

CIRCUIT COURT JUVENILE DIVISION BENCHBOOK

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I. JUVENILE DIVISION PERSONNEL

A. Juvenile Division Judges

1. Shall be designated to hear juvenile cases pursuant to Supreme Court Administrative Order Number 14. **Administrative Order Number 14.**
2. Shall designate at least one intake officer in each judicial district. **Ark. Code Ann. §9-27-308(a)(1) (Supp. 2007).**

The intake officer shall be certified and must complete initial certification requirements within one year of the officer's employment and must maintain the certification during the terms of his/her employment. **Ark. Code Ann. §16-13-328(c) (Supp. 2007).**

3. Shall designate at least one probation officer in each judicial district. **Ark. Code Ann. §9-27-308(b)(1) (Supp. 2007).**

The probation officer shall be certified and must complete initial certification requirements within one year of the officer's employment and must maintain the certification during the terms of his/her employment. **Ark. Code Ann. §16-13-327(c) (Supp. 2007).**

4. Shall immediately report to the child abuse hotline (1-800-482-5964) when he/she has reasonable cause to suspect child maltreatment, that a child has died as a result of child maltreatment, or he/she observes a child being subject to conditions or circumstances that would reasonably result in child maltreatment. **Ark. Code Ann. §12-12-507(b)(11) (Supp. 2007).**

B. Juvenile Intake Officers

1. Shall receive and investigate complaints and charges that a juvenile is delinquent, dependent-neglected or FINS. **Ark. Code Ann. §9-27-308(a)(2)(A)(i) (Supp. 2007).**
2. Shall make appropriate referrals to public or private agencies if assistance is needed or desired. **Ark. Code Ann. §9-27-308(a)(2)(A)(ii) (Supp. 2007).**
3. Shall perform other functions assigned by code, rules, or court. **Ark. Code Ann. §9-27-308(a)(2)(A)(iii) (Supp. 2007).**
4. Shall conduct preliminary investigation upon receiving notice that a juvenile has been taken into custody on allegation of delinquency. **Ark. Code Ann. §9-27-318 (Supp. 2007).**

5. Shall immediately notify the central intake (Hotline) at DHHS when he/she has reasonable cause to suspect that a juvenile has been subjected to maltreatment as defined by Ark. Code Ann. §12-12-503(6) **Ark. Code Ann. §9-27-308(a)(3) (Supp. 2007).**
6. Shall immediately report to the child abuse hotline (1-800-482-5964) when he/she has reasonable cause to suspect child maltreatment, that a child has died as a result of child maltreatment, or he/she observes a child being subject to conditions or circumstances that would reasonably result in child maltreatment. **Ark. Code Ann. §12-12-507(b)(27) (Supp. 2007).**
6. Shall advise juvenile and parent at all conferences of the following rights:
 - a. Juvenile's right to counsel and the right to remain silent when questioned by the intake officer. **Ark. Code Ann. §9-27-324(d)(2) (Repl. 2002).**
 - b. Juvenile's and parent's right to voluntarily participation in intake conference, and the right to refuse to participate at any time. **Ark. Code Ann. §9-27-324(d)(1) (Repl. 2002).**
7. Shall make a detention decision within 24 hours from time juvenile was first taken into custody. **Ark. Code Ann. §9-27-313(d)(2)(A)(ii) (Supp. 2007).**
8. Shall consult with prosecutor to determine if diversion of a delinquency case is in the best interest of the juvenile and society. **Ark. Code Ann. §9-27-323(a) (Supp. 2007).**
9. The intake officer may:
 - g. Interview the complainant, victim, or witnesses. **Ark. Code Ann. §9-27-324(b)(1) (Repl. 2002).**
 - b. Review existing records of court, law enforcement agencies, and public records of other agencies. **Ark. Code Ann. §9-27-324(b)(2) (Repl. 2002).**
 - c. Hold conferences with juvenile and parent to discuss the disposition of the complaint. **Ark. Code Ann. §9-27-324(b)(3) (Repl. 2002).**
 - d. Make additional inquiries only with consent of juvenile and parent. **Ark. Code Ann. §9-27-324(c) (Repl. 2002).**

The Attorney General issued an opinion that stated that there is no statutory authority for juvenile intake and probation officers to prevent and detect crime, or to enforce the criminal traffic or highway laws of the state. Consequently, juvenile probation and intake officers do not fall within the statutory definition of law enforcement officers pursuant to Ark. Code Ann. § 12-9-102; therefore, they are not authorized to carry firearms. Furthermore, the Arkansas Law Enforcement Training Academy (ALETA) is neither obligated nor authorized to offer firearms training for juvenile intake and probation officers. Op. Att'y Gen. No. 92-333 (December 1992).

C. Juvenile Probation Officers

1. Shall make appropriate investigations and reports under code rules or court order. **Ark. Code Ann. §9-27-308(b)(2)(A) (Supp. 2007).**
2. Shall make and keep a complete history of each case prior to the disposition and during the course of probation. **Ark. Code Ann. §9-27-347(a) (Supp. 2007).**
 - a. Predisposition and probation reports:
 - (1) Shall be made and kept prior to probation and during course of probation to show condition of juvenile and results of probation. **Ark. Code Ann. §9-27-347(b)(1-2) (Supp. 2007).**
 - (2) Shall include juvenile's:
 - (a) heredity, environment, condition, treatment, development, results, and **Ark. Code Ann. §9-27-347(b)(1) (Supp. 2007).**
 - (b) age, sex, nativity, residence, education, mentality, habits, whether married or single, employment, and income. **Ark. Code Ann. §9-27-347(b)(2) (Supp. 2007).**
 - (3) Shall never be disclosed except when required by law or directed by the court. **Ark. Code Ann. §9-27-347(b)(3) (Supp. 2007).**
3. Shall furnish to each juvenile released on probation a written statement of the terms and conditions of probation, and explain these to juvenile and parent(s) at initial conference following disposition hearing. **Ark. Code Ann. §9-27-347(c) (Supp. 2007); Ark. Code Ann. §9-27-339(a) (Repl. 2002).**
4. Shall report to the juvenile court any violation or breach of the terms and conditions of probation, and may report violation or breach to prosecutor. **Ark. Code Ann. §9-27-347(c) (Supp. 2007); Ark. Code Ann. §9-27-339(b) (Repl. 2002).**
5. Shall aid and counsel juveniles and their families when required by court order. **Ark. Code Ann. §9-27-308(b)(2)(B) (Supp. 2007).**
6. Shall immediately report to the child abuse hotline (1-800-482-5964) when he/she has reasonable cause to suspect child maltreatment, that a child has died as a result of child maltreatment, or he/she observes a child being subject to conditions or circumstances that would reasonably result in child maltreatment. **Ark. Code Ann. §12-12-507(b)(27) (Supp. 2007).**

7. Perform other functions assigned by code, rules, or court. **Ark. Code Ann. §9-27-308(b)(2)(C) (Supp. 2007).**
8. Shall give appropriate aid and assistance to court upon request by judge. **Ark. Code Ann. §9-27-308(b)(2)(D) (Supp. 2007).**

The Attorney General issued an opinion that stated that there is no statutory authority for juvenile intake and probation officers to prevent and detect crime, or to enforce the criminal traffic or highway laws of the state. Consequently, juvenile probation and intake officers do not fall within the statutory definition of law enforcement officers pursuant to Ark. Code Ann. §12-9-102; therefore, they are not authorized to carry firearms. Furthermore, the Arkansas Law Enforcement Training Academy (ALETA) is neither obligated nor authorized to offer firearms training for juvenile intake and probation officers. Op. Att'y Gen. No. 92-333 (December 1992).

D. Juvenile Officer Certification Standards

1. A juvenile intake and probation officer must:
 - a. Be 21 years of age;
 - b. Be a U.S. citizen;
 - c. Have a B.A. in a related field or equivalent experience working with juveniles for at least one year;
 - d. Attend an AOC approved certification course within the first year of employment;
 - e. Obtain 12 hours of continuing education as authorized by the Circuit Court, Juvenile Division Judges each year after attending the initial certification course; and
 - f. Submit to criminal background checks conducted by the county prior to employment. ***Standards adopted by Juvenile Officers Standards Committee effective January 1, 1998.***

E. Dual Role Precluded

1. A person shall not serve as both a probation officer and as an intake officer. **Ark. Code Ann. §16-13-329 (Supp. 2007).**

F. Personnel Contracts

1. Intake and probation services may be provided by contract between county and community-based provider with approval of the judge or judges of the circuit designated to hear juvenile cases pursuant to Supreme Court Administrative Order Number 14. **Ark. Code Ann. §16-13-330 (Supp. 2007).**

2. Private contractors who provide intake and probation services must be certified in same manner as provided for certifying individual intake and probation officers. **Ark. Code Ann. §16-13-330 (Supp. 2007).**

G. Probation And Intake Officers' Salaries

1. State funding
 - a. State shall pay a portion of the salary of full-time, certified probation and intake officer whose salary has been paid by county or counties for one year
 - b. State shall pay the lesser of the following:
 - (1) \$15,000 a year, or
 - (2) one half the officer's average salary as calculated over the last 12 months. **Ark. Code Ann. §16-13-327(d) (Supp. 2007); Ark. Code Ann. §16-13-328(d) (Supp. 2007).**
2. Counties sharing cost
 - a. County or counties within judicial district may contract with providers for intake and probation services for the court if
 - (1) the judge approves; and
 - (2) private contract providers must be certified in same manner as provided for certifying individual intake and probations officers. **Ark. Code Ann. §16-13-330 (Supp. 2007).**
 - b. Two or more counties, cities or school districts may agree by compact to share costs of juvenile court personnel and facilities. **Ark. Code Ann. §9-27-350 (Supp. 2007).**
3. State reimbursement
 - a. The State Auditor shall administer the state reimbursement to the counties for the juvenile officers' previous year salary. **Ark. Code Ann. §16-13-331(a) (Supp. 2001).**
 - b. The county must submit the following documentation to the State Auditor including but not limited to:
 - (1) proof of the juvenile officer's certification and continuing legal education hours;

- (2) a copy of the juvenile officer's W-2 form for the salary year that is being reimbursed; and
 - (3) a completed form concerning the employment status of the officer which shall be designed and distributed by the AOC. **Ark. Code Ann. §16-13-331(b) (Supp. 2001).**
- c. Counties who contract with a service provider to provide juvenile intake and probation services must submit documentation to the State Auditor, including but not limited to:
 - (1) a copy of the contract for the salary year that is being reimbursed;
 - (2) a copy of the juvenile officer's certification and continuing education hours;
 - (3) a copy of the juvenile officer's W-2 form for the salary year that is being reimbursed; and
 - (4) a completed form concerning the employment status of the officer which shall be designed and distributed by the AOC. **Ark. Code Ann. §16-13-331(c) (Supp. 2001).**
- d. Multiple counties in a judicial district may share the cost of the salary of the intake and probation officer.
- e. One county may be designated as the county to be reimbursed by the state or each county shall designate the portion of the salary that is pays for juvenile intake and probation services. **Ark. Code Ann. §16-13-331(d)(1) (Supp. 2001).**
- f. The county may contract with a service provider for full or part-time juvenile intake and probation officer services.
 - (1) The county shall indicate the percentage of the contractor's time that is spent providing intake and probation officer services for the county.
 - (2) The county or the contractor shall be reimbursed for one half of the portion of the salary that is used for such services up to \$15,000. **Ark. Code Ann. §16-13-331(d)(2) (Supp. 2001).**

