilty plea when it alleges evidentiary errors that arose after the plea and during the sentencing phase, regardless of whether a jury was impaneled for that phase of the trial. (Halsey, B.; CR 09-32; 2-12-10; Corbin).

Brown v. State: [**withdrawal of guilty plea**] The trial court did not err when it denied appellant's motion to withdraw his guilty plea. (Proctor, R.; CACR 09-839; 2-17-10; Vaught).

Graham v. State: [**Confrontation Clause**] The trial court violated the Confrontation Clause by allowing a law enforcement official to testify about statements made to him by a confidential informant without permitting the appellant to confront and cross examine the confidential informant. (Tabor, S.; CACR 09-903; 2-17-10; Marshall).

Frost v. State: [**sufficiency of the evidence; committing a terroristic act**] There was substantial evidence to support appellant's conviction of committing a terroristic act. [**voir dire**] The trial court did not err when it overruled objections made by appellant during voir dire. [**evidence of other crimes**] The trial court did not abuse its discretion when it admitted evidence of other crimes that were committed by appellant because the evidence was independently relevant to appellant's motive and intent. [**mental disease or defect**] The trial court did not abuse its discretion when it refused to instruct the jury on the defense of mental disease or defect. [**question from jury**] The trial court did not abuse its discretion when it answered a question from the jury during deliberations. (Pope, S.; CACR 09-444; 2-17-10; Marshall).

Gray v. State: [**judicial notice**] The circuit court did not abuse its discretion by taking judicial notice of its own case file. [**revocation of probation**] There was sufficient evidence to support the circuit court's finding that appellant violated a condition of his probation. (Hearnsberger, M.; CACR 09-803; 2-17-10; Gruber).

Green v. State: [**sufficiency of the evidence possession of crack cocaine with intent to deliver**] There was substantial evidence to support appellant's conviction. [**speedy trial**] The trial court did not err by denying appellant's motion to dismiss his case, which was based upon an alleged speedy-trial violation. (Pope, S.; CACR 09-503; 2-17-10; Hart).

White v. State: [**revocation of probation**] There was evidence upon which the trial court could conclude that the written conditions of appellant's probation were expressly communicated in writing and verbally to appellant. (Dennis, J.; CACR 09-799; 2-17-10; Robbins).

Brown v. State: [**sufficiency of the evidence; sexual assault in the second degree**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court abused its discretion when it permitted thirty-five year-old, uncharged-misconduct evidence to be admitted during the sentencing phase of appellant's trial. (Arnold, G.; CACR 09-441; 2-17-10; Gladwin).

Johnson v. State: [**sufficiency of the evidence; murder in the second degree**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court did not abuse its

discretion when it admitted various items into evidence and excluded other items from evidence. **[motion for mistrial]** The circuit court did not abuse its discretion when it denied appellant's motion requesting a mistrial. (Anthony, C.; CACR 08-1239; 2-17-10; Gladwin).

McJames v. State: **[error coram nobis]** The deemed-denied provision of Rule 33.3 of the Arkansas Rules of Criminal Procedure is inapplicable to *error coram nobis* proceedings. (Proctor, W.; CR 09-207; 2-18-10; Gunter).

Smith v. State: **[Rule 404(b)]** The trial court did not abuse its discretion when it admitted evidence that established that appellant had participated in other drive-by shootings and that appellant had previously been involved in a shooting incident because the evidence was admissible pursuant to Rule 404(b) of the Arkansas Rules of Evidence. (Piazza, C.; CR 09-930; 2-18-10; Gunter).

State v. Johnson: **[agreement with prosecutor]** Where the State has entered into an agreement not to prosecute with a prospective defendant and the defendant has preformed and acted to his detriment or prejudice in reliance upon that agreement, the government must be required to honor such an agreement. (Clinger, D.; CR 09-644; 2-18-10; Wills).

