

**APPELLATE UPDATE**  
**MAY, 2012**

**DOMESTIC RELATIONS DIVISION**

*Hudson v. Hudson*, 2012 Ark. App. 308 [**change in custody**] The Court of Appeals affirmed the circuit court's finding that no significant change in circumstances affecting the child's best interest or jeopardizing her well being had occurred to justify a change in custody from the mother to the father. (Webb, G.; No. CA 11-1045; 5-2-12; Gruber, R.)

*McCormick v. McCormick*, 2012 Ark. App. 318 [**divorce–property division**] The appellant claimed that the circuit court erred in dividing both marital and nonmarital property unequally. The Court of Appeals outlined the disputed property, both real and personal, as well as all issues the appellant raised. The Court noted that the tracing of money or property into different forms is a tool, a means to an end, but not an end in itself. The fact that one spouse made contributions to property does not require that those contributions be recognized in the division of that property at divorce. In addition, the circuit court found that the appellant had unclean hands, a finding of fact that supported the unequal division. While not a statutory factor for the court to consider in dividing marital property unequally, unclean hands may provide a reason for the unequal division. The decision was affirmed. (Harkey, A.; No. CA 11-1049; 5-2-12; Hoofman, C.)

*McKenzie v. Pierce*, 2012 Ark. 190 [**final order; writ of certiorari**] The appellant is the husband of the appellee's former wife. The appellant's wife and her former husband, the appellee, were parties to a change of custody action involving their minor child. Among the allegations were that the marriage of appellant and his wife was unstable, that appellant was depressed, and that appellant lacked stability. Based upon those contentions, the appellee subpoenaed appellant's health-care providers for his medical records. Appellant filed a motion to quash based upon his not being a party to the action. He said that issuing them would result in a violation of his state and federal rights. The Supreme Court found that because the circuit court's denial of a motion to quash and a motion for Rule 11 sanctions was not a final order, it had no jurisdiction to hear the case as an appeal, but that it could hear it as a petition for extraordinary relief under the original jurisdiction of the Court. Another problem: the appellant had no right to appeal because he was not a party to the custody case. The Court found that the appellant's medical records could not be subpoenaed as he was not a party to the case. Because a direct appeal would not lie, the writ of certiorari was granted. The case was remanded for consideration of whether Rule 11 sanctions are appropriate. (Story, B.; No. SC 11-933; 5-3-12; Baker, K.)

*Baldwin v. Baldwin*, 2012 Ark. App. 334 [**alimony**] In the divorce decree, the trial court ordered the appellant husband to continue to provide the appellee wife with her current health insurance for three years after the divorce decree and to pay one-half of her medical expenses for the same period of time. Her testimony at the hearing was that she could not obtain medical insurance on her own until she was in remission from her previous bout with cancer for five years. Both parties agreed that the order to pay health insurance and non-covered medical expenses was a form of alimony. The Court of Appeals used that standard in its review, and found that the trial court considered the proper factors and did not abuse its discretion. (Huckabee, S.; No. CA 11-1280; 5-

9-12; Glover, D.)

*Wilson v. Powers*, 2012 Ark. App. 351 [**change of custody; modification of child support; visitation**] The Court of Appeals affirmed the circuit court's denial of a change of custody, which the trial court based on its finding that the appellant had failed to demonstrate a material change in circumstances. The Court could not address the trial court's decision on the amount of child support and its effective date because the appellant did not amend his notice of appeal to include a denied posttrial motion on the subject. Finally, the Court affirmed the trial court's decision that all airline tickets for the children's visitation must be purchased as round-trip tickets to airports within a one hundred-mile radius of the parties' residences. The Court found the trial court's reasoning thoughtful and based upon the best interests of the children, so the court did not err in setting visitation requirements. (Williams, C.; No. CA 11-883; 5-16-12; Hoofman, C.)

*Fischer v. Smith*, 2012 Ark. App. 342 [**relocation**] In this relocation decision, the Court of Appeals held that the trial court erred by shifting the burden of proof to the custodial parent to prove some advantage in her relocation with her minor child, and it reversed and remanded for further proceedings. (Powell, R.; No. CA 11-982; 5-16-12; Hart, J.)

*Vander Heyden v. Vander Heyden*, 2012 Ark. App. 356 [**change of custody; relocation**] The Court of Appeals held that the trial court did not err in finding that the appellant failed to show a material change of circumstances in appellee's ability to manage her finances since the entry of the decree of separate maintenance, or a material change in circumstances related to one of their children's education. The appellant also failed to meet his burden to prove that the trial court erred in allowing the children to relocate with the appellee to Canada. The Court noted the trial court's thorough consideration of each of the *Hollandsworth* factors in its 120-point, seventeen-page decree. The decision was affirmed. (Smith, V.; No. CA 11-1234; 5-23-12; Gladwin, R.)

