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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On March 3rd, the Supreme Court published for comment proposed rules changes recommended by the Civil Practice Committee. The comment period is through May 1, 2011. Copies were included in the weekly mailout.

Reminder: Administrative Plans are to be submitted to the Supreme Court by July 1st.

CRIMINAL

Ross v. State: **[jury instructions]** The trial court did not abuse its discretion in denying appellant's request to instruct the jury on criminal trespass because there was no rational basis for a verdict acquitting appellant of residential burglary and convicting him of criminal trespass. **[mistrial]** Appellant, who received a sentence less than the maximum, could not establish that he was prejudiced by the trial court's denial of appellant's motion requesting a mistrial, which was based upon comments made by the prosecutor during *voir dire*. **[leg restraints]** Because appellant had previously fled the jurisdiction, and because he was charged with committing a violent crime, it was not an abuse of discretion for the trial court to require that appellant wear leg restraints during his trial. (McCallum, R.; CACR 10-904; 3-2-11; Martin).

Raymond v. State: **[speedy trial]** The circuit court did not err when it denied appellant's motion to dismiss, which was based upon an alleged speedy-trial violation. (Jones, B.; CACR 10-1056; 3-2-11; Hoofman).

Henry v. State: **[sufficiency of the evidence; DWI]** There was substantial evidence to support appellant's conviction. **[proof of prior convictions]** The trial court did not err by allowing the State to present proof of appellant's prior convictions after it rested its case-in-chief. (Whiteaker, P.; CACR 10-1099; 3-2-11; Gruber).

Hawkins v. State: **[Batson challenge]** The trial court did not clearly err when it concluded that the prosecutor's race-neutral reasons for striking potential jurors were genuine. (Wright, R.; CACR 10-684; 3-2-11; Robbins).

Hancock v. State: **[admission of evidence]** Because there was neither evidence that the recorded statement was adopted by the declarant nor evidence that the statement was accurately recorded, the trial court abused its discretion when it admitted a statement pursuant to Rule 803(5) of the Arkansas Rules of Evidence. The trial court erred by interjecting, on its own initiative, evidence that had not been introduced at trial. (Gibson, B.; CACR 10-670; 3-2-11; Martin).

State v. Robinson: **[State's appeal]** The State must satisfy the procedural requirements of Ark. R. App. P. –Crim. 3 when attempting to appeal from a circuit court's order in which a criminal defendant was granted a new trial pursuant to Rule 33.3 of the Arkansas Rules of Criminal Procedure based upon an allegation of ineffective assistance of counsel. (Wright, H.; CR 10-810; 3-3-11; Corbin).

State v. Threadgill: **[State's appeal]** Because the circuit court's order was based upon the particular facts of Threadgill's case, the correct and uniform administration of criminal law did not require the Supreme Court to review the case. (Wright, H.; CR 10-872; 3-3-11; Brown).

Green v. State: **[Brady violation; double jeopardy]** The remedy for a *Brady* violation is a new trial. Double jeopardy will not bar a new trial that resulted from a *Brady* violation unless the conduct that gave rise to the request for a mistrial was intended to provoke the defendant into requesting the mistrial. (Erwin, H.; CR 10-511; 3-3-11; Gunter)

Ackerman v. State: **[waiver of jury trial]** The trial court did not comply with Rule 31.2 of the Arkansas Rules of Criminal Procedure because it failed to make a record of appellant's waiver of his right to a jury trial. Thus, appellant was entitled to a new trial. (Wright, R.; CACR 10-1062; 3-9-11; Glover).

Synder v. State: **[sentencing]** Following the revocation of appellant's suspended sentence, the circuit court had statutory authority to impose a new sentence, which contained consecutive terms of imprisonment. (Storey, W.; CACR 10-500; 3-9-11; Gruber).

Newton v. State: [**sufficiency of the evidence; possession of cocaine with intent to deliver; compounding**] There was substantial evidence to support appellant's convictions. [**continuance**] The trial court did not err when it denied appellant's motion for a continuance. (Pope, S.; CACR 10-988; 3-9-11; Robbins).

Pratt v. State: [**probation revocation; jurisdiction**] The trial court had jurisdiction to revoke appellant's probation. [**probation revocation; sufficiency of the evidence**] The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. [**probation revocation; hearing**] Appellant's revocation hearing was held within a reasonable time after his arrest. (Clawson, C.; CACR 10-308; 3-9-11; Pittman).