Mhoon v. State: **[accomplice liability; sentencing enhancement]** An accomplice can be subjected to the sentencing enhancement found at Ark. Code Ann. § 16-90-120, even if the accomplice did not personally employ the firearm. (Humphrey, M.; CACR 09-905; 2-24-10; Robbins).

Williams v. State: **[mistrial]** The trial court abused its discretion when it denied appellant's request for a mistrial following the admission of testimony that falsely accused appellant of previously being convicted of terroristic threatening. (Glover, D.; CR 09-355; 2-25-10; Hannah).

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

Nichols v. State: (permitting abuse of a minor) Fogleman, J.; CACR 09-484; 2-3-10; Robbins.

Cunningham v. State: (intimidating a witness) Storey, W.; CACR 09-722; 2-11-10; Kinard.

Sims v. State: (robbery, misdemeanor theft of property; second-degree terroristic threatening) Maggio, M.; CACR 09-759; 2-11-10; Gruber.

Smith v. State: (first-degree murder) Wyatt, R.; CACR 09-787; 2-11-10; Glover.

Harris v. State: (possession of cocaine with intent to deliver) Pope, S.; CACR 08-762; 2-11-10; Hart.

Chavez v. State: (second degree sexual assault) Fitzhugh, M.; CACR 09-880; 2-17-10; Glover.

Williams v. State: (theft of property) Proctor, W.; CACR 09-948; 2-24-10; Gruber.

Earl v. State: (delivery of a controlled substance) Edwards, R.; CACR 09-932; 2-24-10; Kinard.

Elliott v. State: (second degree sexual assault) Wright, J.; CACR 09-750; 2-24-10; Kinard.

St. Clair v. State: (failure to appear) Green, R.; CACR 09-744; 2-24-10; Baker.

CIVIL

Shaffer v. Yang: **[medical malpractice]** Expert did not satisfy the local standard of care requirement. (Patterson, J.; CA 09-568; 2-3-10; Pittman)

Siegel v. Halley: **[assignment/release]** A and B entered contract to sell condominium. B, the seller, assigned the contract to C. Subsequently, A released C. A tried to sue B to recover her earnest money. A's release of

the assignee discharged B's obligation (as a surety) under the contract. (Fox, T.; CA 09-604; 2-3-10; Marshall)

P. Rye Trucking v. Pet Solutions: **[release]** Release agreement did not bar this breach of contract lawsuit because the release was not a blanket one; rather, it was limited to claims for property damage and injuries from claims for property damage. (McCormick, D.; CA 09-700; 2-3-10; Gruber)

Barnett v. Gomance: **[boundary by acquiescence]** Boundary by acquiescence was not established because evidence on which the claim was based did not demonstrate that an old fence was considered the boundary line. Adverse possession was not established. (Wright, J.; CA 09-847; 2-3-10; Henry)

Vaughn v. Bates: **[partition/attorney's fees]** Statute permits attorney's fee and the motion for fees was timely filed prior to the entry of a final order. **[amend order]** Court properly amended its order to correct a property description pursuant to Rule 60. Appointment of circuit clerk to act as commissioner for sale was proper. (Cooper, T.; CA 09-712; 2-3-10; Gladwin)

Red v. U.S. Bank: **[jurisdiction]** Summary judgment order was not appealed and was a final order. Upon expiration of time permitted to file a notice of appeal, circuit court lost jurisdiction to hear motions that attempted to litigate claims already brought to final judgment. (Arnold, G.; SC 09-408; 2-4-10; Hannah)

Loveless v. Agee: **[motion/hearing]** Court erred in ruling on a motion to dismiss without giving the party an opportunity to respond within the time allowed by the civil rules. (Wyatt, R.; SC 08-144; 2-4-10; Gunter)

W.E. Pender & Sons v. Lee: **[new trial]** Trial court did not abuse its discretion in ordering a new trial based on newly discovered evidence. (Fox, T.; SC 09-476; 2-4-10; Corbin)