*Metz v. Steele*, 2012 Ark. App. 373 [**change of custody—material change in circumstances; relocation**] The trial court denied the appellant mother's request to relocate with the child to another state and granted the appellee father's request to change custody, finding a material change in circumstances and that it was in the best interest of the child. The Court of Appeals found that no material change in circumstances had occurred, and reversed without reaching the issue of best interest. On the relocation issue, the Court found that the trial court erred by shifting the burden of proof to the custodial parent, and reversed on that issue, as well. The case was remanded for further proceedings consistent with the opinion. (McCain, M.; No. CA 11-942; 5-30-12; Abramson, R.)

## **PROBATE DIVISION**

*Marcellus v. Mays*, 2012 Ark. App. 304 [**guardianship**] The circuit court's denial of the paternal grandmother's petition for guardianship of her grandson was affirmed. While she presented "considerable evidence about...[the mother's]...shortcomings..." the evidence was largely controverted." The decision was not clearly against the preponderance of the evidence. (Sullivan, T.; No. CA 11-1201; 5-2-12; Hart, J.)

*D.L.R. v. N.K. and C.K.*, 2012 Ark. App. 316 [**adoption**] The appellees' petition for the adoption of appellant's child was granted upon the circuit court's finding that D.L.R. was a parent not having custody and that he was unreasonably withholding his consent to the adoption. The appellant's argument on appeal concerned whether the circuit court erred in finding that he was a parent not having custody. The Court quoted a substantial portion of the circuit court's "thorough and well-stated decision" and affirmed the granting of the adoption. (Boling, L.; No. CA 11-950; 5-2-12; Martin, D.)

*In the Matter of the Guardianship of S.H., et al. v. Herrington, et al.*, 2012 Ark. 245

[**guardianship–termination; discovery–Ark.R.Civ.P 35(a); evidence–hearsay**] The paternal grandparents had guardianship of their grandchild with the natural parents' permission. The child's mother filed a petition to terminate the guardianship, which the trial court denied. In this case of first impression, the Supreme Court adopted the majority view, holding that "parents who have not been found unfit do not relinquish their fundamental liberty interest in raising their children by consenting to a guardianship and, thus, they are entitled to the *Troxel* presumption in a proceeding to terminate that guardianship....[T]his conclusion best comports with the constitutional right of parents, the temporal nature of guardianships, and public policy." Because no weight was given to the mother's decision to terminate despite the presumption that she acts in her child's best interest, the Court held that the application of Ark. Code Ann. § 28-65-401 in this instance violated her constitutional rights. The Court said that "a natural parent who has not been deemed unfit is entitled to the presumption that he or she is acting in the child's best interest, even after consenting to a guardianship." The Court said that when a parent who has not been found unfit and who has consented to a guardianship attempts to terminate that guardianship, that parent must provide evidence that the guardianship is no longer necessary. Then the guardians have the burden of rebutting the presumption that the termination of the guardianship is in the child's best interests. The Court reversed and remanded. The Court also found that the circuit court abused its discretion by not applying the correct legal standard in evaluating the motion for psychological evaluation under Rule 35. Finally, the appellate Court could not consider the hearsay objections because no timely objections were made at the hearing. (Henry, D.; No. SC 11-1107; 5-31-12; Gunter, J.)

**JUNE, 2012**

## **DOMESTIC RELATIONS DIVISION**

*Sisson v. Sisson*, 2012 Ark. App. 385 [**child custody; evidence**] The circuit court found that the appellant's evidence was primarily speculative and did not prove a material change in circumstances warranting a change in custody. In reversing, the Court of Appeals said that the circuit court applied the wrong standard of law, erroneously relying on its conclusion that appellant was required to prove that the children had suffered an adverse impact from appellee's actions and judgment. The Court reversed and remanded for further proceedings. On the issue of the circuit court's denial of introduction of court documents concerning the appellee's boyfriend, the Court found no abuse of discretion in the circuit court's excluding the proffered documents. (Wright, J.H.; No. CA 12-53; 6-13-12; Gruber, R.)

*Mason v. Mason*, 2012 Ark. App. 393 [**Rule 2(a)(1), App. Rules of Pro.–Civil**] Because the decree from which the appellant appealed was not a final, appealable order, the Court of Appeals had no jurisdiction to reach the merits of the appeal. The divorce decree awarded alimony and provided for the division of some, but not all, of the parties' property. The decree contemplates further proceedings to clarify and decide issues concerning the disposition of the marital home. Therefore, it would be premature for the Court to consider the issues raised by the appellant before the circuit court has entered its final order. Dismissed without prejudice. (Smith, V.; No. CA 11-1122; 6-20-12; Vaught, L.)

