

APPELLATE UPDATE

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CRIMINAL

Turner v. State: [**sufficiency of the evidence; first-degree terroristic threatening**] Appellant's conviction was not supported by substantial evidence. (Elmore, B.; CACR 09-897; 3-3-10; Glover).

Berry v. State: [**probation**] The trial court did not err in revoking appellant's probation. (Elmore, B.; CACR 09-1045; 3-3-10; Baker).

Blount v. State: [**motion to suppress**] The trial court did not err when it denied appellant's motion to suppress. (Jones, B.; CACR 09-1084; 3-3-10; Brown).

Barber v. State: [**sufficiency of the evidence; aggravated robbery; kidnapping; theft of property; aggravated assault; fleeing; unlawful discharge of a firearm from a vehicle**] There was substantial evidence to support appellant's convictions. [**motion to suppress**] Law enforcement officials had reasonable cause to arrest appellant without a warrant. Thus, the custodial statement, which appellant gave after his arrest, was not obtained as a result of an illegal arrest. Accordingly, the trial court did not err in denying appellant's motion to suppress the statement. [**speedy trial**] The trial court properly denied appellant's motion to dismiss based upon an alleged speedy-trial violation. (Reynolds, D.; CACR 09-768; 3-3-10; Robbins).

Hickey v. State: [**sufficiency of the evidence; rape; kidnapping**] There was substantial evidence to support appellant's convictions. (Wright, H.; CR 09-878; 3-4-10; Sheffield).

Banks v. State: [**admission of evidence**] Because the evidence was relevant and more probative than prejudicial, the trial court did not abuse its discretion when it admitted into evidence certain ammunition that was seized from appellant's former residence during a search that occurred after his incarceration. The circuit court did not abuse its discretion when it admitted testimony and other evidence regarding a drive-by

shooting that occurred while appellant was incarcerated because such evidence satisfied Rule 404(b) of the Arkansas Rules of Evidence and the balancing test established in Rule 403 of the Arkansas Rules of Evidence. (Piazza, C.; CR 09-838; 3-4-10; Danielson).

Hutchinson v. State: **[jury instruction]** The trial court did not err in refusing to give appellant's proffered jury instruction, which was based upon language from Ark. Code Ann. § 5-2-620. (Humphrey, M.; CACR 09-596; 3-10-10; Gruber).

Noble v. State: **[jury deliberations]** The trial court did not abuse its discretion when it denied appellant's motion to set aside the verdict and to reopen the case to allow a juror to revisit the evidence and to reexamine her vote. (Griffin, J.; CACR 09-992; 3-10-10; Hart).

Lee v. State: **[double jeopardy]** Convictions for simultaneous possession of drugs and firearms and for possession of a controlled substance with the intent to deliver do not violate double-jeopardy rules. (Proctor, W.; CACR 09-646; 3-10-10; Vaught).

Harris v. State: **[admission of evidence]** The trial court did not abuse its discretion when it admitted a copy of a no-contact order into evidence because the order was merely cumulative of other evidence, and because appellant failed to show how he was prejudiced by its admission. (Wright, H.; CACR 09-963; 3-10-10; Brown).

Autrand 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 09-901; 3-10-10; Baker).

Josenberger v. State: **[revocation of suspended imposition of sentence]** The trial court did not err in revoking appellant's suspended sentence. (Cox, J.; CACR 09-890; 3-10-10; Henry).

Torrence v. State: **[jury instruction]** The trial court erred in refusing to submit AMI Crim. 2d 403 to the jury, which would have allowed the jury to decide the accomplice status of a State's witness. (Chandler, L.; CACR 09-679; 3-10-10; Pittman).

O'Neal v. State: **[revocation of probation]** Because Ark. Code Ann. § 5-4-303(g) was not followed, the trial court erred by revoking appellant's probation. (Jones, B.; CACR 09-1179; 3-10-10; Marshall).

Wallis v. State: **[sentencing]** The trial court erred by failing to exercise its discretion when it ordered appellant's sentences to run consecutively rather than concurrently. (Elmore, B.; CACR 09-612; 3-10-10; Glover).