Perkins v. Henry: **[restrictive covenants]** In order for restrictions to be enforceable, there must be a general plan of development -- that is, whether substantially common restrictions apply to lots that are of like character. In this case, evidence did not establish that there was a general plan of development. (Whiteaker, P.; CA 09-800; 2-11-10; Hart)

Stephens Production Co. v. Young: **[attorney's fees]** Court denied request for attorney's fees without any explanation. Since law allowed an award of fees, case must be remanded for a consideration of such an award and the reason for the eventual decision. (Cottrell, G.; CA 09-882; 2-11-10; Kinard)

Gorman v. Gilliam: **[dismissal/state a claim]** Complaint failed to state a claim for fraud because it failed to allege any misrepresentation of fact or whether defendant had any duty to disclose a termite report. However, dismissal should have been without prejudice. **[surety bond]** Buyers of residential property had standing to sue surety on bond that it issued to termite company. **[corporation]** Plaintiffs stated claim against individuals when corporation was acting under an unregistered fictitious name. Only until facts are developed at trial can it be determined whether individuals were acting in a representational capacity for a valid entity. (McGowan, M.; CA 09-501; 2-11-10; Vaught)

McCoy v. Boddiford: **[service]** Service was timely but defective; therefore, case should have been dismissed without prejudice and plaintiff could avail himself of the saving statute and refile the case. (McGowan, M.; CA 09-539; 2-17-10; Hart)

Bruce v. Hancock: **[new trial / damages awarded]** In light of evidence, jury's failure to award damages warranted a new trial. (Fogleman, J.; CA 08-739; 2-17-10; Brown)

Barrows v. City of Fort Smith: **[termination/ whistle blower]** Circuit court lacked jurisdiction over civil service appeal because of failure to comply with statutory requirements in a timely manner. Terminated employee had been found to have committed multiple violations of department rules and policies; consequently, city had an affirmative defense to the whistle-blower claim. The termination was the result of misconduct and was not related to any communication between the employee and the administrator. Since summary judgment was proper as there was no factual dispute, employee was not denied his right to trial by jury. (Tabor, S.; SC 09-756; 2-18-10; Corbin)

Arkansas Media, Inc. v. Bobbitt: **[class action]** Typicality requirement was satisfied because all class members were victims of the same unlawful course of conduct, that is, the defendant's concealment of material facts concerning the proposed corporate merger. Same conduct and same legal claims are shared in common. Requirement of predominance was also satisfied. The common issue is whether the defendant breached a fiduciary duty by failing to disclose all relevant information with respect to the merger. (Fox, T.; SC09-834; 2-18-10; Danielson)

Wonder v. McLeese: **[contract/forfeiture]** Under terms of contract and facts, buyers forfeited their pre-default payments. (Anthony, C.; CA 08-1458; 2-24-10; Marshall)

Mason v. Chenal Country Club: **[dram shop]** Country club was not liable under dram shop statute because there was no buyer-seller relationship. Person was one in a group of ten persons provided with two bottles of wine. There was no evidence that the person was intoxicated at the time the wine was provided or when the tickets were sold. (Brantley, E., C.; CA 09-1060; 2-24-10; Hart)

Volgelgesang v. Vogelgesang: **[conversion]** Former spouse was liable for conversion when her ex-husband converted funds of his mother and deposited them in spouse's bank account. She refused to return the money and intentionally exercised dominion and control over the money, which constitutes conversion. (Kilgore, C.; CA09-727; 2-24-10; Pittman)

Mills v. Finch: **[landlord/duty]** A landlord does not have a duty to protect third parties from an animal owned by a tenant when the landlord knows that the animal has violent propensities. (Huckabee, S.; CA 09-1055; 2-24-10; Brown)

Munzner v. Kushner: **[deed/set aside]** Grantor's mental impairment due to medical condition and medications was debilitating to the point that she was unable to function in a capacity to execute the deed. (Keith, T.; CA09-879; 2-24-10; Baker)