II. CIRCUIT COURT JURISDICTION

The assignment of juvenile cases to the juvenile division of circuit court shall be described by Supreme Court Administrative Order Number 14. The Circuit Court shall have exclusive original jurisdiction and shall be the sole court for the following proceedings, including but not limited to:

A. Delinquent Juveniles

1. Proceedings in which a juvenile is alleged to be delinquent, including juveniles ages 10 to 18; however, the court may retain jurisdiction up to the age of 21 if the juvenile committed the alleged delinquent act prior to the age of 18. **Ark. Code Ann. §9-27-306(a)(1)(A) (Supp. 2007).**
 - a. Any juvenile ten years or older who has committed an act other than a traffic offense or game and fish violation which, if such act had been committed by an adult, would subject such adult to prosecution for a felony, misdemeanor, or violation under the applicable criminal laws of the state; or **Ark. Code Ann. §9-27-303(15)(A) (Supp. 2007).**

*Note: No juvenile under the age of 10 can be alleged or adjudicated a delinquent; they can be adjudicated an EJJ offender only for capital or first degree murder. A juvenile under the age of 10 can be brought before the juvenile court as a FINS for delinquent acts. **Byler v. State, 306 Ark. 37, 810 S.W.2d 941 (1991).***

- b. Any juvenile who has violated Ark. Code Ann. §5-73-119 (Minor in Possession of a Handgun or Possession on School Property); or **Ark. Code Ann. §9-27-303(15)(A) (Supp. 2007).**

*Although two juveniles brought a handgun to school which could not be fired because parts were missing, the juvenile judge correctly found that Ark. Code Ann. " 5-73-119(a)(1)(A) and (a)(2)(A) refer to the type of ammunition which can be fired from the gun, and not whether the gun itself was at that time capable of being fired. **S.T. and C.B. v. State, 318 Ark. 499, 885 S.W.2d 885 (1995).***

*Juvenile courts have jurisdiction to adjudicate charges under Ark. Code Ann. ' 5-73-119. The court stated that there was a drafting error in the definition of delinquent juvenile which was corrected by Act 36 of 1994, which added Ark. Code Ann. ' 5-73-119 to the definition of juvenile delinquent. **Lucas v. State, 319 Ark. 752, 894 S.W.2d 891 (1995); Rosario v. State, 319 Ark. 764, 894 S.W.2d 388 (1995); Jones v. State, 319 Ark. 762, 894 S.W.2d 591 (1995).***

- c. Any juvenile (no age limit) charged with capital murder or murder in the first degree is subject to extended juvenile jurisdiction. **Ark. Code Ann. §9-27-303(15)(B) (Supp. 2007).**

B. Criminal and Juvenile Division Transfers

1. **Prosecutor Charging Discretion:** The state has discretion to charge a juvenile age 14 or 15 at time of alleged act as in the criminal division or in the juvenile division, if the alleged act constitutes:
 - a. Capital murder;
 - b. Murder in the first degree;
 - c. Kidnapping;
 - d. Aggravated robbery;
 - e. Rape;
 - f. First degree battery; or
 - g. Terroristic act. **Ark. Code Ann. §9-27-318(c)(2) (Supp. 2007).**

Subject matter jurisdiction is based on the pleadings, not the proof. Jensen v. State, 328 Ark. 349, 944 S.W.2d 820 (1997).

Circuit court was affirmed in dismissing the felony information charging a 15- year-old juvenile with one count of burglary (Class B felony) and one count of theft of property valued over \$200 (Class C felony) for lack of jurisdiction. State v. Gray, 319 Ark. 356, 891 S.W.2d 376 (1995).

The Arkansas Supreme Court held that circuit court has jurisdiction only in those specific cases set out in the Juvenile Code as cognizable in adult court when defendant is 14 or 15, and that other charges must be heard in juvenile division court. Banks v. State, 306 Ark. 273, 813 S.W.2d 257 (1991).

2. The state has discretion to charge a juvenile at least 16 years old at the time of the alleged act as an adult or as a juvenile if the act would constitute a felony if committed by an adult. **Ark. Code Ann. §9-27-318(c)(1)(Supp. 2007).**

Since the state never filed a felony charge by information or indictment against the 16-year-old juvenile, the circuit court had no jurisdiction over the criminal charge. Whitehead v. State, 316 Ark. 563, 873 S.W.2d 800 (1994).

3. If the state can file charges in the criminal division of circuit court for an act allegedly committed by a juvenile, the state may file other criminal charges that arise out of same act or course of conduct in the same division case **if** after a hearing before the juvenile division of circuit court, a transfer is ordered. **Ark. Code Ann. §9-27-318(d) (Supp. 2007).**

*Where the three theft charges filed against appellant were not among those enumerated in Ark. Code Ann. ' 9-27-318(b)(1), and where the prosecutor did not file the charges in juvenile court and then move to transfer them to circuit court, the circuit court never had jurisdiction of those charges; therefore, the three counts of theft of property filed against appellant in circuit court were dismissed. **Butler v. State, 324 Ark. 476, 922 S.W.2d 685 (1996).***

*When a juvenile is tried for an offense over which the circuit court has jurisdiction, the court does not lose jurisdiction by the jury's convicting of a lesser included offense, even if the lesser included is not one with which he could have been charged originally as an adult. **Walker v. State, 309 Ark. 23, 827 S.W.2d 637 (1992).***

4. The state may file a motion in juvenile division to transfer a case to the criminal division if a juvenile is 14 or 15 at the time of the alleged offense and is charged with the following:
- a. Murder in the second degree;
 - b. Battery in the second degree;
 - c. Possession of a handgun on school property;
 - d. Aggravated assault;
 - e. Unlawful discharge of a firearm from a vehicle;
 - f. Any felony committed while armed with a firearm;
 - g. Soliciting a minor to join a criminal street gang;
 - h. Criminal use of prohibited weapons;
 - i. First degree escape;
 - j. Second degree escape; or
 - k. A felony attempt, solicitation, or conspiracy to commit any of the following offenses:

(1) Capital murder;

- (2) Murder in the first degree;
 - (3) Murder in the second degree;
 - (4) Kidnapping;
 - (5) Aggravated robbery;
 - (6) Rape;
 - (7) Battery in the first degree; or
 - (8) First degree escape;
 - (10) Second degree escape. **Ark. Code Ann. §9-27-318(b)(1) (Supp.2005).**
- l. Possession of handgun on school property if it constitutes a felony under Ark. Code Ann. 5-73-119(a)(1)(A); or **Ark. Code Ann. §9-27-318(b)(2) (Supp. 2007).**
 - m. Engaged in conduct that constitutes a felony and who has, within the preceding 2 years, 3 times been adjudicated as a delinquent juvenile for acts that would have constituted felonies if they had been committed by an adult. **Ark. Code Ann. §9-27-318(b)(3) (Supp. 2007).**
- 5. Upon a finding by clear and convincing evidence that a case should be transferred to another division of circuit court the judge shall enter an order to that effect. **Ark. Code Ann. §9-27-318(h)(2) (Supp. 2007).**
 - 6. Upon a finding by the criminal division of circuit court that a juvenile age 14-17 should be transferred to the juvenile division, the circuit court may enter an order to transfer the juvenile as an extended juvenile jurisdiction offender. **Ark. Code Ann. §9-27-318(i) (Supp. 2007).**
 - 7. If a juvenile age 14 or 15 is found guilty in the criminal division for an offense other than an offense in subdivision (b) or (c)(2) the criminal division shall enter a juvenile delinquency disposition pursuant to Ark. Code. Ann. §9-27-330. **Ark. Code Ann. §9-27-318(j) (Supp. 2007).**

C. Extended Jurisdiction Juveniles

1 Proceedings in which the juvenile is alleged to be an extended juvenile jurisdiction (EJJ) offender pursuant to Ark. Code Ann. §9-27-501 et seq.. **Ark. Code Ann. §9-27-306(a)(1)(G) (Supp. 2007):**

a. Any juvenile age 13 and under and charged with capital murder, or first degree murder. **Ark. Code Ann. §9-27-501(a)(1-2) (Supp. 2007).**

b. Any juvenile age 14 through 17 at the time of the alleged conduct and charged with the following crimes:

(1) Murder in the second degree;

(2) Second degree battery;

(3) Possession of handgun on school property;

(4) Aggravated assault;

(5) Unlawful discharge of a firearm from a vehicle;

(6) Any felony committed while armed with a firearm;

(7) Soliciting a minor to join a criminal street gang;

(8) Criminal use of a prohibited weapon;

(9) First-degree escape;

(10) Second-degree escape; or

(11) A felony attempt, solicitation, or conspiracy to commit any of the following:

(A) capital murder;

(B) first-degree murder;

(C) second-degree murder;

(D) kidnapping;

(E) aggravated robbery;

(F) rape;

(G) first-degree battery;

- (H) first-degree escape; and
 - (I) second-degree escape. **Ark Code Ann. §9-27-501(a)(3-4) (Supp. 2007); Ark Code Ann. §9-27-318(b)(1) (Supp. 2007).**
- c. Juveniles age 14 through 17 at the time of the alleged offense and charged with the following crimes:
 - (1) Capital murder;
 - (2) Murder in the first degree;
 - (3) Kidnapping;
 - (4) Aggravated robbery;
 - (5) Rape;
 - (6) Battery in the first degree; and
 - (7) Terroristic act. **Ark Code Ann. §9-27-501(a)(3-4) (Supp. 2007); Ark. Code Ann. §9-27-318(c)(2) (Supp. 2007).**
- d. The circuit court, criminal division may enter an order to transfer the case as an EJJ case when it determines that a juvenile age 14 through 17 and charged with the crimes in Ark. Code Ann. §9-27-318(c)(2) should be transferred to the juvenile division of circuit court. **Ark. Code Ann. §9-27-318(i) (Supp. 2007).**

D. Family in Need of Services (FINS)

Proceedings in which a family is alleged to be in need of services as defined by this subchapter, which shall include juveniles from birth to 18, except for a juvenile who has been adjudicated a FINS and who is in foster care before age 18, the juvenile may request the court to continue jurisdiction until the age of 21 if the juvenile is engaged in or has a viable plan for instruction or treatment. However, the court shall dismiss jurisdiction after the age of 18 if the juvenile requests dismissal or upon the juvenile's completion or dismissal from independent living services. **Ark. Code Ann. §9-27-306(a)(1)(D)(Supp. 2007).**

- 1. FINS means any family with a juvenile who exhibits behavior that includes, but is not limited to being a truant, a runaway, or one habitually disobedient to the reasonable and lawful commands of his parents. **Ark. Code Ann. §9-27-303(2) (Supp. 2007).**