Sesley v. State: [**repeal by implication**] The Supreme Court declined to overrule *Neely v. State*, 2010 Ark. 452, ___ S.W.3d ___, which held that Arkansas Code Annotated § 16-90-120 was not repealed by implication. (Wright, H.; CR 10-922; 3-10-11; Gunter).

Johns v. State: [**sufficiency of the evidence; simultaneous possession of drugs and firearms; possession of a controlled substance with intent to deliver**] There was substantial evidence to support appellant's convictions. [**witness testimony**] The trial court abused its discretion when it refused to declare that a witness was "unavailable" pursuant to Rule 804 of the Arkansas Rules of Evidence and when it declined to admit previous testimony from the unavailable witness pursuant to Rule 804. (Elmore, B.; CACR 10-708; 3-16-11; Martin).

Iqbal v. State: [**sufficiency of the evidence; theft of property**] There was substantial evidence to support appellant's conviction. [**right to counsel; due process**] A conflict of interest did not arise as a result of the court allowing the State to introduce documents that were produced by appellant's attorney. (Webb, G.; CACR 10-380; 3-16-11; Brown).

Taylor v. State: [**DWI**] Because the State established that it substantially complied with Ark. Code Ann. 5-65-204, it was not error for the trial court to admit the results of appellant's breathalyzer test. (Pope, S.; CACR 10-749; 3-16-11; Glover).

Slater v. State: [**sufficiency of the evidence; delivery of cocaine**] There was insufficient evidence to support appellant's conviction. (Henry, D.; CACR 10-787; 3-16-11; Gruber).

Turner v. State: [**motion to sever**] Joinder was not proper in appellant's case because the offenses were committed at different times, were not part of the same transactions or plans, involved different witnesses, and because the primary effect of joinder was to bolster the State's case by proving that appellant committed other similar offenses in the past. Thus, the circuit court abused its discretion when it denied appellant's motion to sever the charges that were pending against him. (Chandler, L.; CR 10-420; 3-17-11; Hannah).

Newman v. State: **[probation revocation]** The circuit court's finding that appellant's work as a carpenter at a daycare center violated Ark. Code Ann. § 5-14-129 (a) and a condition of his probation was clearly against the preponderance of the evidence. (Jones, B.; CR 10-1077; 3-17-11; Danielson).

Hervey v. State: **[repeal by implication]** The Supreme Court declined to overrule *Neely v. State*, 2010 Ark. 452, __ S.W.3d __, and *Sesley v. State*, 2011 Ark. 104, __ S.W.3d __, cases in which the Court held that Arkansas Code Annotated § 16-90-120 was not repealed by implication. (Humphrey, M.; CR 10-923; 3-17-11; Henry).

Harris v. State: **[fitness to proceed]** The trial court did not err by allowing the criminal proceedings against appellant to resume without first making an affirmative determination that his fitness had been restored. (Halsey, B.; CACR 10-729; 3-30-11; Gladwin).

Robertson v. State: **[admission of evidence; prior conviction]** A record that states that a defendant waived his right to counsel, while not sufficient when arguing a violation of that right, is sufficient to establish a prior sentence to be used for enhancement purposes in later proceedings. The written and signed waiver-of-counsel form in the record in appellant's case, which was from an earlier proceeding, established that appellant was aware of his right to counsel and waived that right before the trial, which resulted in a conviction. Thus, it was not error for the trial court to admit proof of appellant's prior conviction in a subsequent case for enhancement purposes. (Pope, S.; CACR 10-956; 3-30-11; Pittman).

Reese v. State: **[admission of evidence]** Appellant was unable to establish that he suffered prejudice by the admission of certain evidence at his trial because the evidence was cumulative to other evidence that was admitted without objection at appellant's trial. (Henry, D.; CACR 10-820; 3-30-11; Pittman).

Hendrix v. State: **[sufficiency of the evidence; second-degree sexual assault; fourth-degree sexual assault]** 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; cautionary instruction]** The trial court did not abuse its discretion when it denied appellant's motion for a mistrial and appellant's request for a cautionary instruction, which were based upon statements that were made by the prosecuting attorney during closing arguments. (Cox, J.; CR 10-1035; 3-31-11; Hannah).

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

Cooley v. State: (driving while intoxicated) CACR 10-867; 3-2-11; Martin.

Tipton v. State: (internet stalking of a child) CACR 10-731; 3-2-11; Wynne.