Crumpacker v. Gary Reed Construction: **[implied warranty of habitability]** Causation is not an element of a claim for breach of contract or breach of implied warranty of habitability. The plaintiff only had to allege that construction was defective and they were damaged by the defects. (Sutterfield, D.; CA 09-656; Hart)

Spriggs v. Ark. Local Police Retirement Board: **[administrative appeal]** Case must be remanded because board's decision did not contain sufficient findings of fact to allow for proper judicial review. (Kilgore, C.; CA 09-216; 2-24-10; Brown)

Martin v. Hallum: **[qualified immunity]** Officer was entitled to qualified immunity because arrest was based on probable cause. Immunity statute does not provide immunity from intentional torts, such as battery. On civil rights claim, summary judgment was proper because evidence did not create factual issue on use of excessive force. (Yates, H.; CA 09-258; 2-24-10; Henry)

Rio Vista, Inc v. Miles: **[boundary dispute]** Deed set line as the bank of the river, and the river was the natural monument. Adverse possession was not established. (King, K.; CA 09-199; 2-24-10; Gruber)

Zepecki v. Veterinary Medical Board: **[administrative appeal]** Expert testimony is required on the standard of care at a professional conduct hearing in cases where the applicable rules define professional misconduct as falling below certain standards. (Gray, A.; CA 09-266; 2-24-10; Kinard)

Miller v. Enders: **[jurisdiction/workers comp]** Circuit court lacked jurisdiction because the Workers' Compensation Act provided the exclusive remedy. (Finch, J.; SC 09-888; 2-25-10; Danielson)

McCourt Manuf. Corp v. Rycroft: **[tender of interest]** Tender was not sufficient to stop the accruing of post-judgment interest. Tender was not unconditional nor was it "kept good", such as by deposit in the registry of the court. (Fitzhugh, M.; SC 09-1009; 2-25-10; Wills)

Crockett v. C.A.G. Investments: **[final order]** Appeal must be dismissed for lack of a final order. Order failed to address counterclaim that was voluntarily non-suited and can be refiled. Rule 54 (b) requirements were not satisfied. (Honeycutt, P.; SC09-599; 2-25-10; Brown)

Alcoa World v. Weiss: **[use tax/natural gas/ “came to rest” doctrine]** Alcoa was not entitled to a refund of use taxes it paid for purchases of natural gas because gas came to rest in Arkansas under the statutory criteria and was not in the stream of interstate commerce. (Moody, J.; SC 09-688; 2-25-10; Sheffield)

Pulaski Choice, LLC v. 2735 Villa Creek LP: **[certified question answered re publication requirements for state sale of delinquent land]** Notice incorrectly listed parcel number. Statute requires that the parcel number be listed on the published notice. Requirement was effective for notices to be issued following statutory enactment and the date of certification of property to the state is irrelevant. Strict compliance with the statute is required. (Fox, T.; SC 09-331; 2-25-10; Danielson).

DOMESTIC RELATIONS

Doss v. Miller: **[contempt; child custody]** The appellant was found in criminal contempt. He alleged on appeal that the show-cause order was indefinite and that he was not properly notified of the nature of the contempt hearing, resulting in a violation of his constitutional rights. The Court of Appeals found that he was placed on notice of the nature of the proceeding, that he did not preserve his arguments for appeal, and that the arguments do not fit into an exception to the contemporaneous-objection rule. The court affirmed the trial court on direct appeal. On cross appeal, the appellee argued that the joint-custody agreement between the parties should not have been continued and that the trial court erred in not awarding her full custody and child support. The Court of Appeals said the evidence was sufficient to find a change in circumstances based upon the parties’ failure to get along and to be able to agree upon anything in connection with the children.

Because it continued joint custody, the trial court made no findings regarding sole custody and child support. The court reversed and remanded for the trial court to make custody and child-support determinations. (Weaver, T.; No. CA 08-1516; 2-3-10; Vaught).