Johnson and Webb v. State: **[sentencing enhancement]** There was insufficient evidence to support a finding that appellants acted in concert with two other people while committing a battery. Thus, it was error to enhance their sentences pursuant to the Arkansas Criminal Gang, Organization, or Enterprise Act. (Proctor, W.; CACR 09-324; 3-17-10; Pittman).

Gilliland v. State: **[sufficiency of the evidence; rape]** There was substantial evidence to support appellant's rape conviction. (Shirron, P.; CR 09-969; 3-18-10; Wills).

State v. Mancía-Sandoval and Guevara: **[motion to suppress]** The circuit court erred when it looked to the subjective intent of law enforcement officers involved in a traffic stop and found that the stop violated the appellees' constitutional rights based on that intent. (Green, R.; CR 09-1094; 3-18-10; Danielson).

Jones v. State: **[conditions of incarceration]** The trial court did not err when it "recommended" that appellant attend a drug-treatment program while he was incarcerated because appellant requested the treatment and the trial court did not order the treatment but rather recommended it. (Wright, W.; CACR 09-1046; 3-31-10; Henry).

Stidam v. State: **[motion to suppress]** The trial court did not err in denying appellant's motion to suppress his custodial statement. (Green, R.; CACR 09-779; 3-31-10; Glover).

Brewer v. State: **[motion to suppress]** The trial court did not err when it denied appellant's motion to suppress evidence that was obtained during a lawful search of appellant's boat during a valid stop. (Webb, G.; CACR 09-1063; 3-3-10; Kinard).

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

Smith v. State: (attempted first-degree murder, felon in possession of a firearm, committing a terroristic act) CACR 09-972; 3-3-10; Henry.

Haralson v. State: (sexual indecency with a child) CACR 09-960; 3-3-10; Marshall.

Warren v. State: (possession of a controlled substance with intent to deliver; felony fleeing) CACR 09-965; 3-10-10; Pittman.

Whiteside v. State: (distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child) CACR 09-1068; 3-10-10; Robbins.

Hunt v. State: (residential burglary; theft of property) CACR 09-1047; 3-31-10; Gladwin.

Allen v. State: (simultaneous possession of drugs and firearms; possession of counterfeit substance with intent to deliver; possession of drug paraphernalia) CACR 09-1039; 3-31-10; Vaught.

CIVIL

Grassi v. Hyden: **[legal malpractice]** Plaintiff failed to provide expert testimony as to the standard of care or that the defendant breached it. (Proctor, W.; CA 08-1405; 3-3-10; Vaught)

Carlson v. Kelso Drafting, Inc.: **[limitations]** Five-year limitations period for breach of contract claim had expired, and there was no evidence of any fraudulent concealment of the alleged construction deficiency. (Wright, J.; CA 08-1327; 3-3-10; Pittman)

Roetzel v. Coleman: **[contract/ambiguity]** Contract was not ambiguous; therefore, its construction was for the court and not the jury. (Mills, W.; CA 09-162; 3-3-10; Hart)

Gray v. Moreland: **[new trial]** Challenge to the sufficiency of the evidence was not preserved for appellate review. (Sutterfield, D.; CA 09-452; 3-3-10; Gladwin)

Lee v. Bolan: **[contract/ambiguity]** Agreement was not ambiguous as a matter of law. (Pierce, M.; CA 09-968; 3-3-10; Gladwin)

Fireman's Fund Ins. v. Care Management, Inc.: **[certified question/insurance]** When an insurance policy provides that the giving of notice of a claim as soon as practicable is a condition precedent to recovery, and the insured fails to do so, the insurer does not have to prove that it was prejudiced by the failure to give timely notice in order to avoid coverage. However, if notice is not a condition precedent, the insurer must show it was prejudiced by any delay in notice in order to be relieved of liability. (U.S. District Court; SC09-662; 3-4-10; Sheffield)

Marron v. Williams: **[new trial]** Court properly denied motion for a new trial as evidence supports the jury's verdict. Evidence concerning defendant's consumption of alcohol was relevant. (Gunn, M.; CA 09-853; 3-10-10; Hart)