2. Upon notification by the school district or adult education program, that a student has exceeded the number of unexcused absences the prosecuting authority shall:
 - a. File a FINS petition pursuant to Ark. Code Ann. §9-27-310; or
 - b. Enter a diversion agreement pursuant to Ark. Code Ann. §9-27-323. **Ark. Code Ann. 6-18-222(a)(6)(A) (Supp. 2003).**
3. FINS include delinquent acts of children under the age of 10. *Byler v. State*, **306 Ark. 37, 810 S.W.2d 941 (1991).**

E. Dependent-Neglected Juveniles

1. Proceedings in which a juvenile is alleged to be dependent or dependent-neglected from birth to 18, except a juvenile adjudicated prior to the age of 18 may request the court to continue jurisdiction until the age of 21 as long as the juvenile engages in or has a viable plan for a course of treatment or instruction. **Ark. Code Ann. §9-27-306(a)(1)(B)(i) (Supp. 2007).**
2. If a juvenile was adjudicated dependent or dependent-neglected and was in foster care at 18 years of age and left foster care but decides to return prior to the age of 21 to benefit from independent living services, the juvenile may contact his/her AAL to petition the court to return to the court's jurisdiction to receive independent living services. **Ark. Code Ann. §9-27-306(a)(1)(B)(ii) (Supp. 2007).**

Dependent-neglected juvenile means any juvenile who is at substantial risk of harm as a result of the following acts or omissions to the juvenile, a sibling, or another juvenile: abandonment, abuse, sexual abuse, sexual exploitation, neglect, parental unfitness, being present in a dwelling or structure during the manufacturing of methamphetamine with the knowledge of the parent, guardian or custodian, and dependent juveniles. **Ark. Code Ann. §9-27-303(18) (Supp. 2007).**

DHS filed a petition for writ of certiorari arguing that the trial court exceeded its jurisdiction when it split legal and physical custody between a maternal grandmother and DHS following an adjudication hearing. The Court stated that DHS confused the court's jurisdiction, which is a court's ability to act, with a court's error in interpreting a statute. Jurisdiction is the power of the court to hear and determine the subject matter in controversy between the parties. The trial court had jurisdiction to enter an order establishing custody. The proper subject of an appeal is whether the court correctly interpreted the statute in making its custody decision. The writ of certiorari was denied. Ark. Dep't of Human Servs. v. Circuit Court of Sebastian County, 363 Ark. 389, 214 S.W.3d 856 (2005).

The trial court was reversed for failure to adjudicate the siblings of a child who was found dependent-neglected. Evidence included a severe whipping, pouring salt into the wounds, keeping the child in the same pair of underwear for two days while bleeding and oozing caused his underwear to stick to his rear, and failure to seek medical care. The child abuse of one child demonstrated parental unfitness that put the other siblings at substantial risk of harm. Arkansas Dep't of Human Servs. v. Jorden, 80 Ark. App. 104, 91 S.W.3d 536 (2002).

A dependent-neglected child is one who is at risk of serious harm from an unfit parent and such unfitness is not necessarily predicated upon the parent actually causing some direct injury to the child in question. Further, the juvenile court is a court of competent jurisdiction to determine that a parent committed a serious felony assault that results in serious bodily injury. Brewer v. Arkansas Dep't. Of Human Servs., 71 Ark. App. 364, 32 S.W.3d 22 (2001) (substituted opinion on grant of rehearing delivered April 25, 2001).

Juvenile courts have exclusive original jurisdiction for proceedings in which a juvenile is alleged to be dependent-neglected. The juvenile code provides that petitions for dependency-neglect may be filed by any adult. Although appellant argued that the juvenile courts were not intended to assume jurisdiction over ordinary custody matters, the appellate court noted that the allegations of dependency-neglect separated the case from those involving ordinary custody matters. The trial judge was correct in reasoning that the consolidation of the three divorce proceedings with the juvenile action was appropriate to prevent conflicting custody orders within the same judicial district. Lowell v. Lowell, 55 Ark. App. 211, 934 S.W.2d 540 (1996).

- a. **Abandonment** means the failure of the parent to provide reasonable support and to maintain regular contact with the juvenile through statement or contact, when the failure is accompanied by an intention on the part of the parent to permit the condition to continue for an indefinite period in the future, and failure to support or maintain regular contact with the juvenile without just cause, or an articulated intent to forego parental responsibility. **Ark. Code Ann. §9-27-303(2) (Supp. 2003).**
- b. **Abandoned Infant** means a juvenile less than nine months of age and whose parent, guardian, or custodian left the child alone or in the possession of another person without identifying information or with an expression of intent by words, actions, or omissions not to return for the infant. **Ark. Code Ann. §9-27-303(1) (Supp. 2007).**

c. **Abuse** means any of the following acts or omissions by a parent, guardian, custodian, foster parent, person 18 or older living in the home with the child or any person entrusted with the juvenile's care by a parent, guardian, custodian, or foster parent, including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible for the juvenile's welfare:

- (1) Extreme or repeated cruelty to a juvenile; **Ark. Code Ann. §9-27-303(3)(A)(i) (Supp. 2007).**
- (2) Engaging in conduct creating a realistic and serious threat of death, permanent or temporary disfigurement, or impairment of any bodily organ; **Ark. Code Ann. §9-27-303(3)(A)(ii) (Supp. 2007).**
- (3) Injury to a juvenile's intellectual, emotional, or psychological development as evidenced by observable and substantial impairment of the juvenile's ability to function within the juvenile's normal range of performance and behavior; **Ark. Code Ann. §9-27-303(3)(A)(iii) (Supp. 2007).**
- (4) Any injury which is at variance with the history given; **Ark. Code Ann. §9-27-303(3)(A)(iv) (Supp. 2007).**
- (5) Any non-accidental physical injury; **Ark. Code Ann. §9-27-303(3)(A)(v) (Supp. 2007).**
- (6) Any of the following intentional or knowing acts, with physical injury:
 - (A) throwing, kicking, burning, biting or cutting a child;
 - (B) striking a child with a closed fist;
 - (C) shaking a child; or
 - (D) striking a child on the face. **Ark. Code Ann. §9-27-303(3)(A)(vi) (Supp. 2007).**
- (7) Any of the following intentional or knowing acts, with or without physical injury and without justifiable cause:
 - (A) striking a child age six or younger on the face or head;
 - (B) shaking a child age three or younger;

- (C) interfering with a child's breathing;
 - (D) urinating or defecating on a child;
 - (E) pinching, biting or striking a child in the genital area;
 - (F) Giving or permitting a child to consume or inhale a poisonous or noxious substances not prescribed by a doctor that has the capacity to interfere with normal physiological functions;
 - (G) Giving or permitting a child to consume or inhale a substance not prescribed by a doctor that has the capacity to alter the mood including but not limited to: marijuana, alcohol (excluding alcohol recognized religious ceremony or service), narcotics, or over-the-counter drugs purposely administered as an overdose or inappropriately given so the child is detrimentally impacted;
 - (H) Exposing a child to chemicals that have the capacity to interfere with normal physiological functions, including but not limited to chemicals used during the manufacture of methamphetamine;
 - (I) Subjecting a child to Munchausen Syndrome by Proxy when reported and confirmed by medical personnel or a medical facility; **Ark. Code Ann. §9-27-303(3)(A)(vii) (Supp. 2007).**
- (8) This list is illustrative of unreasonable action and is not intended to be exclusive. No unreasonable action shall be construed to permit a finding of abuse without having established the elements of abuse. **Ark. Code Ann. §9-27-303(B) (Supp. 2007).**
- (9) **“Abuse” shall not include** physical discipline of a child when it is reasonable and moderate and is inflicted by a parent or guardian for purposes of restraining or correcting the child. It is not abuse when a child suffers transient pain or minor temporary marks as the result of a reasonable restraint if:
- (A) The person exercising the restraint is an employee of an agency licensed or exempted from licensure under the Child Welfare Licensing Act;
 - (B) The agency has policy and procedures regarding restraints;

- (i) no other alternative exists to control the child except for a restraint;
 - (ii) the child is in danger of hurting himself/herself or others;
 - (iii) the person exercising the restraint has been trained in properly restraining children, de-escalation, and conflict resolution techniques; and
 - (iv) the restraint is for a reasonable period of time. **Ark. Code Ann. §9-27-303(C)(i-ii) (Supp. 2007).**
- (10) Reasonable and moderate physical discipline inflicted by a parent or guardian shall not include any act that is likely to cause, and which does cause, injury more serious than transient pain or minor temporary marks. **Ark. Code Ann. §9-27-303(C)(iii) (Supp. 2007).**
- (11) The age, size, and condition of the child and the location of the injury and the frequency or recurrence of injuries shall be considered when determining whether the physical discipline is reasonable or moderate. **Ark. Code Ann. §9-27-303(C)(iv) (Supp. 2007).**
- d. **Neglect** means those acts or omissions of a parent, guardian, custodian, foster parent, or any person who is entrusted with the juvenile's care by a parent, custodian, guardian, or foster parent including, but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person legally responsible under state law for the juvenile's welfare, which constitute:
- (1) Failure or refusal to prevent the abuse of the juvenile when the person knows or has reasonable cause to know the juvenile is or has been abused;
 - (2) Failure or refusal to provide the necessary food, clothing, shelter and education required by law, including failure to follow an individualized education program, or medical treatment necessary for the juvenile's well-being, except when the failure or refusal is caused primarily by the financial inability of the person legally responsible and no services for relief have been offered or rejected.
 - (3) Failure to take reasonable action to protect the juvenile from abandon-

ment, abuse, sexual abuse, sexual exploitation, neglect, or parental unfitness where the existence of such condition was known or should have been known;

- (4) Failure or irremediable inability to provide for the essential and necessary physical, mental, or emotional needs of the juvenile, including failure to provide shelter that does not pose a risk of health or safety to the juvenile;
- (5) Failure to provide for the juvenile's care and maintenance, proper or necessary support, or medical, surgical, or other necessary care;
- (6) Failure, although able, to assume responsibility for the care and custody of the juvenile or to participate in a plan to assume the responsibility; or
- (7) Failure to appropriately supervise the juvenile that results in a juvenile being left alone at an inappropriate age or in inappropriate circumstances, creating a dangerous situation or a situation which puts the juvenile at risk of harm. **Ark. Code Ann. §9-27-303(36)(A) (Supp. 2007).**

(8) **Neglect** shall also include causing a newborn to be born with:

(A) an illegal substance (a drug prohibited to be used or possessed without a prescription under the Ark. Crim. Code §5-1- 101 *et seq.*) present in the newborn's bodily fluids or bodily substances as a result of the pregnant mother knowingly using an illegal substance before the birth of the newborn. A test of the child's bodily fluids or bodily substances may be used as evidence to establish neglect pursuant to this subsection.