*Bowen v. Bowen*, 2012 Ark. App. 403 [**grandparent visitation**] The appellant father and his former wife, the children's mother, were divorced and granted joint custody of their two children. Sole custody subsequently was granted to the father. The appellee grandparents and the appellant, their son, had a strained relationship. After the divorce, the father limited the grandparents' access to the children's lunch hour at school once a week, and that ceased when the appellant's wife began home-schooling them. The circuit court granted the grandparents visitation of one weekend a month and extended time during the summer and holidays. In reviewing the decision under Arkansas's grandparent visitation statute, Ark. Code Ann. section 9-13-103, the Court of Appeals said the primary issue was whether visitation was in the best interest of the children. To prove that it was in the children's best interests, the grandparents had to show (1) their capacity to give the children love, affection, and guidance, (2) that the loss of the relationship between them would likely cause harm to the children, and (3) that they are willing to cooperate with their son if visitation is allowed. The Court said that the first and third elements were beyond question, and looked at the issue of likely harm resulting from the loss of the relationship. The Court examined cases from other states with similar statutory requirements, and said that our statute places the burden on the grandparents to show that visitation is in the child's best interest. Here, the Court said, the circuit court "substituted a benefit analysis for our required statutory presumption in favor of the parent's decision," requiring the appellant father to prove that visitation would be harmful. Instead, the Court should have required the grandparents to show (1) that appellant's requiring the visitation to be "on his terms" (or be denied) would likely harm the children, and (2) that granting visitation was the remedy for this harm. These burdens were neither required by the trial court nor met by the petitioners, so the decision of the trial court was reversed. (Shirron, P.; No. CA 11-868; 6-27-12; Vaught, L.)

*Williams v. Nesbitt*, 2012 Ark. App. 408 [**child support; res judicata; access to medical records**] Res judicata prevented the consideration of the appellant's issues concerning the award of interest and attorney fees on unpaid support. Her claim that the trial court erred because she was entitled to have a child-support arrearage owed to her reduced to judgment is without merit. Finally, the circuit court did not err in granting the appellee a HIPAA release, which he needed to obtain medical records to verify that the medical services were actually being provided to his child, in light of his assertion that appellant previously had presented him with medical bills for services provided to other children. The case was affirmed. (Huckabee, S.; No. CA 11-1113; 6-27-12; Hart, J.)

## **PROBATE DIVISION**

*In the Matter of the Guardianship of A.M., a Minor*, 2012 Ark. 278 [**guardianship; constitutional challenge to statutes**] The appellant appealed from the circuit court's granting a permanent guardianship of her son to her mother, the appellee. She stipulated below that the evidence was sufficient to establish a need for the guardianship, but did not agree to the guardianship because she wanted to maintain constitutional challenges based on equal protection and substantive due process. The Supreme Court said that it could not address the merits of the constitutional arguments because the Attorney General was not notified of the constitutional challenges to the guardianship statutes as required by Arkansas law, and there was not a full and adversarial development of the constitutional issues. The Court reversed and remanded for compliance with Ark. Code Ann. Section 16-111-106(b). (Scott, J.; No. SC 11-1092; 6-21-12; Corbin, D.)

## AUGUST - SEPTEMBER, 2012

### DOMESTIC RELATIONS DIVISION

*Casas-Cordero v. Mira*, 2012 Ark. App. 457 [**PKPA; UCCJEA**] The Court of Appeals affirmed the trial court's declining to exercise jurisdiction in a child-custody case based upon a finding that it was in the child's best interest for the Superior Court in Los Angeles County, California to assume jurisdiction. The judge there was acquainted with the case, having made custody determinations in 2000 and 2005. In addition, the child's long-time therapist was there to testify to her extensive knowledge of the child and the case and to make recommendations to the court. The two courts had conferred on the jurisdictional issue, as set out in the UCCJEA, had agreed that Arkansas had jurisdiction under the UCCJEA, but then agreed that California was the more appropriate forum. (Webb, G.; No. CA 11-538; 9-5-12; Pittman, J.)

*Harrison v. Phillips, et al.*, 2012 Ark. App. 474 [**grandparent visitation**] The Court of Appeals found that the appellee grandparents failed to rebut the statutory presumption that the appellant mother's decision denying visitation to the grandparents was in the child's best interest. The trial court did not make written findings supporting its decision to award grandparent visitation, as the grandparent visitation statute requires. The appellees failed to establish the second prong of a three-step test, that the loss of the relationship between the grandparents and their grandson was likely to harm the child. Therefore, the trial court abused its discretion in awarding grandparent visitation. The case was reversed and dismissed. (Reynolds, D., No. CA 11-601; 9-12-12; Robbins, J.)

*Favano v. Elliott*, 2012 Ark. App. 484 [**grandparent visitation**] The appellant mother appealed the trial court's granting grandparent visitation to the appellee paternal grandmother of the child. In reversing, the Court of Appeals set out the three separate elements a grandparent petitioner must prove to establish that court-ordered visitation is in the best interest of the child. The appellee grandmother failed to meet her burden to prove the second, that the loss of the relationship between the grandparent and the child is likely to harm the child. The Court said that the trial court failed to address the required element of harm that the child would suffer from a loss of her relationship with her grandmother, and the Court said it found insufficient evidence in

the record to satisfy her burden of this statutory element. (Duncan, X.; No. CA 11-1173; 9-12-12; Hoofman, C.)