State Highway Comm. v. Lewis: **[condemnation]** Evidence of a sale was properly admitted as a comparable sale. (Fogleman, J.; CA 09-983; 3-10-10; Kinard)

Lawrence v. Barnes: **[reformation of deed]** Court was correct in reforming the deed to exclude the mineral rights. Trial court should have considered an award of attorney's fees as a deed is a contract, and the law permits the award of fees in a contract action. (Maggio, M.; CA 09-928; 3-10-10; Gladwin)

Screeton v. ASCO Vending: **[parol evidence]** Parol evidence was not allowed to alter the principal balance amounts reflected in extension agreements where party contended those balances were supplanted by amounts reflected in the underlying promissory notes. (Humphrey, M.; CA 09-492; 3-10-10; Gladwin)

Source Logistics, Inc. v. Lloyd's of London: **[insurance/adverse inference]** AMI Instruction 106A on adverse inference was properly given by the trial court regarding missing payroll records in the context of whether insured discharged its obligation for the care, custody, and control of the insured goods. **[Contract]** Although court erred in one of its ruling on whether contract language was ambiguous, it was harmless as insured failed to satisfy related condition precedent to coverage. (Pearson, W.; CA 09-936; 3-10-10; Glover)

Linder v. Ark. Midstream Gas Services: **[Ark. Code 23-15-101/eminent domain]** The statute is not unconstitutional. It delegates the power of eminent domain to pipeline companies operating as common carriers. The pipeline in question will be operated for the public and the public will have equal right of use. (Harkey, J.; SC 09-705; 3-11-10; Brown)

Clark v. Johnson Regional Medical Center: **[medical malpractice/venue]** Ark. Code Ann. 16-55-213(e) is constitutional and provides that venue for a medial malpractice action shall be filed in the county in which the alleged act occurred. (Tabor, S.; SC 09-431; 3-11-10; Corbin)

Chubb Lloyds Ins. Co. v. Miller County Circuit Court

Foremost Ins. Co. v. Miller County Circuit Court **[standing/jurisdiction]**

Writs of mandamus and prohibition were denied. Miller County Circuit Court has subject matter jurisdiction to proceed with class-action suit against insurance companies asserting various claims based on companies' failure to disclose or pay general contractors' profit and overhead related to certain claims. Argument that an action is not justiciable if there is a lack of standing does not deprive the circuit court of subject matter jurisdiction. (Johnson, K.; SC09-553 and 587; 3-11-10; Corbin and Wills)

Lindsey v. Green: **[res judicata]** Dismissal of federal lawsuit for failure to exhaust administrative remedies related to a Title VII claim did not trigger res judicata as to state law claims that were never asserted in federal court. (Piazza, C.; SC 09-453; 3-11-10; Gunter)

Poff v. Peedin: **[certified question]** The proper standard of review of declaratory-judgment actions is no different than other proceeding, that is, the clearly - erroneous standard set forth in Rule 52 (a) unless the underlying basis for the action is governed by another standard. (Sheffield, R.; SC 09-737; 3-18-10; Harkey)

Koch v. Adams: **[schools/seizure of cell phone]** School official did not violate student's rights by seizing his cell phone. It is not necessary that a state law expressly authorize the "taking of a cell phone." Ark. Code Ann. Section 6-18-502 permits the discipline taken in this case. (Piazza, C.; SC 09-829; 3-18-10; Brown)

Dollarway Patrons for Better Schools v. Morehead: **[illegal exaction]** Misinformation by proponents of a tax increase will not vitiate an election in and of itself. What is necessary is some type of official misinformation either in an ordinance or resolution, notice of election, ballot title, or ballot. (Wyatt, R.; SC 09-826; 3-18-10; Gunter)

Payne v. Donaldson: **[towing/storage lien]** Person storing vehicle towed at the direction of law enforcement was not entitled to retain possession of ATV by virtue of a possessory lien without satisfying the statutory notice in Ark. Code Ann. Section 27-50-1208. (Glover, D.; CA 09-792; 3-17-10; Gladwin)

Mason v. Buckman: **[Duhig rule]** When an owner of a fractional in mineral interest executes a warranty deed without limiting the interest in the minerals granted, and the grant and reservation cannot both be given effect, the reservation fails, and the risk of loss is on the grantor.