Smith v. State: (breaking or entering) CACR 10-645; 3-2-11; Gladwin.

Alvard v. State: (first-degree murder; kidnapping; terroristic threatening) CACR 10-1115; 3-2-11; Hart.

Banks v. State: (second-degree battery, aggravated assault) CACR 10-1100; 3-30-11; Brown.

Cases in which the Arkansas Court of Appeals concluded that the circuit court's decision to revoke appellant's probation or suspended sentence was not clearly against the preponderance of the evidence:

Bovee v. State: (suspended imposition of sentence) CACR 10-837; 3-2-11; Pittman.

Pitchford v. State: (suspended imposition of sentence) CACR 10-848; 3-9-11; Gladwin.

Smith v. State: (probation) CACR 10-1067; 3-30-11; Gruber.

Wilson v. State: (suspended imposition of sentence) CACR 10-849; 3-30-11; Robbins.

CIVIL

Dockery v. Morgan: **[pleadings]** Count was properly dismissed under Rule 12 (b)(6) because complaint alleged conclusory allegations, and no actual relief was sought. **[Game and Fish Comm.]** Amendment 35 and statutes prevent the trial court from diverting the Commission's gas-lease revenue to other state agencies. (Moody, J.; SC 10-651; 3-3-11; Henry)

Brown v. Kelton: **[attorneys]** Insurance company's in-house attorney was disqualified from serving as its insured attorney in litigation involving traffic accident. Such representation would constitute the unauthorized practice of law under Ark. Code Ann. § 16-22-211. Company was not a party to the litigation. Statute prohibiting corporations from practicing law on behalf of a third party is constitutional. (Piazza, C.; SC 10-925; 3-3-11; Danielson)

Tarkington v. Riddle: **[bank accounts/fiduciary]** Court erred in granting a directed verdict on the basis that the bank account was owned jointly with right of survivorship because plaintiff alleged the existence of a fiduciary relationship and that the funds had been fraudulently converted. (Maggio, M.; CA 10-859; 3-2-11; Hart)

Rockett v. Rockett: **[deed reformation]** Deed was reformed to conform to agreement set out in divorce decree to correct a prior deed that included unintended property. (Culpepper, D.; CA 10-528; 3-2-11; Pittman)

McMullen v. Ark. Elder Outreach: **[affirmative defense]** Defendant's answer did not plead the affirmative defense of charitable immunity; it never amended its original answer; and its motion

to dismiss in which the defense was raised was filed 121 days after the complaint was filed. Raising the defense in the motion to dismiss is not sufficient to satisfy the requirement that an affirmative defense be specifically pled. (Shirron, P.; CA 10-491; 3-2-11; Vaught)

McCaran v. Traw: **[injunction/easement]** Prescriptive easement was established by court order in 2008. In 2010, in granting an injunction, court violated doctrine of res judicata by changing the nature of the original easement. (King, K.; CA 10-862; 3-9-11; Glover)

BAC Home Loans v. Benefit: **[default judgment]** Default judgment conformed to the plaintiff's pleading and defendant did not establish judicial estoppel. (Medlock, M.; CA 10-690; 3-9-11; Wynne)

Flippen v. Jones: **[specific performance]** Court properly ordered specific performance of land contract. Fraud was not shown to defeat specific performance. (Tabor, S.; CA 10-601; 3-9-11; Robbins)

Manson v. Mitcham: **[products liability]** Judge failed to address issue of whether the product was rendered unreasonably dangerous by a defect. (Guthrie, D.; CA 10-228; 3-9-11; Gladwin)

Hubard v. Homebank: **[security interest]** The relevant portion of the UCC does not require that the debtor have title to the collateral in order for the secured party to enforce its security interest but only that the debtor have rights in the collateral. (Maggio, M.; CA 10-792; 3-9-11; Vaught)

Burns v. Stewart: **[boundary lines]** Party failed to prove the existence of a boundary by acquiescence. (Hughes, T.; CA 10-678; 3-9-11; Glover)

Chase Manhattan Mortgage v. First Security Bank: **[attorney's fees]** Court erred in finding that holder of the second mortgage was a prevailing party and awarding attorney's fees on that basis. (Sutterfield, D.; CA 10-887; 3-16-11; Brown)