Hollingsworth v. Hollingsworth: **[grandparent visitation]** The Court of Appeals found that the trial court correctly interpreted and applied the grandparent visitation statute, and that it did not abuse its discretion in denying the appellant grandfather’s petition for visitation rights. The trial court had found that the appellee mother had reduced the appellant’s visitation, but had not denied that visitation. The court found that the appellant had failed to rebut the presumption that the limitation was in the child’s best interest. (Carson, G.; No. CA 09-125; 2-3-10; Robbins).

Roberts v. Yang: **[divorce; property]** The appellant contended on appeal that the trial court erred by “dividing and distributing the parties’ assets without determining their value as of the time of the divorce decree.” However, because the appellant raised the issue for the first time on appeal, the court did not consider the argument. (Pierce, M.; No. SC 08-52; 2-4-10; Wills).

Gilliam v. Gilliam: **[division of marital property; debt; alimony; attorney fees; child support]** The Court of Appeals affirmed the trial court on appeal and cross-appeal, finding that the court did not err or abuse its discretion on the issues of the division of marital property, the division of debt, the award of alimony to the appellee, the award of attorney fees to appellee’s attorney, or the amount of appellant’s monthly income in computing child support. (Wilson, R.; No. CA 08-809; 2-11-10; Glover).

Brewer v. Smith: **[paternity–change in custody]** The parties’ child was born out of wedlock and an order of paternity was entered a little over a year later. An order provided for child support and for visitation for the appellee father. The Court of Appeals outlined problems the appellant mother had caused with visitation from the time the paternity order was entered.

When the appellee filed a second motion for contempt for denying visitation, he also requested a change in custody. The trial court granted a change in custody, finding changed circumstances and that it was in the best interest of the child to change custody from the appellant mother to the appellee father. (Honeycutt, P.; No. CA 09-337; 2-11-10; Gruber).

Moore v. Moore: [**modification of visitation; material change in circumstances**] The Court of Appeals found that a change in the dates of summer vacation from school was not a material change in circumstances warranting a modification of visitation rights. Because the appellant mother did not overcome the initial hurdle of showing a material change in circumstances, the court did not reach the best-interest argument. (Gunn, M.A.; No. CA 09-598; 2-11-10; Kinard).

Mathews v. Schumacher: [**relocation; change of custody; recusal of a judge**] The trial court granted the appellee custodial father's request to relocate with the child to South Dakota and denied the appellant mother's counterclaim for change of custody to her. Finally, the court denied the appellant mother's motion for the trial judge to recuse from the case. The Court of Appeals affirmed the trial court on all issues. (Keaton, E.; No. CA 09-565; 2-17-10; Gladwin).

Harris v. Harris: [**visitation; change of custody; material change in circumstances; UCCJEA**] After the appellant custodial mother moved with the children to Atlanta, Georgia, in June 2006, previous difficulties with the appellee father's visitation continued. The appellant mother had been found in contempt four times for denying him visitation; the first time was before the parties' divorce decree was entered. The appellee filed a motion for a change of custody alleging a material change in circumstances. The trial court found that it had jurisdiction under the UCCJEA, found a material change in circumstances, and found that it was in the best interest of the two children to change custody to the appellee father. The Court of Appeals affirmed, setting out in the opinion the factual details constituting changed circumstances. (Pierce, M.; No. CA 09-639; 2-17-10; Gruber).

Medina v. Roberts: [**child custody**] In this custody determination for an out-of-wedlock child, the trial court awarded custody to the father, finding him fit, finding that he had assumed his responsibilities to the child, and finding that it was in the child's best interest to live with her father. The Court of Appeals, noting that the record was essentially a "swearing match," found that the trial court was in the best position to judge the witnesses' credibility, deferred to its decision on credibility issues, and affirmed the decision. (Duncan, X.; No. CA 09-802; 2-17-10; Marshall).