(Maggio, M.; CA 09-682; 3-17-10; Robbins)

Heflin v. Brackelsberg: **[contract]** The buyer breached the contract because he did not apply for or attempt to secure financing as the contract required. Case must be remanded to determine if handling of the earnest money was an election to treat the earnest money as liquidated damages. (Kilgore, C.; CA 09-912; 3-17-10; Marshall)

Larco, Inc. v. Strebeck: **[laches/estoppel]** There was no showing of detrimental reliance to support application of equitable remedies. **[corporations]** Corporations were erroneously held to be jointly and severally liable for commissions owed to plaintiff. Merely because the corporations were operated by the same person and employed the same people are not sufficient grounds to disregard the separate legal existence of the corporate entities. The liability for the commissions must be allocated between the two corporations. (Bogard, D.; CA 09-854; 3-17-10; Henry)

Hobson v. Holloway: **[real party/bankruptcy]** Bankruptcy trustee had not abandoned claim at the time plaintiff filed her complaint and the claim was part of the bankruptcy estate. Plaintiff was not the real party in interest and her complaint was a nullity. (Hughes, T.; CA 09-777; 3-17-10; Brown)

Prickett v. Hot Spring County Medical Center: **[standing]** Probate division lacked the authority to re-open the estate almost two years after it was closed, and it was proper for the civil division to set aside the order re-opening the estate. Since the state was closed, and the executrix was discharged, she had no standing to bring a wrongful death action. (Williams, C.; CA 09-672; 3-31-10; Brown)

Winrock Grass Farm v. Affiliated Real Estate Appraisers: **[res judicata]** Prior foreclosure/bankruptcy proceedings between the parties barred subsequent action alleging various tort claims. Winrock had the opportunity to litigate the claims that it alleged in the subsequent tort action. (Fox, T.; CA 09-857; 3-31-10; Glover)

Schmidt v. Stearman: **[remand]** When a directed verdict was entered on a claim in the first trial and the directed verdict was not appealed, the claim could not be relitigated in the trial on remand. Law of the case doctrine teaches that issue was conclusively decided. (Smith, K.; CA09-1126; 3-31-10; Robbins)

Massey v. Fulks: **[statute of non-claim]** Party had a tort claim against the decedent and argued that he had two years to assert it because he was not provided actual notice. However, the statute of non-claim bars any tort actions not filed in probate court within six months of publication of notice to creditors. (Harkey, J.; CA 09-1082; 3-31-10; Gladwin)

Mendez v. Aguilar: **[option to purchase]** Buyer failed to prove that seller breached the option agreement because of lack of proof on the sales price. (McCormick, D.; CA 09-715; 3-31-10; Pittman)

Deltic Timber v. Newland: **[summary judgment]** Summary judgment was not proper in litigation regarding mineral rights. Deed was ambiguous and extrinsic evidence is needed for its interpretation as to whether a present reversionary right in mineral interests was being reserved or excepted.. (McCormick, D.; CA 09-810; 3-31-10; Kinard)

DOMESTIC RELATIONS

Edwards v. Edwards: **[alimony]** In a supplemental divorce decree, the trial court awarded the appellee alimony of \$300 a week, retroactive to the date of the original decree. In affirming, the Court of Appeals summarized the pertinent factors in awarding alimony, and said that appellant's burden of paying appellee less than 10% of his weekly earnings was not so unjust as to constitute an abuse of discretion.

On the issue of retroactivity, the court said that the 2008 proceeding was in response to appellee's motion for reconsideration to address the issue of alimony. The Code requires that orders concerning alimony be made when the divorce decree is entered, which, here, was in 2006. The court had the discretion to order that alimony would begin to accrue on the date of the parties' separation. Therefore, the trial court did not err in making the alimony award announced in the 2008 supplemental decree retroactive to the date of the 2006 divorce decree. The appellant had also argued that the trial court erred in denying his motion for a new trial on grounds of newly discovered evidence. The court had no jurisdiction to address the issue because appellant's notice of appeal was filed after the decree but before disposition of the new-trial motion, and was effective only to appeal the decree. The record did not show that appellant filed a new or amended notice of appeal after the new-trial motion was deemed denied. (Chandler, L.; No. CA 08-1142; 3-10-10; Pittman).