(B) a health problem as a result of the pregnant mother's use before birth of an illegal substance (a drug prohibited to be used or possessed without a prescription under the Ark. Crim. Code §5-1- 101 *et seq.*). A test of the child's or mother's bodily fluids or bodily substances may be used as evidence to establish neglect pursuant to this subsection. **Ark. Code Ann. §9-27-303(36)(B) (Supp. 2007).**

e. **Sexual abuse** means sexual intercourse, deviate sexual activity, or sexual contact by forcible compulsion (including attempted), indecent exposure, or forcing the watching of pornography or live human sexual activity by a person 10 years or older to a person younger than 18. **Ark. Code Ann. § 9-27-303(50)(A) (Supp. 2007).**

- (1) Sexual intercourse, deviate sexual activity or sexual contact (including attempted) by a person 18 years or older to a person not his/ her spouse who is younger than 16. **Ark. Code Ann. §9-27-303(50)(B)(Supp. 2007).**
- (2) Sexual intercourse, deviate sexual activity or sexual contact (including attempted) by sibling or a caretaker to a person younger than 18. **Ark. Code Ann. §9-27-303(50)(C) (Supp. 2007).**
- (3) Forcing or encouraging the watching of pornography, forcing permitting or encouraging the watching of live sexual activity, forcing listening to phone sex line, or an act of voyeurism as defined by Ark. Code Ann. §5-16-102 by a caretaker to a person younger than 18. **Ark. Code Ann. §9-27-303(50)(D) (Supp. 2007).**
- (4) Sexual intercourse, deviate sexual activity, or sexual contact by forcible compulsion (including attempted) by a person younger than 10 to a person younger than 18. **Ark. Code Ann. §9-27-303(50)(E) (Supp. 2007).**
 - (A) **Caretaker** means a parent, guardian, custodian, foster parent or any person 10 years or older entrusted with a child's care by a parent, guardian, custodian or foster parent, including but not limited to, an agent or employee of a public or private residential home, child care facility, public or private school, or any person responsible for a child's welfare. **Ark. Code Ann. §9-27-303(8) (Supp. 2007).**
 - (B) **Forcible compulsion** means physical force, intimidation or threat (express or implied) of death, physical injury to, rape, sexual abuse or kidnapping of any person. If the act was committed against the will of the juvenile, then a forcible compulsion has been used.
 - (C) The age, developmental stage, and stature of the victim and the relationship between the victim to the assailant, as well as the threat of deprivation of affection, rights, and privileges from the victim by the assailant, shall be considered in weighing the sufficiency of the evidence to prove compulsion. **Ark. Code Ann. §9-27-303(27) (Supp. 2007).**
 - (D) **Sexual contact** means any act of sexual gratification involving touching, directly or through clothing, of the sex organs, buttocks, or anus of a juvenile, or the breast of a female, encouraging the juvenile to touch the offender in a

sexual manner, or the requesting the offender to touch the juvenile in a sexual manner. Evidence of **sexual gratification** may be inferred from the attendant circumstances surrounding the investigation of the specific complaint of child maltreatment. Nothing in this section shall permit normal affectionate hugging to be construed as sexual contact. **Ark. Code Ann. §9-27-303(51) (Supp. 2007).**

- (E) **Deviant sexual activity** means any act of sexual gratification involving:
 - (i) penetration, however slight, of the anus or mouth of one person by the penis of another person; or
 - (ii) penetration, however slight, of the labia majora or anus of one person by a body member or foreign instrument manipulated by another person. **Ark. Code Ann. §9-27-303(21) (Supp. 2007).**

- (F) **Sexual exploitation** includes allowing, permitting, or encouraging participation or depiction of the juvenile in prostitution, obscene photographing, filming, or obscenely depicting, obscenely posing or obscenely posturing a juvenile for any use or purpose. **Ark. Code Ann. §9-27-303(52) (Supp. 2007).**

F. Dependent Juveniles

1. A child of a parent who is in DHS custody;
2. A child whose parent or guardian is incarcerated and the parent or guardian has no appropriate relative or friend willing or able to provide for the child;
3. A child whose parent or guardian is incapacitated, whether temporarily or permanently, so that the parent or guardian cannot provide care for the juvenile, and the parent or guardian has no appropriate relative or friend willing or able to provide care for the child;
4. A child whose custodial parent dies and no stand-by guardian exists;
5. A child who is an infant relinquished to DHS custody for the sole purpose of adoption;
6. A safe haven baby, pursuant to Ark. Code Ann. §9-34-201 *et seq.*, or

7. A child who has disrupted his/her adoption and the adoptive parents has exhausted resources available to them. **Ark. Code Ann. §9-27-303(17) (Supp. 2007).**

G. Emergency Custody/72-Hour Hold

The circuit court shall have jurisdiction in proceedings in which emergency custody or a 72-hour hold has been placed on a juvenile pursuant to Ark. Code Ann. §9-27-313 or Ark. Code Ann. §12-12-516. **Ark. Code Ann. §9-27-306(a)(1)(C) (Supp. 2007).**

H. Termination of Parental Rights

A TPR petition may be filed by DHHS or the attorney ad litem for juveniles under the jurisdiction of the juvenile division court. **Ark. Code Ann. §9-27-306(a)(1)(E) (Supp. 2007); Ark. Code Ann. §9-27-341(a)(1)(A) (Supp. 2007).**

The Arkansas Supreme Court found that the juvenile court had jurisdiction over the father in termination case filed subsequent to dependency-neglect case. Arkansas Dep't of Human Servs v. Farris, 309 Ark. 575, 832 S.W.2d 482 (1992).

I. DHHS Custody

1. Proceedings where custody of a juvenile is transferred to DHHS or proceedings for which custodial placement proceedings are filed by DHHS. **Ark. Code Ann. §9-27-306(a)(1)(F and I) (Supp. 2007).**
2. When DHHS exercises custody of a juvenile pursuant to Ark. Code Ann. §12-12-516 (72-hour hold) and DHHS files a dependency-neglect petition concerning that juvenile, any party to that proceeding may file a motion to transfer any other legal proceeding concerning the juvenile to the court hearing the dependency-neglect petition. Upon such motion being filed, the other legal proceeding shall be transferred to the court hearing the dependency-neglect case. **Ark. Code Ann. §9-27-306(a)(3)(A-B) (Supp. 2007).**

J. Adoption

1. The court shall retain jurisdiction to issue orders of adoption, interlocutory or final, if a juvenile is placed outside of the state of Arkansas. **Ark. Code Ann. §9-27-306(a)(4) (Supp. 2007).**
2. Adoptions may be filed in a juvenile court that has previously asserted continuing jurisdiction of the juvenile. **Ark. Code Ann. §9-27-307(a)(4) (Supp. 2007).**

K. Guardianship

1. If a juvenile is the subject matter of an open case filed under the Arkansas Juvenile Code, the guardianship petition shall be filed in that case. **Ark. Code Ann. §28-65-107(c) (Supp. 2007).**
2. Guardianships may be filed in a juvenile court that has previously asserted continuing jurisdiction of the juvenile. **Ark. Code Ann. §9-27-307(a)(4) (Supp. 2007).**

L. Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA)

The circuit court shall have jurisdiction to hear proceedings commenced in any part of the state or court of comparable jurisdiction of another state which are transferred pursuant to the UCCJEA Ark. Code Ann. §9-19-101 *et seq.* **Ark. Code Ann. §9-27-306(d) (Supp. 2007).**

Appellant did not argue with the trial court's initial jurisdiction with the emergency order, but argued that the trial court lacked jurisdiction because it failed to contact the Louisiana court. However, there was no evidence in the record of a custody order or proceeding in Louisiana identified by appellant pursuant to Ark. Code Ann. §9-19-209. There was no certified copy of a Louisiana custody order ever registered in accord with Ark. Code Ann. §9-19-305. The only evidence was a statement by appellant about a case involving the physical abuse of her daughter five years ago and that the case had been closed.

*UCCJEA does not require a trial court who has assumed temporary jurisdiction to return custody to a parent where there is no competing custody order and in such absence Ark. Code Ann. §9-19-204(b) applied and Arkansas became the home state of the children. **Davis v. v. Arkansas Dep't. of Human Servs., 98 Ark. App. 275, ___ S.W. 3d___ (2007).***

The trial court was affirmed for dismissing a paternity and child support petition finding that it did not have jurisdiction because Arkansas was not the home state under the UCCJEA. The appellant argued that the paternity statutes, not the UCCJEA, should govern. The UCCJEA is the exclusive method for determining the proper forum in child custody proceedings, including paternity, involving other jurisdictions. The trial court was correct in finding that Arkansas was not the

home state. There was evidence that the child lived in South Carolina. There was no evidence that the child had ever lived in Arkansas; no court declined to exercise jurisdiction on the grounds that Arkansas was a more appropriate forum; and no other American court had exercised jurisdiction. **Greenhough v. Goforth, 354 Ark. 502, 126 S.W.3d 345 (2003).**

The Supreme Court held that the probate court had jurisdiction to consider the guardianship petition. It further held that the Florida *ex parte* order at issue was void *ab initio* and invalid on its face; that even had the Florida order been valid, it was not entitled to full faith and credit because it was never registered in Arkansas as required under the UCCJEA. DHS was without authority to seize the child and relinquish the child to Florida in direct violation of an order of a probate court in Arkansas. **Arkansas Dep't of Human Servs. v. Cox, 349 Ark. 205, 82 S.W.3d 806 (2002).**

M. Arkansas Supreme Court Administrative Order No. 14

1. The assignment of cases to the juvenile division of circuit courts shall be described by Supreme Court Order No. 14.
2. The definitions of probate and domestic relations are not intended to restrict the juvenile division of circuit court from hearing adoption, guardianship, support, custody, paternity or commitment issues which may arise in juvenile proceedings. **Supreme Court Administrative Order 14 (1)(b) (Adopted April 6, 2001; amended November 1, 2001).**

*It was clearly erroneous for the trial court to grant an adoption finding that the appellant failed to have substantial contact or to contribute support. There was no evidence that appellant failed to significantly communicate or provide for her child for a one-year period. The trial court did not specify the time period for which the contact or contribution failed to occur. Further, the appellate court could not determine from review of the record if it lasted for the statutorily mandated period of one-year. **Ray v. Sellers, 82 Ark App. 530, 120 S.W.3d 134 (2003).***

*The trial court did not have jurisdiction to terminate appellant's parental rights. Ark. Code Ann. ' 9-9-220 sets out grounds for termination but only in connection with an adoption proceeding. **Hudson v. Kyle, 352 Ark. 346, 101 S.W.3d 202 (2003).***

The Court of Appeals reversed the trial court's order granting appellee putative father's motion to vacate an adoption based upon the trial court's finding that his consent was required. The Court remanded for the trial court to consider A.C.A. ' 9-9-206 in conjunction with provision ' 9-9-207, upon which the trial court relied in finding that the appellee's consent was

required. The Court of Appeals noted that the two provisions must be read together, and that the trial court should have the first opportunity to analyze the evidence under the appropriate statutory framework. **Britton v. Gault, 80 Ark. App. 311, 94 S.W. 3d 926 (2003).**