Page v. Page: [**divorce–alimony; medical insurance; attorney's fees**] The appellant appealed the circuit court's award to appellee of \$350 a month alimony and continued medical insurance coverage, both for one year, and \$2000 in attorney's fees. The circuit court had made detailed findings in support of its decision. In affirming, the Court of Appeals noted a trial judge's discretion to award alimony, and the court discussed rehabilitative alimony specifically. Considering the facts of the case, the court said that the circuit court did not abuse its discretion in awarding one year each of alimony and medical payments. The court also found no abuse of discretion in the award of fees to appellee's attorney. The court noted the disparity in the parties' income and other facts that supported the decision. (Hearnsberger, M.; No. CA 09-906; 2-24-10; Kinard).

Wise v. Wise: [**child custody**] The appellant mother appealed the award of custody of the parties' son to the appellee father, arguing, among other things, that the trial court based its decision on gender bias in favor of the father. The Court of Appeals detailed the evidence presented in the circuit court, noting the deference it pays to credibility determinations made by the trial court. The evidence made it clear that both parties are good parents and that, while the mother was the primary care giver when the child was very young, there was evidence that the father has been the primary care giver in recent years. The trial court determined, upon reviewing all of the evidence, that it was in the child's best interest to be placed in his father's custody. The decree was affirmed. (Kilgore, C.; No. CA 09-513; 2-24-10; Robbins).

PROBATE

Fletcher v. Scorza: **[guardianship]** The trial court appointed the appellee guardian of the appellant's minor son. Although not his biological father, the appellee, the natural father of the child's step-siblings, had been in loco parentis to the child for a number of years. The Court of Appeals reversed the order of guardianship. The Supreme Court reversed the Court of Appeals and affirmed the circuit court's order granting guardianship to the appellee.

The Supreme Court said, "the sole considerations in determining guardianship pursuant to Ark. Code Ann. § 28-65-204(a) are whether the natural parent is qualified and suitable and what is in the child's best interest. To the extent that any of our prior cases suggest a standard of fitness or unfitness in guardianship proceedings involving the statutory natural-parent preference, we overrule them." (Pierce, M.; No. SC 09-561; 2-12-10; Danielson).

Heirs of F.D. Goza, Jr., et al. v. Estate of William E. Potts, Deceased: **[will--revocation; testamentary capacity; insane delusions]** The trial court found that the appellee's decedent had revoked his will and did not suffer from insane delusions when he revoked it. The court refused to admit the will to probate and ruled that the decedent died intestate. In affirming the trial court, the Court of Appeals set out the law with respect to revocation of a will and testamentary capacity. The appellants failed in their burden to prove that the decedent lacked testamentary capacity when he revoked his will. Revocation of a will requires the same degree of mental capacity as is necessary to make a will. Complete sanity in the medical sense is not essential to testamentary capacity, so long as one has the power to think rationally. Even if one has testamentary capacity, he may be laboring under one or more insane delusions that make his purported will a nullity. The appellants had the burden to show that decedent suffered from an insane delusion when he revoked his will. If any basis in fact exists for a delusion, or if it is not proven that the making or revocation of a will was a product of the delusion, then such a delusion will not warrant setting aside a legal document. The appellants did not meet their burden. (Williams, C.; No. CA 09-235; 2-17-10; Pittman).

Reynolds, et al. v. Estate of Thomas Edward Goodwin, Deceased, et al.: **[will--claim against the estate; trust; inter vivos gift]** Appellants, the former wife and the son of appellee's decedent, argued on appeal--(1) that the court erred in denying the appellants' claim against the estate, and (2) that the court erred in ordering the return to the estate and the sale of a motorcycle that the son claimed his father gave him by inter vivos gift. For their first argument, the appellants asserted that the claim against the estate resulted from a property settlement agreement between the decedent and the appellant former wife. But it was actually the decree that provided the decedent would either provide a \$100,000 life insurance policy naming his son as beneficiary or, in the alternative, would convey real property he owned to the son, free of debt. He failed to acquire a life insurance policy, so the appellants sought enforcement of the provision to convey the property. The Court of Appeals said that, because the provision the appellants were trying to enforce was in the divorce decree, not in the property settlement agreement, there was no contract. Therefore, the proper remedy would have been to file a petition to enforce the decree while the decedent was still alive. The trial court's denial of the claim was the right result, even if the reason was not, so it was affirmed. With respect to the second issue, both appellants and appellees agreed that the motorcycle, which the appellee had in his possession, was a gift to the appellee son by his father while he was alive. The trial court found that more testimony was required before a determination could be made, but then ordered that the motorcycle be sold for the benefit of the estate. The Court of Appeals reversed the trial court's order giving the estate permission to sell the motorcycle and remanded for further findings on whether it was an inter vivos gift, whether it was to pass through the estate, or whether it was an asset of the estate. (Williams, L.; No. CA 09-874; 2-24-10; Vaught).