Wright v. Wright: [**divorce—child support; marital property; attorney and witness fees**] The Court of Appeals directed that in calculating child support for a self-employed payor, a court must first consider the past two years of tax returns and quarterly estimates for the current year, allowing depreciation as a deduction if it reflects the actual decrease in value of an asset. Then, if the trial court believes that the tax returns are unreliable, the trial court must make specific findings to support its determination. After that, the trial court can determine a payor's income by using the net-worth method. In this case, the court used a hybrid approach, relying upon an expert who was unaware of Administrative Order No. 10. The court reversed and remanded for a recalculation based upon the calculation method in the opinion. Because the income determination also affected the imputed-income and alimony determinations, the case was reversed and remanded on those two points, as well. On the issue of the award of marital property, the court reversed and remanded for the establishment of the values of the assets awarded that the court said constituted an unequal division, and to make findings to support an unequal division. The court affirmed the trial court on the awards of attorney and expert-witness fees. (Duncan, X.; No. CA 09-156; 3-17-10; Vaught).

Coatney v. Coatney: [**divorce—division of property**] In dividing the parties' property at the time of divorce, the trial court considered property the parties owned before marriage, property that each acquired after the marriage, including gifts, and property they acquired together. Both parties appealed from the division and award of property. The Court of Appeals affirmed the trial court. Among other things, the court discussed the "active appreciation" of nonmarital assets, a case-law exception to the general rule that the definition of marital property does not include the increase in the value of property acquired before the marriage or by gift. The exception is that "when one spouse makes significant contributions of time, effort and skill which are directly attributable to the increase in value of nonmarital property . . . the presumption arises that such increase belongs to the marital estate." *Layman v. Layman*, 292 Ark. 539, 543, 731 S.W.2d 771, 774 (1987). The court said that it has upheld a decision to award a non-owning spouse an interest in the increased value of a nonmarital asset where the non-owning spouse's efforts contributed to the asset's increased value. The court has also held that a non-owning spouse is entitled to some benefit when marital funds have been expended to improve or reduce the debt on the other spouse's nonmarital property. (Epley, A.; No. CA 09-377; 3-17-10; Henry).

Valentine v. Valentine: [**divorce; child custody; child support; attorney fees**] The Court of Appeals affirmed the trial court's denial of a change of custody from the appellee mother to the appellant father and the court's awarding an increase in child support to the appellant. (VanAusdall, R.; No. CA 08-1518; 3-17-10; Glover).

Young v. Young: [**contempt**] The appellant appealed an order finding him in contempt for failure to pay money due under his divorce decree. He raised five points on appeal. However, the Court of Appeals held that the case is moot because the appellant has already served his contempt sentence. The court noted that when the terms of a contempt order have been fulfilled, the issue of the propriety of the contempt order is moot. When a case involves issues that are moot but are capable of repetition, yet evade review, the court may elect to settle the issue. However, the court held that the record in this case did not compel the court to do so. (Hearnsberger, M.; No. CA 09-769; 3-17-10; Hart).

Stills v. Stills: **[child custody, relocation]** This is a case of first impression raising the issue whether parties can contract to waive the *Hollandsworth* presumption in favor of relocation for custodial parents with primary custody of their children and shift the burden of proof back to the custodial parent. The Supreme Court affirmed the circuit court's finding that they cannot. Under the terms of the parties' agreement, the appellee custodial mother agreed that there would be no presumption in favor of her relocating outside a 25-mile radius and that she would bear the burden of proving to the court that it was in the best interest of the children to relocate. The court said that "the presumption is, at its core, the establishment of a legal burden of proof to be enforced by the circuit courts in deciding relocation disputes. It is not a 'right' that may be claimed by one party or another, nor can it be altered or waived by a party." (Lindsay, M.; No. SC 08-1352; 3-18-10; Gunter).