*Browning v. Jones*, 2012 Ark. App. 505 [**contempt; visitation**] The trial court's denial of the parties' requests for contempt findings against each other and the denial of the appellant's motion for modification of visitation, based upon the court's finding no material change of circumstances, were affirmed. The Court of Appeals found that the trial court's findings were not clearly erroneous or clearly against the preponderance of the evidence. (Pierce, M.; No. CA 12-170; 9-19-12; Gruber, R.)

*Cole (Madden) v. Cole*, 2012 Ark. App. 528 [**child custody**] The Court of Appeals held that the trial court did not clearly err in finding that it was in the best interest of J.C. that primary custody be changed from the appellant mother to the appellee father, based upon a material change in circumstances. (Spears, J.; No. CA 11-1231; 9-26-12; Gruber, R.)

## OCTOBER, 2012

### DOMESTIC RELATIONS DIVISION

*Lucas v. Jones*, 2012 Ark. 365 [**adoption**] The circuit court entered a decree of adoption of the appellant's six-year-old daughter by the appellee maternal grandparents. Although the appellant argued that, as an indigent, she was entitled to appointed counsel in the adoption case, she failed to raise that issue clearly with the circuit court or to ask for a specific ruling by the court on the issue. The Supreme Court noted the evidence showed that the appellant had failed significantly without justifiable cause to communicate with the child or to support the child for at least one year, which is a statutory provision that is strictly construed. The Supreme Court affirmed the decree of adoption. (Lindsay, M.; No. SC 12-133; 10-4-12; Hannah, J.)

*Coker v. Coker*, 2012 Ark. 383 [**divorce--general indignities; attorney's fees**] The appellee filed for divorce on the ground of general indignities. The trial court found that "[t]he Defendant was having an ongoing affair which [led] to Plaintiff's condition in life becoming intolerable." The Court of Appeals reversed and dismissed the divorce. On review, the Supreme Court affirmed and said, "While adultery can give rise to indignities that may cause the spouse's condition in life to become intolerable, the act of adultery itself is a separate distinct cause for divorce under the statute....The two causes for divorce should not be confused." The Court reviewed the requirements for granting a divorce for general indignities, and noted that in this case the appellee offered evidence of her husband's rudeness, unmerited reproach, and studied neglect. The Court said evidence was presented to show the continuous and permanent conduct arising from a long-term adulterous relationship, evidence constituting "settled hate." The Court found that the circuit court did not clearly err in finding his conduct constituted such indignities to her as to render her condition intolerable. On the issue of attorney's fees, the Court reversed and remanded for the circuit court to consider the request for fees and expenses in light of the appellee's failure to file an affidavit and request a specific sum except for a statement in her proposed findings of fact and conclusions of law. (Williams, L.; No SC11-1257; 10-11-12;

Hannah, J.)

*Madden v. Madden*, 2012 Ark. App. 582 [**child custody**] The Court of Appeals affirmed the change in custody from the appellant mother to the appellee father based upon a material change in circumstances and the best interest of the child. (Spears, J.; No. CA11-1230; 10-24-12; Hart, J.)

*Byrd v. Byrd, et al.*, 2012 Ark. App. 589 [**child support**] The appellant appealed from the circuit court's modification of his child-support obligation. In affirming the circuit court's decision, the Court of Appeals noted that, given the evidence presented—or not presented--by the appellant to support his statements regarding his job search and his earning capacity, the court did not abuse its discretion in imputing income to the appellant. Regarding the appellant's argument that the court should have been required to find that he intended to evade his parental responsibilities before it could impute income to him, the Court said the law governing imputed income was set by the Arkansas Supreme Court in case law and in Administrative Order No. 10, and that it has no authority to overrule, amend, or expand it. (Womack, S.; No. CA12-107; 10-24-12; Gruber, R.)

*Mathis v. Estate of Doyle McSpadden*, 2012 Ark. App. 599 [**paternity; res judicata**] Based upon res judicata, the circuit court dismissed the appellant's complaint to establish paternity against the appellee Estate of Doyle McSpadden. The appellant's mother had filed a 1980 bastardy complaint against Doyle McSpadden, resulting in a finding in county court that he was the appellant's father. It was subsequently dismissed with prejudice on appeal because her mother failed to appear at the hearing. Appellant claimed that she was not a party or in privity to a named party in that action. The Court of Appeals found that its holding in a previous case governed this case and affirmed on that basis. *Department of Human Services v. Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991). The Court held in *Seamster* that without question a bastardy action under the previous statute was brought on behalf of the child, that the child was the real party in interest, and that the action barred a subsequent paternity complaint. The Court also recognized that the paternity statutes have been rewritten and currently provide specifically that the action may be filed by the child as a named party, and that the child's rights in the matter may differ from those of the mother. Although the appellant claimed the two paternity actions involved different causes of action, the remedy sought was the same, the establishment of paternity. The decision was affirmed. (Hannah, C.; No. CA12-259; 10-24-12; Hoofman, C.)