Strother v. Mitchell: **[boundary]** Location of the boundary line to alter line fixed by survey was not justified by either acquiescence or adverse possession. **[sanctions]** Sanctions assessed against the party and referral of attorney to Professional Conduct Committee was proper based on unsupported allegations against the judge in party's motion. (Weaver, T.; CA 10-929; 3-16-11; Brown)

Thorn v. Pierson: **[deed]** Court erred in revoking deed based on undue influence arising from a confidential relationship. Evidence did not show that daughter was the dominant party in the relationship with her mother. (Maggio, M.; CA 10- 229; 3-16-11; Pittman)

Van Buren County v. Fairfield Bay: **[tax refund]** Wastewater corporation was entitled to refund of taxes it paid because it was exempted from payment as a nonprofit corporation. Taxes were not paid as a volunteer. (Wood, R.; CA 10-782; 3-16-11; Pittman)

Williams v. Liberty Bank: **[security interest]** Issue regarding bank's lien was moot because party was made whole from the proceeds of the wheat crop and he had no claim to the 2002 crop because he released the financing statement. (Boling, L.; CA 10-57; 3-16-11; Hoofman)

Vaughn v. Shelter Ins. **[underinsurance coverage]** Insured failed to satisfy condition of timely supplying insurer with notice of settlement. (Epley, D.; CA 10-884; 3-16-11; Hart)

Berry v. Dillard: **[share-holder derivative]** Complaint was properly dismissed because plaintiff failed to establish that he made a presuit demand on the board of directors or that such a demand was futile. (Piazza, C.; CA 10620; 3-30-11; Martin)

Emerson v. Linkinogger: **[quiet title/adverse possession]** Elements of adverse possession were not established. There was not a showing that a permissive use had become hostile. (Maggio, M.; CA 10-1002; 3-30-11; Gladwin)

Howell v. Benton: **[usury]** Usury claim was barred because decedent's estate had entered into a settlement agreement in which usury claim was dismissed with prejudice. When the estate settled the claim, any possible derivative claim was resolved. (Honeycutt, P.; CA 10-412; 3-30-11; Pittman)

Simpson v. Braden: **[motion in limine]** It was error to grant a motion in limine excluding any evidence of a right to setoff on the basis that agreements had merged. Agreements had not merged because neither the same parties entered into both agreements nor did the subsequent agreement constitute the entire agreement. Party had a right of setoff and he should not have been barred from presenting it. (Wilson, R.; CA10-861; 3-30-11; Brown)

Redwine v. Turner: **[easement]** Court did not err in ordering parties to share the expenses of maintaining the easement, by requiring a fence, and by not allowing one of the owners to install gates at the end of the easement. (Smith, P.; CA 10-1082; 3-30-11; Brown)

Barwick v. GEICO: **[electronic signature/insurance]** An electronically generated signature meets the requirement that a rejection of no-fault coverage be in writing. (Duncan, X.; SC 10-1076; 3-31-11; Henry)

Gatson v. Billings: **[summons]** Summons was defective because it failed to provide "State of Arkansas to" defendant. It was not in strict compliance with Rule 4. Court properly dismissed complaint for failure to serve a valid summons. (Guthrie, D.; SC 10-777; 3-31-11; Brown)

King's Ranch v. City of Jonesboro: **[conditional-use permit]** City planning commission and city council's action in denying a petition for a conditional-use permit was quasi-judicial in nature and not legislative. Circuit court used incorrect standard of review (rational basis) on appeal. (Lineberger, J.; SC09-1311; 3-31-11; Hannah)

Vibo Corp v. State of Arkansas: [tobacco settlement] In suit brought by state against tobacco companies for breach of settlement agreement and amount of damages owed to the state, summary judgment in favor of the state was proper, but trial court did not have authority to allocate amounts to states who were not joined in the suit because they are indispensable parties. (Pierce, M.; SC 10-758; 3-31-11; Brown)

JUVENILE

D.B. v. State [EJJ Designation] Affirmed. The trial court was affirmed in granting the state's designation for Extended Juvenile Jurisdiction (EJJ). The state filed a petition in February 2009 requesting an EJJ designation. At a pre-adjudication hearing, eight months later, the juvenile raised the issue that no EJJ Designation Hearing had been held within in 90 days of the petition as required by the statute. The state moved to nolle pros the charge in December 2009. In February 2010, almost a year later, the state filed a new petition with the same allegations and requested an EJJ Designation. Appellant argued that the court lost subject matter jurisdiction over EJJ in failing to hold an EJJ Designation Hearing within 90 days as required by statute. Appellant waived his right to a timely hearing because he did not object until after the 90 days had already passed. Appellant also argued that he was denied due process because of the potential adult sentence and the state was provided a "do over." The court reasoned that there is nothing in the statute about the effect of noncompliance that indicates the time limit is jurisdictional. (Sullivan, T; 10-739; 2-23-2011; Hoofman)