PROBATE

Deslauriers v. The Marilyn Irene Deslauriers Revocable Trust, et al.: **[wills and trusts—testamentary capacity]** The appellant, decedent's cousin, contested four documents that decedent executed during and after hospitalization following a stroke, which resulted in the bulk of the estate being left to a friend and care giver after specific monetary gifts to her church, a cemetery association, her cats, and the appellant. She alleged undue influence of the friend who was the primary beneficiary. The trial court found that appellant had failed to prove undue influence or mental incapacity. In affirming the trial court, the Court of Appeals said that the trial judge found that the decedent had, "at the time of the execution of documents, the power to think rationally and to retain without prompting the nature of her estate, the disposition she desired, and the beneficiaries of her desires." The court found that the trial court did not clearly err in finding that she was mentally competent when executing the documents. (Whiteaker, P.; No. CA 09-477; 3-3-10; Robbins).

Long v. Alford, et al.: **[wills and trusts; exhumation of remains; claim against the estate]** The appellant, ex-wife of decedent, and executrix of his estate, appealed from the trial court's denial to exhume his remains for reburial in a plot that decedent and appellant owned together, from the court's allowing a claim by the appellee daughter of decedent for funeral expenses that she arranged, and from appointment of a successor trustee to administer a trust the decedent created. The Court of Appeals reversed the denial of the exhumation. The decedent had provided his clear wishes in his will concerning his place of burial. Even though the appellant may have waived her right to make disposition decisions at the time of decedent's death by failing to notify the appellee or the funeral home about the will and the intent of the decedent, that waiver did not undermine the decedent's right to decide the burial issue, which he did in his will. Only when a decedent fails to make a directive during the course of his or her life will the right and obligation fall upon a survivor. A decedent's wishes concerning the ultimate disposition of his or her remains are entitled to consideration and should be carried out as far as possible. The decedent's directive complied with Ark. Code Ann. § 20-17-102, and the existence of the directive was known before his death and burial. The court affirmed the trial court's awarding the claim against the estate for funeral expenses paid by the appellee daughter. The trial court found that she had operated in good faith in making the funeral arrangements and was unaware of the will's directive concerning the place of burial. (Brantley, E.; No. CA 09-676; 3-10-10; Robbins).

Butcher, Guardian of Thelma L. Healy v. Beatty, personal representative of the estate of John Healy: **[estate by the entirety; specific performance]** Specific performance is an equitable agreement which compels the performance of an agreement or contract in the precise terms agreed upon. But specific performance is not available when performance is impossible. Here, the appellant, guardian of Thelma Healy, had an agreement with her estranged husband, John Healy, that Thelma's estate would pay John \$40,000 in return for full title to the parties' rental property they held as tenants by the entirety. John died before performance of the agreement. At his death, full title vested in Thelma, and his estate had no interest in the property. Therefore, performance of the agreement was rendered impossible. (Shirron, P.; No. SC 09-1169; 3-18-10; Hannah).

Breckenridge v. Breckenridge, et al.: **[will—confidential relationship, undue influence and testamentary capacity; doctrine of inconsistent positions (doctrine of judicial estoppel)]** The trial

court found that a confidential relationship existed between the decedent father and both of his sons, the appellant and the appellee, and that the appellee son did not procure the will, which would have resulted in a presumption of undue influence. The Court of Appeals said that the preponderance of the evidence supported that the execution of the will was not the result of undue influence upon the testator by the appellee. The court also affirmed the circuit court's finding that the testator had the capacity to execute a will, "the ability...to retain in memory without prompting the extent and condition of property to be disposed of, to comprehend to whom he is giving it..." and to realize whom he is excluding from his will. Finally, the court found that the appellee did not maintain inconsistent positions in maintaining that the testator had testamentary capacity when he had also sought a guardian of the estate for the testator during the same period of time. The court said it is conceivable that one could lack the ability to make decisions regarding his estate so as to need a guardian of the estate, yet experience a lucid interval so as to possess testamentary capacity. (Bell, K.; No. CA 09-1035; 3-31-10; Kinard).