## NOVEMBER, 2012

## DECEMBER, 2012 - JANUARY, 2013

### DOMESTIC RELATIONS DIVISION

*Farrell v. Farrell*, 2013 Ark. App. 23 [**divorce—marital property; alimony**] Although the trial court gave reasons for its unequal division of property in its letter opinion, it did not incorporate the letter opinion into the decree. A letter opinion that has not been incorporated into the judgment is not the equivalent of a written order and does not constitute a judgment or decree.

Therefore, the issue was remanded for the court to satisfy the statute requiring the recitation of the basis and reasons for an unequal division of property in the court's order. Because alimony and property divisions are complementary devices, the trial court may reconsider its alimony award on remand. (Spears, J.; No. CA 12-275; 1-23-13; Gladwin, R.)

*Paschal v. Paschal*, 2013 Ark. App. 27 [**order of protection**] The decision granting an order of protection against the appellant preventing his contact with his two children for one year was affirmed without the court's reaching the merits because the appellant failed to remedy deficiencies in his brief, despite two opportunities to make corrections. See Supreme Court Rule 4-2. (Taylor, J.; No. CA 11-209; 1-23-13; Wynne, R.)

*Nicholson v. Harrison*, 2013 Ark. App. 44 [**child custody; child support**] After a detailed recitation of the testimony, the Court of Appeals found that the circuit court did not err in awarding custody of the parties' three children to the appellee father, and it affirmed on this point. However, it found a \$4.00 error, under Administrative Order No. 10, in the amount of child support the appellant mother was ordered to pay, so it modified the court's order on that point. (Harkey, A.; No. CA 12-448; 1-30-13; Harrison, B.)

*Newton v. OCSE*, 2013 Ark. App. 53 [**abatement of child support--estoppel**] The Court of Appeals found that the circuit court did not err in denying the appellant father's request for abatement of his obligation to pay child support based upon a lack of income resulting from his being incarcerated. The trial court relied upon a previous Court of Appeals case. The facts were similar in the cited case, in which the appellant had been convicted and imprisoned for raping his daughter, and in this case, in which the appellant was imprisoned for sexual abuse against his stepdaughter. The Court of Appeals stated that when reduced earnings are the obligor's own fault, he is not entitled to a reduction in child support. The trial court also dismissed appellant's estoppel argument, that child support should be abated because he was denied visitation. The Court of Appeals said the trial court was correct that visitation and child support are separate matters, involving independent duties of the parties. The decision was affirmed. (Bryan, E.; No. CA 12-147; 1-30-13; Vaught, L.)

## **PROBATE DIVISION**

*Harvill v. Bridges, et al.*, 2012 Ark. App. 683 [**grandparent visitation**] After denying the appellee maternal grandparents permanent guardianship of their three grandchildren, ages eight, seven, and four, the circuit court granted their alternative plea, unsupervised visitation with the children for one weekend a month and one week during the summer. The appellant father of the children appealed. In reversing, the Court of Appeals held that the grandparents had failed to rebut the statutory presumption that the custodian's decision denying or limiting grandparent visitation is in the best interest of the children. The Court held that the evidence was insufficient to show either that the grandparents' relationship with the children had been lost or that the appellees were willing to cooperate with the children's father if visitation were allowed. Here, there was no evidence that a relationship had been lost or would be lost absent court-ordered visitation. The appellant had allowed the grandparents to visit the children before they filed for

grandparent visitation. He never told them that visitation would not be allowed in the future. Equally important, the Court said, was the appellee grandparents' failure to show a spirit of cooperation with the father. To the contrary, the Court said, their actions show that they "will be satisfied with nothing less than control over the children." (McCallister, B.; No. CA 12-371; 12-5-12; Pittman, J.)

*Crenshaw v. Crenshaw, et al.*, 2012 Ark. App. 695 [**guardianship of a child–termination; directed verdict or dismissal**] The circuit court granted the appellee grandparents' motion for a "directed verdict" at the close of appellant mother's case to terminate the guardianship of her child. The court found that the mother had presented no evidence about the best interest of the child. The Court of Appeals agreed with the appellant that the circuit court had erred in its finding and reversed the decision. The Court said that under the Code, a guardianship should be terminated if it is no longer necessary or for the best interest of the ward. Prior cases have held, the Court said, that it was necessary to show both that the parent was fit and that termination of the guardianship was in the child's best interest. The Supreme Court has held that a fit parent is presumed to act in the best interest of the child. Here, the Court held the proof presented was sufficient to show that it was in the child's best interest to terminate the guardianship and, thus, to withstand a motion for a directed verdict or dismissal. (Hendricks, A.; No. CA 12-232; 12-12-12; Pittman, J.)