D.W. v. State [Delinquency Adjudication] Affirmed on delinquency adjudication on one count of second-degree domestic battery. Appellant argued that state failed to prove that he was not justified in committing the act. Whether justification exists is a question for the trier of fact to resolve. The circuit court's decision is supported by substantial evidence and the court could have concluded that appellant was not justified in using deadly force, or that appellant could not have reasonably believed that his father was about to use deadly force or commit a felony against him, or that the amount of force appellant used was not necessary. (Gilbert, M.; 10-417; 3-9-2011; Hart)

M.S. v. State [Sex Offender Registration] Reversed. Appellant plead to a reduced charge of sexual assault in the third degree which requires a recommendation of the Sex Offender Assessment Committee prior to registration. No such recommendation was made and the court acted in excess of its authority and lacked subject matter jurisdiction to register the appellant. (Fergus, L.; 10-828; 3-16-2011; Brown)

Calahan v. Arkansas Dept. of Human Servs. [Reunification Services] Motion to Dismiss granted. An order to terminate reunification services is an adjudication order. However, it was not a final order but an order authorizing such a motion and to schedule a hearing on the issue. (Hudson, A.; 10-1029; 3-2-2011; Robbins)

Cranford v. Arkansas Dept. of Human Servs. [TPR] Reversed. The trial court's finding that termination was in the child's best interest was clearly erroneous where the child had been placed with his maternal grandparents and where the caseworker testified his placement was excellent. There was no evidence that the parents had abused or harmed the child or would be a threat in the future. The appellate court noted that maternal grandmother stated that it was in the child's best interest to have continued contact with his parents. (Spears, J. ;10-1193; 3-16-2011; Robbins)

Velazquez v. Arkansas Dept. of Human Servs. [TPR] Affirmed. Appellant challenged the termination arguing that permanency had already been achieved through permanency with a relative. Appellant argued that the Permanency Planning and Fifteen Month Statute provide for an exception to termination if the juvenile is being cared for by a relative. However, appellant failed to raise this issue at the Permanency Planning Hearing where the goal was changed and waived his argument for appeal. (Finch, J.;10-1083; 3-2-2011; Wynne)

Woodall v. Arkansas Dept. of Human Servs. [TPR] Affirmed. Appellant challenged the best interest finding arguing that there was no credible evidence that his five children were adoptable. However, the circuit court had evidence to consider the likelihood that the children were adoptable and made such a finding. (Whiteaker. P.;10-1187; 3-30-2011; Hoofman)

Case in which the Court of Appeals Affirmed No-Merit and Motion to Withdraw Granted:
Pearson v. Arkansas Dept. of Human Servs. [TPR] (Crow, K.; 10-1194; 3-9-2011; Vaught)

DOMESTIC RELATIONS

Walchli and Walchli v. Morris and Morris: [grandparent visitation; attorney ad litem fees] The appellees had no standing to pursue an action for grandparent visitation once the mother's parental rights were terminated and the child was adopted by his stepmother. After that, he was no longer an "illegitimate" child, and the appellee did not fit within the grandparent visitation statute as a "maternal grandparent" of the child. Neither were the appellees entitled to visitation because they stood in loco parentis to the child at various times in his life. Here, the appellees were not in the position of co-parents of the child, who has always been in the legal custody of his appellant father. On the issue of ordering the parties to split the fee for the Attorney Ad Litem, the Court of Appeals said the trial court did not follow the statutory scheme for payment to the attorney ad litem. The court said the circuit court erred in not transmitting an order to the Administrative Office of the Courts and in not making a specific determination of the ability of the parties to pay. (Spears, J.; No. CA 10-834; 3-2-11; Gruber).

Piccioni v. Piccioni: [UCCJEA; Ark.R.Civ.P. 52(b)(1)] The trial court deferred jurisdiction to the courts of Pennsylvania under the UCCJEA, and dismissed any pending matters in Arkansas. The trial court did not specify its basis for declining to exercise jurisdiction. Because the appellant did not timely request additional findings of fact pursuant to Ark.R.Civ.P. 52(b)(1), she waived her right to request additional findings. The Court of Appeals noted evidence from which the trial court could have found that appellant and her son did not reside in Arkansas, so that the Arkansas court lost its continuing jurisdiction of the case under the UCCJEA. There was

also evidence to conclude that Pennsylvania was the home state of the child and that it had jurisdiction over the case. (Elmore, B.; No. CA 10-170; 3-2-11; Martin).