Moore, et al. v. First Presbyterian Church of Searcy, Arkansas, Inc., et al.: **[reopening estate-- Rule 60; Ark. Code Ann. § 28-53-119]** The circuit court reopened an estate to reform the probate file and a deed to show that two tracts of real property were conveyed to the appellants with a reservation of one-half the mineral rights on each tract. The Court of Appeals affirmed. The appellants argued that Rule 60 precluded the probate court from reopening the estate, but the Court of Appeals noted that the rule does not limit a probate division's authority to reopen the estate under Ark. Code Ann. § 28-53-119. This provision in the Probate Code authorizes the reopening of an estate on the grounds allowed in the statute, separate and apart from the grounds for reopening a case provided under Rule 60. (Hannah, C.; No. CA 09-1112; 3-31-10; Hart).

JUVENILE

Mason v. Arkansas Dept. of Human Servs.: **[TPR]** TPR affirmed where appellant argued that there was insufficient evidence to support termination. The case began when appellant's fifteen-month-old child was taken into care due to severe burns over twenty percent of her body, all of which were isolated to the upper half of her body. Doctors testified that the injuries were inconsistent with appellant's explanation. Appellant's children remained out of the home for more than 12 months. DHS provided services, but the conditions that caused removal were not remedied. Based on the severity of the burns, the trial court further found that the children were subjected to aggravated circumstances and that it was improbable that appellant's children could be returned home in a reasonable period of time even with appropriate services being provided. *Note: The appellate court noted and quoted the trial court's "extremely thorough and clear...precise and compelling" aggravated circumstances findings on pages 4-5 of the opinion.* (Branton, W.; CA 09-1257; 3-17-2010; Vaught).

Churchwell v. Arkansas Dept. of Human Servs.: **[TPR]** TPR affirmed in case where appellant's prescription drug abuse prevented her from being able to parent her child. Court affirmed on best interest finding and termination ground that child had been removed from the home for more than 12 months and that despite DHS' meaningful rehabilitate efforts the conditions that caused removal had not been remedied. Appellant never accepted responsibility for her drug addiction, could not remain drug free in an uncontrolled setting, did not have suitable housing, steady employment, and continued to test positive for prescribed and non-prescribed drugs. (Thyer, C.; CA 09-1223; 3-10-2010; Gruber)

Leaf v. Arkansas Dept. of Human Servs.: **[TPR]** TPR affirmed due to appellant's drug addiction and subsequent factors that arose after filing the initial d-n petition. Appellant argued that her drug use was at issue since the beginning of the case and cannot constitute a subsequent issue. The appellate court declined to read the statute so narrowly. Subsequent issues included: appellant's relapse, failure to complete out-patient treatment, refusal to take drug tests, failure to attend scheduled visitation, and continued drug use. These circumstances all occurred after the original petition and revealed the extent

of appellant's addiction and her inability to correct the conditions that were keeping her from her child. (Chandler, L; CA 09-1098; 3-10-2010; Marshall)

Gosset v. Arkansas Dept. of Human Servs.: **[No Merit - TPR]** TPR affirmed and motion to withdraw granted. Court affirmed on best interest finding and termination grounds. The trial court was affirmed in denying a relative placement as an alternative where appellant's sister did not appear at the hearing, had not taken any steps to establish her home as a placement, and had not expressed any interest in the placement. (Thyer, C.; CA 09-1244; 3-1-2010; Glover)

Lipscomb v. Arkansas Dept. of Human Servs.: **[D-N Adjudication]** Adjudication affirmed. The trial court found that the child was sexually abused by the step-father as a result of appellant's failure to protect the child. Appellant did not challenge that her child was sexually abused, only that DHS failed to prove that she failed to protect her child. The appellate court noted that even if appellant's argument was addressed the case must be affirmed due to the sexual abuse. However, the trial court found that appellant had suspicions about the abuse, failed to prevent it, and facilitated the abuse by leaving her daughter alone with the step-father when she should have and could have taken appropriate action to protect her child. "A parent has an affirmative duty to protect a child and can be considered unfit even though she did not directly cause the child's injury; a parent must take affirmative steps to protect her children from harm." (Warren, J.; CA 09-1183; 1-17-2010; Kinard).