*Yerby v. Yerby*, 2013 Ark. App. 25 [**adoption–consent of father**] The trial court denied the single-parent adoption by the mother of her three children, finding that the father's consent was required but not given. The mother contended that the father had failed significantly without justifiable cause to communicate with the children or to provide for their care and support for a period of at least one year. The trial court found that the father had justifiable cause for his lapses. The court found that his physical and mental health had improved and that his devotion to his children was such that it would be contrary to their best interest to sever the parental relationship by granting the adoption. The Court of Appeals affirmed. (Cottrell, G.; No. CA 12-511; 1-23-13; Pittman, J.)

## FEBRUARY, 2013

### DOMESTIC RELATIONS DIVISION

*Hancock v. Hancock*, 2013 Ark. App. 79 [**domestic violence; order of protection**] The appellant argued that evidence was insufficient to show that the victims listed in appellee's petition for an order of protection were in immediate and present danger of domestic violence. He contended that the testimony of the witnesses was inconsistent with each other's testimony as well as with the testimony of the appellee, and he questioned her veracity. In affirming, the Court of Appeals noted that the appellant was actually requesting the Court to re-weigh the disputed testimony and the credibility of the witnesses. The Court said it gives due regard to the trial court's decisions of credibility and the weight to be given to the testimony. On the trial court's failure to address the issue of visitation in the final order of protection, the Court said that the award of visitation in an order of protection is discretionary, citing Arkansas Code Annotated section 9-15-205(a)(3), and

that the appellant had not raised this issue with the trial court at the time of its ruling. Therefore, the Court declined to address that issue. (Williams, C.; No. CA 12-516; 2-33-13; Gladwin, R.)

*Wingfield v. Wingfield*, 2013 Ark. App. 124 [**child custody–modification**] The appellant mother of the child argued on appeal that the trial court erred in finding that she failed to demonstrate changed circumstances to support a change in custody. In affirming, the Court of Appeals noted that the trial court did modify visitation, granting the appellant additional time in the summer and extending her usual visitation to include Sunday nights. The Court said that the appellant’s numerous allegations involved the credibility of the witnesses, which lies within the duty of the trial court. (Fox, T.; No. CA 11-1179; 2-20-13; Brown, W.)

*Magee v. Magee*, 2013 Ark. App. 108 [**child custody; evidence**] The appellant mother alleged that the trial court erred in admitting specific pages from her journal into evidence. The Court of Appeals said it will not reverse a ruling on the admissibility of evidence absent a manifest abuse of discretion and that, even if the court erred, it would affirm absent a showing of prejudice. Here, the admission of the journal entries was not an abuse of discretion. The appellant also argued that the court erred in granting custody to the appellee father of their three children. The Court said that based upon all the evidence and the trial court’s superior ability to observe the parties, it could not say the trial court clearly erred in its award of custody, based upon the welfare and best interest of the children. (Schantz, D.; No. CA 12-580; 2-20-13; Walmsley, B.)

*Cole v. Griffin*, 2013 Ark. App. 125 [**child support**] The appellant mother appealed a circuit court decision reducing the amount of child support the appellee father was paying. Her first point on appeal was the court abused its discretion in not following the requirements of Administrative Order No. 10 to determine the payor’s income, recite the amount of support the guidelines require, and recite whether the court is deviating from the chart. The trial court imputed an income of \$500 to the appellee, recited the amount required under the guidelines, and awarded that amount. However, the evidence showed that the appellee had an actual income. The court’s failure to show how it reached the imputed income amount prevented the Court of Appeals from determining whether or not Administrative Order No. 10 was violated. The appellant’s second point was that the court erred in reducing the child support obligation and by imputing less than his actual income. Administrative Order No. 10 permits a court to grant more or less support if it determines that the dependents’ needs require a different level of support, and it allows a court to deviate from the chart amount after considering certain factors. In this case, the court did not deviate and provide reasons for the deviation, but instead imputed an amount without providing sufficient findings for the Court of Appeals to conduct a meaningful review. The appellate court reversed and remanded for sufficient findings to support the income calculation. Upon remand, the Court said, the trial court may consider its decision in light of changed circumstances that occurred during the appeal. (Huckabee, S.; No. CA 12-328; 2-20-13; Brown, W.)