Adoption case was certified to the Supreme Court by the court of appeals as presenting an issue of significant public interest. Court affirmed the probate court's reversal of an adoption and held that, before actual notice to a father of the adoption of his biological child may be deemed an adequate substitute for the notice required by Ark. Code Ann. § 9-9-212 and Rule 4 of the Rules of Civil Procedure, that notice must be gained before the entry of the adoption decree. Here, the natural father did not have knowledge of the adoption until after a final decree had been entered that forever terminated his rights as the child's father. Knowledge that an adoption has already occurred is not the same as notice and an opportunity to be heard before parental rights are terminated. Because the father had not been provided the kind of notice contemplated by Ark. Code Ann. § 9-9-212 and the due process provisions of the US and Arkansas constitutions, the one-year limitations provision of section 9-9-216(b) did not bar his petition to set aside the adoption. **Mayberry v. Flowers, 347 Ark. 476, 65 S.W.3d 418 (2002).**

The Court of Appeals affirmed a trial court's overturning an adoption outside the one-year period of time set out in Ark. Code Ann. 9-9-216(b) (Repl. 2002). The trial court had found, and the Court of Appeals affirmed, the factual finding that the adoptive parent(s) had never taken custody of the adoptive child. The Court also affirmed the trial court's finding that a fraud was practiced upon the court in procuring the decree of adoption. **Wunderlich.v. Alexander, 80 Ark. App. 167, 92 S.W. 3d 715 (2002).**

Minor mother challenged an adoption of her child that was granted without the knowledge of her parents in this appeal of the trial court's denial of a petition to set aside the interlocutory order of adoption. The Court of Appeals found that the trial court's finding that the teenager was not under duress when she executed a consent to adopt was not clearly erroneous. Social workers visited her only after she requested help with her baby's adoption, and she testified that neither of them attempted to force her to place her child for adoption, but that she made the decision herself. She was provided a guardian ad litem who explained the process of consenting and of revoking her consent. The Court pointed out that consent can be withdrawn after an interlocutory order only upon a showing of fraud, duress, or intimidation and that, given the showing that she was under no duress at the time she executed the consent, her argument must fail. **Gray v. The Gladney Center, 79 Ark. App. 165, 87 S.W.3d 797 (2002).**

N. No Jurisdiction

In no event shall a juvenile remain under the court's jurisdiction past 21 years of age.
Ark. Code Ann. §9-27-306(a)(2) (Supp. 2007).

III. DISTRICT COURT JURISDICTION OF JUVENILES

A. Curfew Violations

1. The juvenile division of circuit court shall have concurrent jurisdiction with district court for juvenile curfew ordinance violations. **Ark. Code Ann. § 9-27-306(c)(1) (Supp. 2007).**
2. The prosecuting authority may file a curfew violation FINS petition in juvenile division of circuit court or citation in municipal court. **Ark. Code Ann. § 9-27-306(c)(2) (Supp. 2007).**

B. Traffic Offenses - Ark. Code Ann. - § 9-27-303(15) (Supp. 2007).

*The Arkansas Supreme Court held that DWI is a traffic offense. Therefore, the juvenile division of chancery court does not have jurisdiction of DWI offenses. **Robinson v. Sutterfield, 302 Ark. 7, 786 S.W.2d 572 (1990).***

*Because the juvenile court has no subject matter jurisdiction of DWI cases, the juvenile division court was without jurisdiction to dismiss the case on speedy trial grounds. Further, the court had no statutory authority to transfer the case to municipal court. Juvenile court was without authority to take any action in the case. **State v. J.B., 309 Ark. 70, 827 S.W.2d 144 (1992).***

C. Game & Fish Violations - Ark. Code Ann. § 9-27-303(15) (Supp. 2007).

IV. PETITIONERS, PETITIONS, VENUE & TRANSFERS

A. Petitioners

1. Delinquency
 - a. Any person can submit a complaint to an intake officer for investigation and upon substantiation the officer may refer to the prosecuting attorney or any appropriate agency. **Ark. Code Ann. § 9-27-310(d)(1) (Supp. 2007).**
 - b. Only the prosecutor can file a delinquency petition. **Ark. Code Ann. § 9-27-310(b)(1) (Supp. 2007).**
 - c. Only the prosecutor can file a petition for revocation of probation. **Ark. Code Ann. § 9-27-310(b)(1) (Supp. 2007).**
2. Only a law enforcement officer, prosecuting attorney, or DHHS or its designee can file a dependency-neglect petition seeking ex parte emergency relief. **Ark. Code Ann. § 9-27-310(b)(2) (Supp. 2007).**
3. Any adult or any member 10 years or older of the immediate family alleged in need of services can file a dependency-neglect or FINS petition. **Ark. Code Ann. § 9-27-310(b)(3) (Supp. 2007).**
4. A paternity petition can be filed by the:
 - a. Biological mother,
 - b. Putative father,
 - c. Juvenile, or
 - d. Office of Child Support Enforcement (OCSE). **Ark. Code Ann. § 9-27-310(b)(4) (Supp. 2007).**
5. Only DHHS and the attorney ad litem can file petition to terminate parental rights pursuant to the juvenile code. **Ark. Code Ann. § 9-27-341(a)(1)(A) (Supp. 2007).**

B. Defendants

1. All of the following parties named in petition (except paternity petitions) are defendants:
 - a. Juvenile;
 - c. Each of the parents or the surviving parent;
 - c. The person, agency or institution having custody of juvenile;
 - d. Putative and presumed legal father in paternity petition; and
 - e. Putative parent in dependency-neglect petition. **Ark. Code Ann. § 9-27-311(c) (Repl. 2002).**

*The trial court erred in denying standing to a putative father where he claimed to be the father and the mother claimed that he was the biological father. **Jorden v. State, 73 Ark. App. 1, S.W.3d 914 (2001).***

C. Intervention

Where appellees moved to intervene on the day a temporary order finding probable cause for dependency-neglect was entered, which was just over a month after the original petition had been filed, and where appellant did not show that there was any prejudice as a result of the intervention; the juvenile court did not abuse its discretion in finding that the motion was timely.

*The timeliness of a motion to intervene is a matter clearly within the trial court's discretion, and it will be reversed only where that discretion has been abused; the factors considered by the appellate court regarding the timeliness of a motion to intervene are: (1) how far the proceedings have progressed; (2) any prejudice to other parties caused by the delay; and (3) the reason for the delay. Under Ark. R. Civ. P. Rule 24(b), intervention may be permitted when the main action and an applicant's claim or defense have a question of law or fact in common; here, the common facts and questions of law involved the proper care and custody of appellant's three sons; as with timeliness, permissive intervention is also a matter within the trial court's discretion, and the appellate court will reverse only for abuse of that discretion. **Lowell v. Lowell, 55 Ark. App. 211, 934 S.W.2d 540 (1996).***

*The Arkansas Supreme Court found that a stepparent had no legal rights to the children; therefore, he could not intervene in proceedings initiated by DHS. The chancellor correctly found that the appellant's divorce from the children's mother rendered moot any interest he might have. **Stair v. Phillips, 315 Ark. 429, 867 S.W.2d 453 (1993).***

D. Contents of Petition

1. Petition shall include:
 - a. Name, address, gender, date of birth and social security number of each juvenile subject to the petition. **Ark. Code Ann. § 9-27-311(a)(1)(A) (Repl. 2002).**

A single petition for dependency-neglect or FINS shall be filed which includes all siblings who are subjects of the petition. **Ark. Code Ann. § 9-27-311(a)(1)(B) (Repl. 2002).**
 - b. Name and address of each of the juvenile's parents or surviving parent. **Ark. Code Ann. § 9-27-311(a)(2) (Repl. 2002).**
 - c. Name and address of the person, agency or institution having custody of juvenile or having a claim of custody or guardianship of the juvenile. **Ark. Code Ann. § 9-27-311(a)(3-4) (Repl. 2002).**
 - d. Name and address of putative and presumed legal father in petition to establish paternity. **Ark. Code Ann. § 9-27-311(a)(5) (Repl. 2002).**
 - e. The name and address of a putative parent in a dependency-neglect proceeding. **Ark. Code Ann. § 9-27-311(a)(6) (Repl. 2002).**
 - f. Facts which, if proven, would bring juvenile and juvenile's family within court's jurisdiction. **Ark. Code Ann. § 9-27-311(d)(1)(A) (Repl. 2002).**
 - g. Code section upon which jurisdiction is based. **Ark. Code Ann. § 9-27-311(d)(1)(B) (Repl. 2002).**
 - h. Relief requested by petitioner. **Ark. Code Ann. § 9-27-311(d)(1)(C) (Repl. 2002).**
 - i. Sections of criminal laws allegedly violated if delinquency petition. **Ark. Code Ann. § 9-27-311(d)(1)(D) (Repl. 2002).**
2. Except in delinquency, paternity or TPR petitions, a petition shall be supported by an affidavit of facts. **Ark. Code Ann. § 9-27-311(d)(2) (Repl. 2002).**
3. If name or address of anyone listed above cannot be ascertained by petitioner with reasonable diligence, such shall be alleged and petition shall not be dismissed for insufficiency, but the court shall direct appropriate measures to find and give notice to such persons **Ark. Code Ann. § 9-27-311(b) (Repl. 2002).**

E. Filing Petition

1. With the court clerk.
2. By transfer from another court. **Ark. Code Ann. § 9-27-310(a) (Supp. 2007).**
3. No fees, including but not limited to fees for filing, copying, faxing, including petitions for adoptions and guardianships, summons or subpoenas shall be charged or collected by the clerk or sheriff's office for cases filed in the circuit court pursuant to this subchapter by a governmental entity or nonprofit, including but not limited to the PA, AAL in dependency-neglect cases or DHHS. **Ark. Code Ann. § 9-27-310(e) (Supp. 2007).**
4. If the clerk's office has a fax machine the clerk shall accept fax transmission of papers filed pursuant to this subchapter as described in Rule 5 of the Arkansas Rules of Civil Procedure in cases commenced by a governmental entity or nonprofit, including but not limited to the PA, AAL in dependency-neglect cases or DHHS. **Ark. Code Ann. § 9-27-310(f) (Supp. 2007).**

F. Notification

1. Any juvenile defendant age 10 and above and any person having care and control of the juvenile and any adult defendants shall be served with:
 - a. Copy of petition;
 - b. Notice of hearing; and
 - c. Order to appear as provided by Arkansas Rules of Civil Procedure **Ark. Code Ann. § 9-27-312 (Repl. 2002).**

*The U.S. Supreme Court held that juvenile and parents or guardian must be notified in writing of specific charges or factual allegations to be considered in hearing and that such notice be given at the earliest practicable time, sufficiently in advance of hearing to permit preparation. **In Re Gault, 387 U.S. 1 (1967).***

2. Concurrent with the filing of a petition that requests that DHHS take custody or provide services to a juvenile and his/her family, the petitioner shall mail a copy of the petition to the DHHS Director and local OCC attorney. **Ark. Code Ann. § 9-27-310(c) (Supp. 2007).**

G. Venue

1. Juvenile shall be brought before the circuit court in county in which juvenile resides, except the following proceedings may be commenced in county where alleged act or omission occurred in:
 - a. Nonsupport proceedings after paternity is established; or
 - b. Delinquency proceedings; or
 - c. Dependency-neglect proceedings. **Ark. Code Ann. § 9-27-307(a)(1-2) (Supp. 2007).**

No dependency-neglect proceeding shall be dismissed if filed in the incorrect county, but it shall be transferred to the proper county upon discovery of the juvenile's residence. **Ark. Code Ann. § 9-27-307(a)(1)(B) (Supp. 2007).**

2. UCCJEA proceedings shall be commenced in court as provided by UCCJEA. **Ark. Code Ann. § 9-27-307(a)(3) (Supp. 2007).**
3. Adoptions and guardianships may be filed in the court which has previously asserted continuing jurisdiction of the juvenile. **Ark. Code Ann. § 9-27-307(a)(4) (Supp. 2007).**
- D. Except for detention hearings pursuant to Ark. Code Ann. §9-27-326 and probable cause hearings pursuant to Ark. Code Ann. §9-27-315, circuit judges must have agreement of the parties to hear contested cases outside of the county of venue as required by Ark. Code Ann. §16-13-210. **Ark. Code Ann. § 9-27-307(a)(5) (Supp. 2007).**

H. Case Transfers

1. Following an adjudication the court, on its own motion or any party's motion, may transfer the case to the county of the juvenile's residence if the UCCJEA does not apply. **Ark. Code Ann. § 9-27-307(b)(1) (Supp. 2007).**

NOTE: Upon transferring a case the judge should contact the judge in the judicial circuit for administrative purposes to see if the judge will accept the case and to schedule the next hearing date. The transferring judge should set a date and time for the next hearing in the new Judicial District and county in the transfer order.