Brinkley v. Brinkley: **[contempt]** Both parties filed petitions for contempt for alleged violation of the parties' property settlement agreement entered into at the time of divorce and incorporated into and made a part of the divorce decree. After a hearing, the circuit court entered an order dismissing both parties' petitions for contempt, finding that both parties had unclean hands. The Court of Appeals found no error in the circuit court's findings and affirmed its order. (Lindsay, M.; No. CA 10-747; 3-9-11; Gruber).

Bundy v. Moody: **[contempt]** Under the substantive rules on contempt, whether civil or criminal, the alleged contemtor must willfully disobey a valid court order. Here, under the terms of the parties' divorce decree, appellant had to pay appellee a sum certain within 60 days of May 4, 2009. If he failed to pay within 60 days, then interest would begin accruing until he finally paid. However, the decree did not include a date certain by which the appellant had to finish paying. Because the decree was not definite in its terms, clear in the duties imposed, and express in its commands regarding the "pay-by date," the contempt order was erroneous. (Smith, P.; No. CA 10-478; 3-9-11; Abramson).

Stout v. Stout: **[child custody; visitation; transportation costs; division of property and debts]** The Court of Appeals affirmed the award of custody of the parties' child to the appellee mother, but remanded to the circuit court for entry of a revised order of visitation. Although the appellant father currently resides in California, the court entered a standard visitation order, which cannot be followed under the circumstances, and which denies the appellant and his son any meaningful opportunity for visitation, such as by telephone or extended summer visitation. The court affirmed that appellant is responsible for transportation costs of visitation, given the economic differences between the parties. The court affirmed the division of property and allocation of debt. The court noted that Arkansas has no presumption that an equal division of debts must occur, nor is there a requirement to make findings explaining an unequal division. Although Ark. Code Ann. § 9-12-315 does not apply to the division of marital debts, the trial judge has the authority to consider the allocation of debt in a divorce case, and in fact, it is an essential item to be resolved. within the context of distribution of all of the parties' property. The Court reversed and remanded on the award of attorney's fees to the appellee because there was no discussion or analysis of the factors in *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). (Spears, J.; No. CA 10-827; 3-9-11; Abramson).

Maiorano v. Maiorano: **[property; alimony]** The Court of Appeals affirmed the unequal division of the parties' retirement benefits, given that the appellant testified that the appellee gave her \$50,000 to equalize the parties' retirement portfolios. The court reversed the trial court with respect to the proceeds from the sale of a condominium that both parties acknowledged was the appellant's separate property. While the divorce was pending, the appellee sold the condominium and gave appellant \$100,000. At the hearing, the parties agreed that he had withheld from her about \$150,000 from the sale, but no express findings were made. On the issue of alimony, which appellant contended was insufficient, the court ordered the trial court to

consider the factors in awarding alimony in light of the holding that the \$150,000 was appellant's separate property. (Williams, L.; No. CA 10-918; 3-16-11; Hart).

Marchand v. Marchand: **[child custody]** The Court of Appeals found that the trial court's award of custody to the appellee mother was not clearly erroneous, given the deference the court affords to the superior position of the trial judge to evaluate the witnesses, their testimony, and the child's best interests. (Huckabee, P.; No. CA 10-767; 3-16-11; Gladwin).