*Winn v. Bonds*, 2013 Ark. App. 147 [**child custody**] The appellant mother of a child and the custodian of the child, the appellant’s former step grandmother and her current husband, the appellees, were involved in a custody dispute. The appellant mother appealed a temporary order and a subsequent amended order awarding the appellee custody of the child, with visitation

awarded to the appellant. The appellant argued that the court erred in allowing the appellee to intervene in the proceedings and in awarding her temporary custody pending a custody hearing that resulted in a final custody order. The Court of Appeals said the standard of review for a decision to allow someone to intervene is abuse of discretion. Here, the trial court did not abuse its discretion in allowing the step grandmother to intervene. On the issue of temporary custody, the Court of Appeals noted that final custody had been decided in a final hearing. The final order was not appealed. Any error in the temporary hearing is now moot. A temporary order is terminated upon entry of a subsequent permanent order, so the appellant was challenging an order that was terminated and no longer in effect. The final order of custody to the appellee will be unaffected by any decision concerning the temporary-custody order. The rights of the parties were determined by the final order, which the appellant did not contest, so the Court said it did not need to address that challenge to the temporary award of custody. The decision was affirmed. (Brantley, E.; No. CA 11-1250; 2-27-13; Hixson, K.)

## MARCH, 2013

### DOMESTIC RELATIONS DIVISION

*Office of Child Support Enforcement, et al. v. Harper*, 2013 Ark. App. 79 [**child support**] The Court of Appeals found that the circuit court judge erred in failing to include in its computation of modification of child support and arrearages a prior judgment of \$8,191.45, in not considering in calculating an arrearage unpaid child support after the January 17, 2008 judgment and before the June 1, 2008 modification, and in not including payments made by the appellee after June 1, 2011. The Court remanded for recalculation, and encouraged the trial court to consider the differences in the calculations of the appellant and the appellee. Further, the appellate court ordered the trial court to adjust its calculation of arrearages to account for child support payments for a period for which the court found the appellee in contempt, and for any payments credited to the appellee that were not made (for a time period set out in the order). The Court did not consider an issue relating to an arrearage in alimony because it was not preserved for appeal. (Landers, M.; No. CA 12-738; 3-6-13; Brown, W.)

*Scudder v. Ramsey*, 1013 Ark. 115 [**grandparent visitation; contempt; attorney's fees and costs**] The issue of first impression for the Supreme Court in this case is "the effect of an adoption on the visitation rights of a grandparent where, as here, the individual adopted is the adult daughter of the grandparent who enjoys visitation with the offspring of the daughter." The Court said that Ark. Code Ann. section 9-9-215(a) provides that the effect of a final decree of adoption "terminates all legal relationships between the adopted individual and his or her biological relatives, including his or her biological parents, so that the adopted individual thereafter is a stranger to his or her former relatives for all purposes." Here, the appellant was adopted by third parties so that she was no longer legally related to the appellee, her biological mother. The appellee's rights to her grandchild were derived from her relationship to her daughter. Once that relationship was severed, the appellee was no longer entitled to visitation under the grandparent-visitiation statute. That part of the circuit court's order that continued the visitation was reversed. That part of the order finding the appellant in civil contempt for failing to follow the court's

visitation order before the adoption was granted was affirmed. That part of order awarding attorney's fees and costs to the appellee was reversed and remanded on the issue of the amount of fees awarded, because part of the fees was for work involving, not the contempt action, but the adoption proceeding. (Smith, P.; No. SC 12-476; 3-14-13; Goodson, C.)

*Szabo v. Womack*, 2013 Ark. App. 198 [**child support–Social Security disability benefits**] In this appeal after remand, the appellant argued that the trial court failed to give him credit for Social Security Disability benefits as required by the Court of Appeals, that the trial court erred in finding him in contempt for not disclosing his receipt of a lump-sum benefit check for \$7,980, and erred in awarding attorney's fees to the appellee. The Court said that the trial court attempted to comply with the mandate to give appellant credit for an overpayment based upon reliance upon an Exhibit in the case, which led to a miscalculation by the circuit court. Therefore, the Court reversed and directed that the appellant be credited with the correct amount of \$7,980. The Court said it need not address the issue about the contempt, because no penalty was attached to the circuit court's finding. Finally, the Court found that the trial court complied with its mandate regarding the award of attorney's fees. The decision was affirmed in part, reversed in part, and remanded. (Duncan, X.; No. CA 12-410; 3-27-13; Pittman, J.)

## **PROBATE DIVISION**

*Furr v. James, et al.*, 2013 Ark. App. 181 [**custody; guardianship**] This was an appeal from change-of-custody and guardianship cases that were consolidated for hearing. In the original divorce case, the father of the three children was awarded custody. After that, the appellee paternal grandmother sought and was awarded guardianship of the children. This appeal involved the appellant mother's motion to have the custody of the children placed with her because, she alleged, the trial court did not find that she was unfit as a part of the guardianship case. In affirming, the Court of Appeals cited *Fletcher v. Scorza*, 2010 Ark. 64, 359 S.W3d 413, in which the Supreme Court found that no finding of parental unfitness is required in awarding guardianship, and the natural-parent preference is only one factor for the court to consider in deciding who is the most suitable guardian for the child. The best interest of the child is the "paramount consideration." In applying *Fletcher* to this case, the Court of Appeals also noted that in a case decided after the *Fletcher* case, *Madison v. Osburn*, 2012 Ark. App. 212, it had relied in part upon a fitness standard in a guardianship proceeding involving the statutory natural-parent preference. The Court overruled *Madison* and any other prior cases that suggested such a standard be used in a third-party guardianship case involving the natural-parent preference. (Lindsay, M.; No. CA 12-708; 3-13-13; Glover, D.)