2. The court shall not transfer any case where a TPR petition has been filed unless the court has taken final action on the petition. **Ark. Code Ann. § 9-27-307(b)(2) (Supp. 2007).**

3. Prior to transferring a case to another venue, the court shall contact the judge to confirm that the judge will accept the case and upon confirmation that the judge will accept the case, the transferring judge shall enter a transfer order that shall:
 - a. indicate that the judge has accepted the transfer;
 - b. state the locate of the court in the new venue; and
 - c. set the date and time of the next hearing. **Ark. Code Ann. § 9-27-307(c)(1-2) (Supp. 2007).**
4. The transfer order shall be provided to all parties in the case and shall be transmitted immediately to the judge accepting the transfer along with copies of the court records. **Ark. Code Ann. § 9-27-307(c)(2-3) (Supp. 2007).**

V. TAKING INTO CUSTODY

A. Alleged Delinquent Juvenile

1. With Warrant

- a. Officer shall immediately take juvenile before court which issued warrant and make every effort possible to notify the custodial parent, guardian, or custodian of the juvenile's location. **Ark. Code Ann. §9-27-313(b)(1) (Supp. 2007).**
- b. The judge shall decide whether the juvenile should be tried as a delinquent or a criminal defendant pursuant to § 9-27-318. **Ark. Code Ann. §9-27-313(b)(2) (Supp. 2007).**

2. Without Warrant

- a. By court order. **Ark. Code Ann. §9-27-313(a)(1)(A) (Supp. 2007).**
- b. By law enforcement officer pursuant to Ark. R. Crim. P. 4.1, concerning custody without warrant. **Ark. Code Ann. §9-27-313(a)(B) (Supp. 2007).**
- c. By law enforcement officer or DHHS representative if there is reasonable grounds to conclude that:
 - (1) Juvenile is in immediate danger; and
 - (2) Removal is necessary to prevent serious harm, illness, or injury to juvenile; and
 - (3) If parents, guardians, or others with authority to act are unavailable or have not taken appropriate action to protect juvenile; and
 - (4) No time for court order prior to taking the juvenile into custody. **Ark. Code Ann. §9-27-313(a)(C) (Supp. 2007).**
- d. When any juvenile is taken into custody without a warrant, the officer taking the juvenile into custody shall immediately make every effort possible to notify the custodial parent, guardian, or custodian of the juvenile's location. **Ark. Code Ann. §9-27-313(a)(2) (Supp. 2007).**

3. **Mandatory Detention**

- a. Officer shall take a juvenile to detention and immediately make every effort to notify the custodial parent, guardian, or custodian of the juvenile's location when a juvenile is taken into custody for the following crimes:
 - (1) Unlawful possession of a handgun;
 - (2) Possession of a handgun on school property;
 - (3) Unlawful discharge of a firearm from a vehicle;
 - (4) Any felony committed while armed with a firearm; or
 - (5) Criminal use of a prohibited weapon. **Ark. Code Ann. §9-27-313(d)(1)(A) (Supp. 2007).**
- b. The law enforcement officer shall take juvenile to detention and notify the juvenile intake officer and the prosecuting attorney within 24 hours so that a petition may be filed. **Ark. Code Ann. §9-27-313(d)(1)(A) (Supp. 2007).**
- c. Under this subsection a juvenile intake officer has no authority to release. **Ark. Code Ann. §9-27-313(d)(1)(B) (Supp. 2007).**
- d. A detention hearing shall be held by the court pursuant to Ark. Code Ann. §9-27-326 within 72 hours after the juvenile is taken into custody on an allegation of delinquency; however, if the 72 hours ends on a holiday or weekend, then the next business day. **Ark. Code Ann. §9-27-326(a) (Supp. 2007).**

Note: Ark. Code Ann. §9-27-326(a) provides that a detention hearing shall be held as soon as possible but no later than 72 hours after the juvenile was taken into custody; however, if 72 hours ends on a holiday or weekend then the next business day. Otherwise the juvenile shall be released.

4. **Alleged Felony**

- a. A law enforcement officer shall immediately make every effort possible to notify the custodial parent, guardian, or custodian of the juvenile's location.

- b. A law enforcement officer may:
- (1) Take the juvenile to detention; or
 - (a) The court intake officer shall be notified immediately to make a detention decision pursuant to Ark. Code Ann. § 9-27-322 within 24 hours. The PA must be notified within 24 hours.
 - (b) If a juvenile remains in detention, a detention hearing must be held within 72 hours of the taking into custody; if the 72 hours ends on a Saturday, Sunday or holiday, then the next business day. **Ark. Code Ann. §9-27-313(d)(1)(A) (Supp. 2007).**

Note: Ark. Code Ann. §9-27-326(a) provides that a detention hearing shall be held as soon as possible but no later than 72 hours after the juvenile was taken into custody; however, if 72 hours ends on a holiday or weekend then the next business day. Otherwise the juvenile shall be released.
 - (2) Issue a citation to the juvenile and his/her parents to appear before the juvenile court and release the juvenile; or
 - (a) The citation shall be issued pursuant to the Arkansas Rules of Criminal Procedure.
 - (b) The intake officer and the prosecuting attorney shall be notified within 24 hours so that a petition may be filed. **Ark. Code Ann. §9-27-313(d)(2)(B) (Supp. 2007).**
 - (3) Return the juvenile to his/her home. **Ark. Code Ann. §9-27-313(d)(2)(C) (Supp. 2007).**

5. Alleged Misdemeanor

- a. If a juvenile is taken into custody for an act that would be a misdemeanor if committed by an adult, the law enforcement officer shall immediately make every effort possible to notify the custodial parent, guardian, or custodian of the juvenile's location. **Ark. Code Ann. §9-27-313(d)(3) (Supp. 2007);Ark. Code Ann. §9-27-313(d)(4)(A) (Supp. 2007).**

Note: Ark. Code Ann. § 9-27-322(a) (Repl. 2002) provides that upon receiving notice that a juvenile has been taken into custody on an allegation of delinquency, the intake officer shall immediately notify the juvenile's parent, guardian or custodian of the location

at which the juvenile is being held and the reasons for the juvenile's detention if such notification has not previously taken place.

- b. Law enforcement may notify the juvenile intake officer who shall make a detention decision pursuant to Ark. Code Ann. §9-27-322. **Ark. Code Ann. §9-27-313(d)(3)(A) (Supp. 2007).**
- c. Law enforcement may issue a citation to the juvenile and his/her parents to appear before the juvenile court and release the juvenile.
 - (1) The citation shall be issued pursuant to the Arkansas Rules of Criminal Procedure.
 - (2) The intake officer and the prosecuting attorney shall be notified within 24 hours so that a petition may be filed. **Ark. Code Ann. § 9-27-313(d)(3)(B) (Supp. 2007).**
- d. Law enforcement may return the juvenile to his/her home. **Ark. Code Ann. §9-27-313(d)(3)(C) (Supp. 2007).**

6. Custody Restrictions

a. Juvenile Statements

Statements made by juvenile to intake or probation officer during an intake process and prior to hearing shall not be used against juvenile at any stage of any proceedings. **Ark. Code Ann. §9-27-321 (Repl. 2002).**

b. Juvenile Release from Custody

If no delinquency petition to adjudicate the juvenile is filed within 24 hours after the detention hearing or 96 hours after the alleged delinquent is taken into custody, whichever is sooner, the alleged delinquent shall be discharged from custody, detention, or shelter care. **Ark. Code Ann. §9-27-313(f) (Supp. 2007).**

c. Juvenile Witness

- (1) Whenever a law enforcement officer has reasonable cause to believe that any juvenile found at or near the scene of a felony is a witness to the offense, he may stop that juvenile.
- (2) After having identified himself, the officer must advise the juvenile of the purpose of the stop and may then demand of him his/her name, address, and any information he may have regarding the offense.

- (a) Such detention shall in all cases be reasonable and shall not exceed 15 minutes unless the juvenile shall refuse to give such information.
- (b) If detained further, the juvenile shall immediately be brought before any judicial officer or prosecuting attorney to be examined with reference to his name, address, or the information he may have regarding the offense. **Ark. Code Ann. §9-27-317(i)(1) (Repl. 2002).**

7. Questioning Juveniles

- a. A law enforcement officer shall not question a juvenile who has been taken into custody for a delinquent act or criminal offense until the law enforcement officer has advised the juvenile of his/her rights in the juvenile's own language:
 - (1) Miranda rights, and
 - (2) Right to speak to his/her custodial parent, guardian or custodian or to have that person present. **Ark. Code Ann. §9-27-317(i)(2)(A-B) (Repl. 2002).**
- b. No law enforcement officer shall question a juvenile who has been taken into custody for a delinquent act or criminal offense if the juvenile has indicated in any manner:
 - (1) That he/she does not wish to be questioned; **Ark. Code Ann. §9-27-317(i)(2)(C)(i) (Repl. 2002).**
 - (2) That he/she wishes to speak with his/her custodial parent, guardian or custodian or to have that person present; and **Ark. Code Ann. §9-27-317(i)(2)(C)(ii) (Repl. 2002).**

Circuit Court affirmed in suppressing custodial statements of minor. Juvenile was taken into custody after an alleged terroristic threatening and criminal-mischief complaint at school. Juvenile had allegedly threatened to shoot another student. The officers questioned the juvenile and he was subsequently appointed counsel. Several days later officers questioned him again about other criminal allegations.