Gillison v. Gillison: **[marital property; child support; alimony; attorney's fees]** The parties' property settlement agreement was incorporated into their divorce decree. Appellant filed a motion for contempt, alleging that appellee had violated the agreement by failing to make timely mortgage payments and by moving another person into the marital home (her one-and-a-half-year-old daughter by another man). Appellee filed a petition for modification to increase monthly child support, to transfer the mortgage payments to appellant, to sell the property and to equally divide the proceeds when the youngest child reached age 18, to continue alimony payments, and to stop appellant from deducting from child support the expenses of taking the children on trips. The circuit court found that the parties' agreement was contractual and independent of the divorce decree. The agreement provided for circumstances under which the marital home would be sold. The court found that the appellee's having her one-and-a-half-year-old child in the home was not "moving another person into the home" as contemplated by the provision in the agreement. Regarding alimony, the court found that it had no authority to modify or terminate the payments unless one of the specified events occurred, and that alimony should not be terminated. The court also found that appellant had improperly reduced alimony by half when he had the children for summer vacation, relying upon a provision in the agreement for reduction that applied only to child support. On the issue of child support, the agreement had no provision for an automatic reduction when a child reached 18. Although appellant might have been entitled to a reduction or modification, he had not sought that. The court found that he was entitled to a reduction when the oldest child reached 18 and it calculated the amount of child support for the other children, as well as an arrearage. The court considered appellant's increased income, the children's needs, the oldest child's turning 18, and the second child's moving in with appellant. The court also ordered appellant to pay appellee's attorney's fee. On appeal, the Court of Appeals affirmed the trial court on all issues except for the order of attorney's fees. The court remanded for the court to analyze the request for attorney's fees by considering the *Chrisco* factors. *Chrisco v. Sun Industries, Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990). (Johnson, K.; No. CA 10-924; 3-30-11; Martin).

OCSE, et al. v. Butler: **[child support—overpayment]** The circuit court ordered OCSE to pay the appellee \$3146, a refund of monies paid under wage assignment, which included \$6.50 per week to be applied to past-due support. OCSE claimed on appeal that the trial court computed the overpayment erroneously. It was error for the court to abate his child support payments made before the date that he filed a petition to abate child support. The amount the appellee overpaid was \$676.60. Under the doctrine of sovereign immunity, OCSE cannot be ordered to refund any

amount when the only source of payment would be the state treasury. The decision was reversed and remanded for a reduction of the award to appellee to \$676.60. (McGowan, M.; No. CA 10-1048; 3-30-11; Hoofman).

PROBATE

Sexton, Executor v. Sexton.: [**decedent's estates; homestead**] The widow of the decedent was entitled to exercise her homestead rights in the marital home, despite the fact that she had moved from the home seventeen years before her husband's death to escape an abusive situation. The court said that the question of abandonment of the property was answered by her testimony that she always intended to go back. A spouse's right to elect her homestead right accrues when her husband dies. The fact that she lived for many years before his death on property belonging to her personally did not affect that right. (Shirron, P; No. CA 10-863; 3-2-11; Gladwin).

Fox v. Nagle: [**adoption**] The circuit court granted an adoption of a child by the child's stepfather, finding the natural father's consent was not necessary because he had failed significantly and without justifiable cause to communicate with the child. In reversing, the Court of Appeals could not say that the father had failed "significantly" and "without justifiable cause" to communicate with his son. The court found that over the course of the year, the father had seen his son on numerous occasions. He made efforts to see the child, took him to a family reunion, and took him to a family birthday party. He made ongoing efforts to see him. (McCallister, B.; No. CA 10-793; 3-2-11; Martin).

White v. Palo, et al.: [**trusts; jurisdiction; writ of certiorari**] A petition for writ of certiorari was granted because the court found the appellant had no other adequate remedy for her jurisdictional argument on behalf of the trust for which she is the trustee. The court held that once the decedent died, the circuit court had jurisdiction to make a final accounting and to close the guardianship, but was without authority to administer the decedent's trust or to probate her estate. The co-guardians of decedent's estate failed to follow Ark. Code Ann. § 28-65-323(a) to transform the guardianship into a probate proceeding. After the ward's death, the circuit court lacked subject-matter jurisdiction to order the sale and disbursement of trust assets because its jurisdiction was limited to the guardianship. (Looney, J.; No. SC 10-1085; 3-31-11; Gunter).

EIGHTH CIRCUIT

Summerhill v. Terminix Inc.: [**fraud**] Assuming plaintiff's first amended complaint adequately pleaded that defendant engaged in affirmative and fraudulent acts of concealment, the applicable statutes of limitations would only be tolled until plaintiff discovered the fraud or should have discovered it by the exercise of reasonable diligence. By failing to allege when and how he discovered the fraud, plaintiff failed to meet his burden of sufficiently pleading that the doctrine of fraudulent concealment saved his otherwise time-barred claims. (E.D. Ark; # 09-3691; 3-24-11)

Falcon Steel v. US Technology Marine Services: **[liens]** District court did not err in finding Falcon's lien was timely perfected and valid and that it attached jointly and severally to four barges. (W.D. Ark.; #09-3896; 3-29-11)