JUVENILE

Reid v. Arkansas Dept. of Human Servs. [D-N Adjudication] This is an appeal of a companion case involving an adjudication of a sibling of a juvenile removed from the Tony Alamo Ministries who had previously been adjudicated dependent-neglected. Appellant argued that the circuit court erred by directing a verdict at the close of the plaintiff's case. Rule 50 (a) of the Arkansas Rules of Civil Procedure provides that the correct time to make a motion for a directed verdict or judgment is at the close of the opponent's evidence or at the close of all evidence. However, appellant did not preserve the argument for appeal.(Griffin, J.; 09-581; 2-17-2010; Gladwin)

Henderson and Devon v. Arkansas Dept. of Human Servs.: [TPR] Devon's no merit appeal was affirmed and Henderson's merit TPR was affirmed as to best interests and termination grounds. The circuit court did was not in error when it considered appellant's history of noncompliance and efforts to rehabilitate herself. The court noted appellants eleventh-hour improvements need not be credited by the circuit court and will not be held to outweigh evidence of prior noncompliance. Appellant's drug rehabilitation was still a work in progress at the time of the termination hearing. Past actions of a parent over a meaningful period are good indicators of what the future may hold.

Appellant argued that her rights were terminated based solely on incarceration. However, the evidence showed the juvenile had been out of the home for more than two years and that despite services including intensive family services, drug treatment, counseling, parenting, and visitation, the conditions had not been remedied. At the time of the termination hearing appellant was incarcerated and hoped to be eligible for early release in three months. Even if, appellant was released, it would require additional time for her to demonstrate her ability to maintain suitable housing, employment, and living a drug-free life style. The court noted that the prolonged time it would take for appellant to prove herself is beyond the time without permanency contemplated by the termination statute. Specifically, Ark. Code Ann. § 9-27-341(a)(3) provides that the intent of the termination statute is to provide permanency in a child's life in all instances in which the return to the family is contrary to the child's health, safety, or welfare and it appears from the evidence that return to the family cannot be accomplished in a reasonable period of time as viewed from the child's perspective.

Subsequent factors that arose after the filing of the original petition noted by the appellate court included continued drug use, the commission of drug related crimes after appellant's child was taken into care, failure to follow court orders, failure to have appropriate housing, and failure to obtain employment. (Finch, S.; 09-1135; 2-24-2010; Glover)

Thompson v. Arkansas Dept. of Human Servs.: [TPR] TPR affirmed as to best interest and termination grounds. Appellant argued insufficient evidence as to potential harm in the best interest analysis and as to the termination grounds. She argued that she made overwhelming progress in overcoming her addiction to drugs and has maintained stable housing with an uncle, specifically that it is unfair for the court to require her to live independently. At the third and final permanency planning hearing the circuit court found that appellant's dependency on others and the absence of employment and her own housing contributed to her cocaine abuse which she continued to test positive for.