**APRIL, 2013**

## **DOMESTIC RELATIONS DIVISION**

*Carruth v. Carruth*, 2013 Ark. App. 213 [**appeal; Ark.R.App.Pro.–Civ. 4(a)**] The appeal was dismissed for lack of jurisdiction, based upon the Court's finding that appellant failed to file a timely notice of appeal pursuant to Arkansas Rule of Appellate Procedure–Civ. 4(a). (Guthrie,

D.; No. CA 12-351; 4-3-13; Walmsley, B.)

*Gray v. Gray*, 2013 Ark. App. 223 [**order of protection–modification; contempt; attorney’s fees**] The parties’ divorce decree provided for a division of personal property, and reserved the issue of the appellant father’s visitation with their 7-year-old daughter because he had pending criminal charges based upon his alleged sexual assault of his 10-year-old stepdaughter. He was also subject to a temporary order of protection forbidding his contact with either girl. A final order of protection was entered subsequently. The appellant entered a plea to a reduced charge of harassment, later filed for modification of the order of protection to permit visitation with his daughter, then filed for modification of the divorce decree to grant him primary custody. He filed a contempt petition alleging that appellee did not give him all the personal property to which he was entitled under the decree. The trial court denied modification of the protective order, the change-of-custody petition, and the contempt petition. The Court of Appeals affirmed, finding that the trial court did not err in finding that he failed to prove a material change in circumstances or that it would not be in the child’s best interest to dissolve the protective order. The Court also affirmed the award of attorney’s fees. The appellant had argued that the trial court erred in awarding them because the court erred in ruling on the merits of the case and that the appellee was not the prevailing party. Given the fact that it upheld the decree, the Court said appellant failed to demonstrate that appellee was not the prevailing party. (Lindsay, M.; No. CA 12-430; 4-10-13; Pittman, J.)

*John v. Bolinder*, 2013 Ark. App. 224 [**child custody; visitation; child support; attorney’s fees**] The appellant filed a paternity action, which resulted in a finding of paternity, an award of custody to the appellee mother, visitation to the appellant father, child support, and attorney’s fees to the appellee mother. The Court of Appeals affirmed the custody decision, holding that it was not clearly erroneous. On the issue of child support, the trial court found no credibility in appellant’s tax returns and found them unacceptable as a measure of his actual income, based upon his lifestyle, the money passing through his bank account, and his credit-card statements. The court then calculated appellant’s child support based on his tax returns. The Court reversed and remanded on appellee’s cross-appeal, and directed the court to use an alternative method to determine his income, based upon Administrative Order No. 10, Section III(c). The Court affirmed the trial court’s order that the appellant pay all the costs of transportation for his visitation with his child, noting that the trial court did not find his reported income credible. Finally, the Court affirmed the award of attorney’s fees, finding no abuse of discretion. (Schrantz, D.; No. CA 12-451; 4-10-13; Walmsley, B.)

*Lane v. Blevins*, 2013 Ark. App. 270 [**paternity; custody**] The parties were never married but had two children over the six-year period they lived together. OCSE filed a complaint against the plaintiff for child support and to establish paternity, which he admitted. He filed a third-party complaint against the appellee for custody. The trial court found that he failed to establish a material change in circumstances, said that appellee should maintain primary custody, and that appellant should have the right to reasonable visitation. The Court of Appeals reversed and remanded on the issue of custody, citing cases in which the Court of Appeals has held that a change in circumstances need not be proved in cases in which there has never been an order

awarding custody to either party that would justify a change in custody requirement. *Donato v. Walker*, 2010 Ark. App. 566, 377 S.W.3d 437 (2010), and *Harmon v. Wells*, 98 Ark. App. 355, 255 S.W.3d 501 (2007). The paternity/custody determination between these parties was the initial custody determination, so upon remand the trial court should employ the correct analysis. (Mason, C.; No. CA 12-649; 4-24-13; Glover, D.)

## **PROBATE DIVISION**

*Gilliam, et al. v. Sanders*, 2013 Ark. App. 227 [**guardianship**] The trial court's order granting guardianship to the appellee of her four grandchildren was affirmed because the appellants' argument that service of the original summons on separate appellant Day, mother of the children, was defective, was not decided by the trial court. Although they raised the issue below, they failed to get a ruling from the court. Therefore, the appellants' arguments on appeal were not preserved for appellate review. (McGowan, M.; No. CA 12-766; 3-10-13; Harrison, B.)