Jackson v. Arkansas Dept. of Human Servs.: **[D-N Adjudication]** Adjudication affirmed. The trial court found that the child was sexually abused by the step-father and that the appellant failed to protect the child. Appellant did not contend that there was insufficient evidence of sexual abuse, but she argued that the trial court erred in finding that she failed to protect the child when she did not know nor should have known about the abuse. However, appellant testified that she did not think her child was telling the truth that the abuse occurred or that her husband posed a danger to her daughter. (Wright, R.; CA 09-1161; 3-10--2010; Baker).

Ashcroft v. Arkansas Dept. of Human Servs.: **[D-N Adjudication]** Adjudication affirmed. The trial court found that appellant had inappropriately touched his child, C.A.. Appellant challenged the sufficiency of the evidence and challenged C.A.'s testimony. C.A., who was an 11-year-old child, is hearing and speech impaired. His testimony was elicited through qualified interpreters. The trial court found that he was credible despite the inconsistencies in his testimony, which the court attributed to the fact that he did not possess normal communication skills. The trial court also noted the child's demeanor and the forcefulness in which he recounted certain events in assessing his credibility. Appellant next argued that the court limited his cross-examination of C.A. The record reflects that the hearing continued on to a second trial date and that the court instructed the parties not to repeat questions previously asked and answered by the child. While the court interrupted questioning when it considered matters already addressed at the prior hearing, the court allowed questions specific to the alleged abuse. Appellant's final argument is that the court denied a continuance at the outset of the hearing for additional time to gain an investigatory file and an audio-taped interview from the state police. The court denied the motion. In denying the request, the trial court noted the time constraints required by law, that it was appellant's responsibility to investigate the events, and that the information, which would be found, would be of little benefit. The granting of a continuance is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion and appellant must show prejudice. (Branton, W.; CA 09-1115; 1-10-2010; Henry).

R.W. v. State: **[Delinquency Adjudication]** Adjudication affirmed. The trial court found that the juvenile committed the offense of misdemeanor theft by receiving. Although appellant moved for a directed verdict, appellant argued for the first time on appeal that the store owner did not: (1) testify that

the items were stolen, (2) state the value of the items, or (3) testify that appellant had possession of the property. Appellant's reliance on corroborating evidence not being supported by an accomplice is misplaced because the charge is a misdemeanor not a felony as provided in Ark. Code Ann. § 16-18-11(e)(1). **[Probation Revocation]** Appellant was previously on probation and as a condition of probation was required to obey all state, federal, and municipal laws. The subsequent delinquency adjudication is sufficient to support the court's revocation. (Halsey, B.; CA 09-925; 3-3-2010; Brown).

M.S. v. State: **[Delinquency Adjudication]** Adjudication affirmed. The trial court found that the juvenile committed the offense of carrying a weapon. While driving a friend's car, appellant was arrested for an outstanding warrant for failure to appear. Appellant asked the officer to retrieve his cell phone from the car. The officer found a knife between the passenger seat and the console. Appellant constructively possessed the knife. It was found within appellant's reach and was close to his personal property, the cell phone. The State is required to also prove that appellant possessed the weapon with the purpose to employ it against a person. Appellant's argument that the search should be suppressed is without merit because there was no search but rather an errand at appellant's request to retrieve his phone. (Hewett, H.; CA09-891; 3-17-2010; Hart)

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George's, Inc. v. Allianz Global Risks US Ins. **[Insurance]** Fixed expenses fell within a provision in the policy which excluded costs that normally would have been incurred in conducting the business during the same period had the direct physical loss or damage not occurred, and defendant was entitled to summary judgment on this claim. Chickens that died during a power outage were not covered under the policy's exclusion for animals, and the district court did not err in granting defendant summary judgment on this claim. (W.D. Ark.; No: 09-2220, 09-2248; 3/09/2010)