Appellant was provided additional time due to DHS' failure to provide referrals for services. There was no error where appellant was only in partial compliance with the case plan and had not gained employment or lived independently. It was not an error for the trial court to order appellant to live independently at the end of the case. Appellant had ample opportunity to achieve this goal and failed to so. (Branton, W.; 09-1053; 2-17-2010; Henry)

Emmert v. Arkansas Dept. of Human Servs.: [No Merit TPR] TPR affirmed as to five children and motion to withdraw granted. The evidence demonstrated that all children were likely to be adopted and that their welfare and safety would be jeopardized in the continued custody of the appellant. The case continued for five years without successful reunification. Despite meaningful efforts by DHS to provide services, appellant failed to remedy the situation that caused removal and manifested an incapacity or indifference to remedy subsequent issues that arose in the case. Appellant consistently failed to

maintain stable employment or housing and her living conditions have endangered her children. (Harrod, L.; 09-944; 2-11-2010; Robbins)

Moreno v. Arkansas Dept. of Human Servs.: [TPR] TPR affirmed as appellant's four sons due to drug use and her inability to care for their basic needs. The court affirmed by memorandum opinion based on the "quantum of evidence and findings supporting the order." (Thyer, C.; 09-1065; 2-24-2010; Vaught)

D.A.S. v. State, [Juvenile Division Transfer] Circuit court affirmed in denying appellant's motion to transfer his charges to juvenile division court. Appellant, at age 16, was charged with residential burglary, criminal mischief in the first degree, and theft for acts occurring two days before his 17th birthday. Appellant argued that the court did not properly weigh the statutory factor that he had no prior criminal or juvenile history and that there was not sufficient evidence to support other factors. The trial court made specific findings as to each statutory factor and appellant's argument as to the weight is without merit. Further appellant's argument that he could not be rehabilitated is without merit due to appellant's age and the seriousness of the crime. (Wilson, R.; 09-84; 2-11-2010; Brown)

EIGHTH CIRCUIT

Nooner v. Norris [lethal injection procedure] In challenge to the Arkansas protocol for execution by lethal injection, legal injection protocol does not subject inmates to a substantial risk of serious harm and does not violate Eighth Amendment. Arkansas protocol contains sufficient safeguards to ensure inmate is fully unconscious before drugs are administered. Protocol requires placement of central venous lines by qualified personnel. IV team qualification requirements under Arkansas protocol are substantially similar to requirements of the Kentucky protocol upheld in *Baze*. (E.D. Ark.; No: 08-2978; 2-8-10)

Parrish v. Sheriff Ron Ball: [civil rights] While it may have been unwise to fail to train deputies that sexually assaulting detainees was wrong, it is not so obvious that failure to do so would actually result in an officer assaulting a female detainee, and the County is not liable for its alleged failure to train the officer. Sheriff was not liable in his individual supervisory capacity for his own failure to train and supervise the deputy as the sheriff had no reason to know that failure to train the deputy not to assault detainees would cause him to engage in that behavior. (W.D. Ark.; No. 08-3517; 2-10-10)

Paine v. Jefferson National: [limitations] Plaintiff's claims for breach of contract, deceptive acts, bad faith and tort were time barred under Arkansas law. Plaintiff failed to establish fraudulent concealment and was not entitled to toll the statute of limitations on that basis. (E.D. Ark.; No. 08-3743; 2-10-10)

U. S. SUPREME COURT

Maryland v. Shatzer: [miranda] In 2003, a police detective tried to question Shatzer, who was incarcerated at a Maryland prison pursuant to a prior conviction, about allegations that he had sexually abused his son. Shatzer invoked his *Miranda* right to have counsel present during interrogation so the detective terminated the interview. Shatzer was released back into the general prison population, and the investigation was closed. Another detective reopened the investigation in 2006 and attempted to interrogate Shatzer, who was still incarcerated. Shatzer waived his *Miranda* rights and made inculpatory statements. The trial court refused to suppress those statements, reasoning that *Edwards v. Arizona*, did not apply because Shatzer had experienced a break in *Miranda* custody prior to the 2006 interrogation. Shatzer was convicted of sexual child abuse.

Held: Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his 2006 statements. (#08-680; 2-24-10)