When the state filed the delinquency petition, the juvenile filed a motion to suppress his statements, arguing that the police violated 9-27-317 by failing to notify his parents when he was taken into custody. The state argued that the trial court erred in suppressing the statement because there were no attempts to notify the parents. Under 9-27-317(h)(2) authorities must notify a parent when a child is taken into custody. The parent is then present, if the child invokes his/her right to speak to the

parent. If the parent refuses to go then counsel is appointed to represent the juvenile.

The Supreme Court held that the parental notification operates as an invocation of the juvenile's right to counsel. Once invoked - questioning must stop!

*The state's second argument that the trial court erred in ruling that the officers violated the juvenile's Sixth Amendment right to counsel once counsel was appointed and when officers questioned him outside the presence of counsel is not necessary to address because the trial court properly suppressed the statements on the basis that officers made no attempt to contact the juvenile's parents prior to questioning the juvenile. **State v. L.P.**, 369 Ark. 21, __ S.W. 3d __ (2007).*

*Since the felony information charging appellant with capital murder was not filed in juvenile court, he had no right to assert that his mother should have been present during his questioning. **Jenkins v. State**, 348 Ark. 686, 75 S.W. 3d 180 (2002).*

*A sixteen-year-old juvenile was charged as an adult with capital murder, burglary and theft of property. He argued that the trial court should have suppressed his statement because he asked to speak to a parent and questioning should have stopped pursuant to the juvenile code. However, the Arkansas Supreme Court, in a 4-3 decision, held that since the juvenile was to be charged as an adult, the protection in the juvenile code of having a parent present during the interrogation did not apply. **Ray v. State**, 344 Ark. 136, 40 S.W.3d 243 (2001).*

*A juvenile's right to speak to a parent/guardian or to have one present at questioning is a statutory, not a constitutional right. Law enforcement does not have to inform a juvenile of this right. The juvenile must invoke this right. **Miller v. State**, 338 Ark. 455, 994 S.W.2d 476 (1999); **Matthews v. State**, 67 Ark. App. 35, 991 S.W.2d 639 (1999).*

*A juvenile has the right to speak to a parent or have a parent present during juvenile or criminal proceedings; however, the juvenile and not the parent or guardian must invoke this statutory right. **Conner v. State**, 334 Ark. 457, 978 S.W.2d 300 (1998); **Isbell v. State**, 326 Ark. 17, 931 S.W. 2d 74 (1996).*

- (3) that he/she wishes to consult counsel before submitting to any questioning. **Ark. Code Ann. §9-27-317(i)(2)(C)(iii) (Repl. 2002).**

- c. No waiver of the right to counsel shall be accepted when a juvenile is in the custody of DHHS, including the Division of Youth Services. **Ark. Code Ann. §9-27-317(g) (Repl. 2002).**
- d. All waivers of the right to counsel, except those made in the presence of the court and accepted only upon a finding by the court of clear and convincing evidence, shall be in writing and signed by the juvenile. **Ark. Code Ann. § 9-27-317(h)(1) (Repl. 2002).**
- e. If the custodial parent, guardian or custodian cannot be located or refuses to go where the juvenile is held, counsel shall be appointed as if the juvenile invoked the right to counsel. **Ark. Code Ann. §9-27-317(h)(2) (Repl. 2002).**
- f. A law enforcement officer who takes a juvenile into custody for a delinquent or criminal offense shall advise the juvenile of his/her Miranda rights in the juvenile's own language. **Ark. Code Ann. §9-27-317(i)(2)(A) (Repl. 2002).**

9. Fingerprinting & Photographing

- a. A juvenile shall be photographed and fingerprinted by the law enforcement agency when he/she is arrested for an offense that, if committed by an adult, would be a felony or a Class A misdemeanor wherein violence or the use of a weapon was involved. **Ark. Code Ann. §9-27-320(a)(1) (Supp. 2007).**
- b. In an allegation of delinquency, a juvenile shall not be photographed or fingerprinted by any law enforcement agency unless he has been taken into custody for the commission of an offense which, if committed by an adult, would be a felony or a Class A misdemeanor wherein violence or the use of a weapon was involved. **Ark. Code Ann. §9-27-320(a)(2) (Supp. 2007).**
- c. Copies of a juvenile's fingerprints and photograph shall be made available only to:
 - (1) Law enforcement agencies;
 - (2) Arkansas Crime Information Center (ACIC);
 - (3) Prosecuting attorneys; and
 - (4) Circuit Court, Juvenile Division. **Ark. Code Ann. §9-27-320(b)(1) (Supp. 2007).**
- d. Photographs and fingerprints of juveniles adjudicated delinquent for offenses for which they could have been tried as adults shall be made available to prosecuting attorneys and circuit courts for use at sentencing

in subsequent adult criminal proceedings against those same individuals. **Ark. Code Ann. §9-27-320(b)(2) (Supp. 2007).**

- e. Each law enforcement agency in the state shall keep a separate file of photographs and fingerprints, it being the intention that such photographs and fingerprints of juveniles not be kept in the same file with those of adults. **Ark. Code Ann. §9-27-320(c) (Supp. 2007).**
- f. Where the juvenile is found not to have committed the alleged delinquent act, the juvenile court:
 - (1) may order any law enforcement agency to return all pictures and fingerprints to the juvenile court; and
 - (2) shall order the law enforcement agency that took the juvenile into custody to mark the arrest record with the notation "found not to have committed the alleged offense." **Ark. Code Ann. §9-27-320(d) (Supp. 2007).**

B. Custody of Alleged Dependent-Neglected Juvenile

- 1. By court order. **Ark. Code Ann. §9-27-313(a)(1) (Supp. 2007).**
- 2. By law enforcement officer or DHHS representative if there are clear reasonable grounds to conclude that the:
 - a. Juvenile is in immediate danger;
 - b. Removal is necessary to prevent serious harm from his/her surroundings and to prevent illness or injury to juvenile;
 - c. Parents or others with authority to act are unavailable or have not taken appropriate action to protect juvenile from danger; and
 - d. There is no time to petition for and obtain court order. **Ark. Code Ann. § 9-27-313(a)(1)(C) (Supp. 2007).**
- 3. By law enforcement officer, DHHS representative or other authorized person when juvenile is alleged to be dependent-neglected or pursuant to Child Maltreatment Reporting Act. **Ark. Code Ann. §9-27-313(c) (Supp. 2007); Ark. Code Ann. §12-12-516(a) (Supp. 2007).**
- 4. When taken into custody the official shall notify DHHS and make every possible effort to notify the custodial parent, guardian, or custodian of the juvenile's location and written notification to the parents shall provide:
 - a. That the juvenile is in foster care;

- b. The name and number of a DHHS representative whom they can contact about the juvenile;
 - c. The juvenile's and parent's right to receive copy of petition;
 - d. The location and telephone number of court; and
 - e. The procedure for obtaining a hearing. **Ark. Code Ann. §9-27-313(c)(1)(B) (Supp. 2007).**
5. Return the juvenile home. **Ark. Code Ann. §9-27-313(c)(2) (Supp. 2007).**

C. Custody of Alleged FINS

- 1. By court order; **Ark. Code Ann. § 9-27-313(a)(1) (Supp. 2007).**
- 2. By law enforcement officer or DHHS representative if there are clear reasonable grounds to conclude that the:
 - a. Juvenile is in immediate danger; and
 - b. Removal is necessary to prevent serious harm from his/her surroundings, and to prevent illness or injury to juvenile; and
 - c. Parents or others with authority to act are unavailable or have not taken appropriate action to protect juvenile from danger; and
 - d. There is no time to petition for and obtain court order. **Ark. Code Ann. § 9-27-313(a)(1)(C) (Supp. 2007).**
- 3. FINS custody options:
 - a. Take juvenile to shelter care.
 - (1) Law enforcement shall notify DHHS, parents, guardian, other person having care of the juvenile and the intake officer.
 - (2) Written notification to parents shall provide:
 - (a) the juvenile's location;
 - (b) juvenile's and parent's right to receive copy of petition;
 - (c) location and telephone number of court; and
 - (d) procedure for obtaining a hearing. **Ark. Code Ann. §9-27-313(e)(1) (Supp. 2007).**

- c. Return the juvenile home. **Ark. Code Ann. §9-27-313(e)(3) (Supp. 2007)**
- d. Hold in juvenile detention facility for identification, processing, or arranging for release or transfer, only if:
 - (1) the parent or guardian lives beyond a 50 mile radius or out of state and the juvenile has been away from home for more than 24 hours, the juvenile may be held in a juvenile detention facility for up to 6 hours (if parent lives in state) or 24 hours excluding weekends & holidays (if parent lives out of state). **Ark. Code Ann. §9-27-313(e)(1)(B)(i) (Supp. 2007).**
 - (2) Limitation on the detention of FINS:
 - (a) Such holding shall be limited to the minimum time necessary for purposes of identification, processing, or arranging for release or transfer to another facility.
 - (b) Holding shall not occur in any facility utilized for the incarceration of adults and must also be separated from detained juveniles charged or held for delinquency. **Ark. Code Ann. §9-27-313(e)(1)(B)(ii) (Supp. 2007).**

D. DHHS Custody Solely Because of Actions of Someone Other than Custodial Parent

- 1. DHHS shall immediately exercise all efforts to identify and locate the custodial parent or custodial parents of the minor. **Ark. Code Ann. §9-25-104(a) (Repl. 2002)**
- 2. When the custodial parent is identified and located, and if that parent is a custodial parent, DHHS shall immediately notify the parent as to the location of the minor and of the parent's right to obtain possession of the minor at that location. **Ark. Code Ann. §9-25-104(b) (Repl. 2002).**
- 3. DHHS shall not withhold custody or possession of any child from the child's custodial parent or parents unless a petition for dependency-neglect is filed naming the custodial parent or parents as a party. **Ark. Code Ann. §9-25-104(c) (Repl. 2002).**

JUDGES' EMERGENCY EX PARTE ORDER CHECKLIST

A.C.A. §9-27-314

for the child;

Purpose:

① When there is probable cause to believe that immediate emergency custody is necessary to protect the health or physical well-being of the juvenile from immediate danger or prevent the juvenile's removal from the state the court shall issue an emergency ex parte order to remove the juvenile and determine an appropriate placement plan. **A.C.A. §9-27-314(a)(1)**

② To provide specific appropriate safeguards to protect the juvenile when there is probable cause to believe an emergency order is necessary to protect the juvenile from severe maltreatment, if the alleged offender has a legal right to custody or visitation with the juvenile, has a property right allowing access to the home where the juvenile resides, or is a juvenile. **A.C.A. §9-27-314(a)(2)**

Severe maltreatment means sexual abuse, sexual exploitation, acts or omissions which may result in death abuse involving the use of a deadly weapon, bone fracture, internal injuries, burns, immersions, suffocation, abandonment, medical diagnosis of failure to thrive, or causing a substantial and observable change in behavior or demeanor of the child. **A.C.A. §12-15-503(16)**

③ When there is probable cause to believe that a juvenile is dependent, the court shall issue an ex parte order for emergency custody to DHS. **A.C.A. §9-27-314(a)(2)**

Dependent juvenile means:

- A child of a parent in DHS custody;
- A child whose parent or guardian is incarcerated and has no appropriate relative or friend willing or able to provide care for the child;
- A child whose parent or guardian is incapacitated so they cannot care for the juvenile and they have no appropriate relative or friend to care

- A child whose custodial parent dies and no stand-by guardian exists;
- A child who is an infant relinquished to the custody of DHS for the sole purpose of adoption;
- A safe-haven baby; or
- A child who has disrupted his/her adoption and the adoptive parents have exhausted resources available to them. **A.C.A. § 9-27-314(a)(3)**

Time Constraints:

⌚ The Probable Cause Hearing shall be held within five business days of the issuance of the ex parte order. **A.C.A. § 9-27-315(a)(1)(A)**

Filing:

Only a law enforcement officer, prosecuting attorney or DHS or its designee can file a dependency-neglect petition seeking ex parte relief. **A.C.A. 9-27-310(b)(2)**

Notice:

Immediate notice of the order shall be given by the petitioner or court to parents, guardians or custodians and service shall be in accordance with Arkansas Rules of Procedure. **A.C.A. § 9-27-314(c)(1)**

JUDGES' EMERGENCY EX PARTE ORDER CHECKLIST

Petition Shall Include:

- Name, address, gender, social security number, and date of birth of each juvenile subject of the petition.
- Name and address of each of the parents or the surviving parent of the juveniles.
- Name and address of the person, agency, or institution having custody of the juveniles.
- Name and address of any other person, agency or institution having a claim to custody or guardianship of the juveniles.
- Name and address of a putative parent, if any.
- Petition shall set forth, in plain and concise words, facts which, if proven, would bring the family or juvenile within court's jurisdiction; section of the subchapter upon which jurisdiction is based; and relief requested.
- Petition shall be supported by an affidavit.
- If name or address is unknown or cannot be ascertained with reasonable diligence, allege such in petition and petition shall not be dismissed for insufficiency but court shall direct appropriate measures to find and give notice to the persons.
- Single petition shall be filed which includes all siblings who are subjects of the petition. **A.C.A. §9-27-311.**

Emergency Order Shall Include:

- ① Notice to juvenile's parents, custodian, or guardian of the right to a hearing and that a hearing will be held within 5 business days of issuance of ex parte order;
- ② Right of parent, guardian, or custodian from whom custody was removed to be represented by counsel and to appointed counsel if indigent, and how to obtain counsel

Best Practice: Appoint parent counsel in the emergency ex parte order and determine request and indigency at PC Hearing.

Court may appoint counsel for parent or guardian from whom custody was removed in the ex parte emergency order. **A.C.A. §9-27-316 (h)(1)(B)**

- ③ Appointment of attorney ad litem for child; and **A.C.A. § 9-27-316(f)(1)**
- ④ Information regarding hearing or location and telephone number of the court and procedure for obtaining a hearing. **A.C.A. §9-27-314 (b)(4)**
- ⑤ **REQUIRED IV-E FINDING**
In the initial order placing a child in DHS, the Court must make a finding on whether:
 - * "it is contrary to the juvenile's welfare to remain with the parent/guardian/custodian"
 - * immediate removal and the reasons for removal are "necessary to protect the health and safety of juvenile;" and
 - * That removal is in the juvenile's best interest. **A.C.A. §9-27-328(b)(1)**

Where the state's first contact with the family has occurred during an emergency in which the juvenile could not remain safely in the home even with reasonable efforts being provided, reasonable efforts shall be deemed. **A.C.A. §9-27-328(c)**

Best Practice: Set Probable Cause Hearing for specific date and time and order parties to be present. Have background information affidavit and indigency affidavit attached to emergency ex parte order and develop system in Judicial Circuit of who is responsible for ensuring that information is completed prior to the Probable Cause Hearing so that it can be introduced into evidence at the Probable Cause Hearing.

VI. EMERGENCY EX PARTE ORDERS

A. Ex Parte Order

1. Court shall issue an ex parte order to remove the juvenile from the custody of the parent, guardian, or custodian when probable cause exists that immediate emergency custody is necessary to:
 - a. Protect the juvenile's health or physical well-being from immediate danger; or
 - b. Prevent juvenile's removal from state. **Ark. Code Ann. §9-27-314(a)(1) (Supp. 2007).**
2. Court shall issue an ex parte order to provide specific appropriate safeguards to protect the juvenile from severe maltreatment if the alleged offender has a legal right to custody or visitation with juvenile or a property right allowing access to the home where the juvenile resides. **Ark. Code Ann. §9-27-314(a)(2) (Supp. 2007).**

Severe Maltreatment means sexual abuse, sexual exploitation, acts or omissions which may or do result in death, abuse involving the use of a deadly weapon as defined by the Ark. Criminal Code § 5-1-102, bone fracture, internal injuries, burns, immersions, suffocation, abandonment, medical diagnosis of failure to thrive or causing substantial and observable change in the behavior or demeanor of the child. **Ark. Code Ann. §12-12-503(16) (Supp. 2007).**

3. The court shall issue an emergency ex parte order for emergency custody placing the juvenile with DHHS when there is probable cause to believe that a juvenile is dependent. **Ark. Code Ann. §9-27-314(a)(3) (Supp. 2007).**
 - a. **Dependent juvenile** means:
 - (1) A child of a parent under 18 and in DHS custody;
 - (2) A child whose parent or guardian is incarcerated and has no appropriate relative or friend willing or able to provide care for the child;
 - (3) A child whose parent or guardian is incapacitated so they cannot care for the juvenile and they have no appropriate relative or friend to care for the child;
 - (4) A child whose custodial parent dies and no stand-by guardian exists;
 - (5) A child who is an infant relinquished to the custody of DHS for the sole purpose of adoption;
 - (6) A safe-haven baby; or

(7) A child who has disrupted his/her adoption and the adoptive parents have exhausted resources available to them. **A.C.A. §9-27-303(17) (Supp. 2007).**

2. Purpose of ex parte order for emergency custody is to:

- a. Remove the juvenile from custody of parent, guardian and/or to protect the juvenile;
- b. To determine an appropriate plan for the juvenile's placement. **Ark. Code Ann. §-27-314(a) (Supp. 2007).**

B. Ex Parte Order Notice

1. The order shall include notice to that parent, custodian or guardian of the:

- a. Right to hearing and procedure for obtaining hearing within 5 business days of issuance of ex parte order;
- b. Right to representation by counsel;
- c. Right to appointed counsel if indigent and procedure for obtaining appointed counsel; and
- d. Location and telephone number of court. **Ark. Code Ann. §9-27-314(b) (Supp. 2007).**

2. Immediate notice of order shall be given to juvenile's parents, guardians, or custodian by petitioner or court. **Ark. Code Ann. §9-27-314(c)(1) (Supp. 2007).**

3. All defendants shall be served according to Arkansas Rules of Civil Procedure or as otherwise provided by court. **Ark. Code Ann. §9-27-314(c)(2) (Supp. 2007).**

C. Appointment of Parent Counsel

The court may appoint counsel for the parent or guardian for whom custody was removed in the emergency ex parte order. **Ark. Code Ann. §9-27-316(h)(1)(B) (Supp. 2007).**

The state only pays for parent counsel for parents or guardians from whom custody is removed and at, or prior to, a termination of parental rights hearing if the parent or guardian qualifies in dependency-neglect proceedings. If the court appoints counsel in the emergency ex parte order, the court shall determine the request for counsel and indigency at the Probable Cause Hearing. Counsel shall be paid contingent on the reimbursement guidelines and an indigency affidavit considered and filed with the court. **Ark. Code Ann. § 9-27-316(h) (Supp. 2007); § 9-27-401(Supp. 2007).**

D. Appointment of Attorney Ad Litem

The Court shall appoint an attorney ad litem to represent the best interest of the juvenile when an emergency ex parte order is entered in a dependency-neglect case. **Ark. Code Ann. §9-27-316(f)(1) (Supp. 2007).**

E. Federal IV-E Findings Required

1. In the initial order of removal the court must find:
 - a. Whether it is contrary to the welfare of the juvenile to remain at home;
 - b. Whether removal and the reasons for removal is necessary to protect the health and safety of the juvenile; and
 - c. Whether removal is in the best interest of the juvenile. **Ark. Code Ann. §9-27-328(b) (Supp. 2007).**

VII. RIGHT TO COUNSEL

A. Alleged Juvenile Delinquents' and FINS' Right to Counsel

1. Juvenile and parent, guardian or custodian shall be advised of right to counsel at all stages of the proceedings. Juvenile shall be advised of right by:
 - a. Law enforcement officer taking juvenile into custody;
 - b. Intake officer at initial intake interview;
 - c. Court at juvenile's first appearance. **Ark. Code Ann. §9-27-316(a) (Supp. 2005); Rhoades v. State, 315 Ark. 758, 869 S.W.2d 698 (1994).**

Ark. Code Ann. § 9-27-316 makes it clear that in both delinquency and FINS cases a juvenile has a right to counsel and to an attorney ad litem who represents the best interest of the juvenile, but that this is not intended to be the same person. Because the juvenile was denied counsel, the trial court exceeded its authority and the order was thus invalid. The petitioner's writ of habeas corpus was granted. Since the writ of habeas is granted the writ of certiorari is moot. Arkansas Dep't of Human Servs. v. Mainard, et al., 358 Ark. 204, ___ S.W.3d ___ (2004).

The provisions of Anders v. California, 386 U.S. 738 (1967), which protect an adult appellant's right to counsel on appeal, apply equally to a juvenile's appeal of an adjudication of delinquency. Gilliam v. State, 305 Ark. 438, 808 S.W.2d 738 (1991).

The U.S. Supreme Court held that the child and his parent must be notified of the child's right to be represented by counsel and to have counsel appointed if they cannot afford it. In Re Gault, 387 U.S. 1 (1967).

B. EJJ Offenders' Right to Counsel

Right exists at every stage of the proceeding, including all reviews. **Ark. Code Ann. §9-27-316(a)(2)(Supp. 2007).**

Note: Ark. Code Ann §9-27-317(f) provides that no waiver of counsel shall be accepted in any case when a juvenile has been designated as an EJJ offender.

C. Appointed Counsel

1. Court shall appoint counsel to represent juvenile at all appearances before the court if counsel is not retained and it does not appear that counsel will be retained, unless counsel has been waived. **Ark. Code Ann. §9-27-316(c) (Supp. 2007).**
2. Court shall appoint attorney when judge determines that there is a reasonable likelihood that juvenile proceeding will result in commitment to an institution in which juvenile's freedom would be curtailed, and counsel has not been retained. **Ark. Code Ann. §9-27-316(d)(Supp. 2007).**

Note: Ark. Code Ann. §9-27-317(e) provides that no waiver of counsel shall be accepted in any case where counsel was appointed due to likelihood of juvenile's commitment to an institution.

3. Court shall consider juvenile's and family's financial resources. **Ark. Code Ann. §9-27-316(b)(1) (Supp. 2007).**
4. The court may order financially able juveniles, parents, guardians, or custodians to pay all or part of reasonable attorneys' fees and expenses for representation of a juvenile:
 - a. Following a review of an affidavit of financial means completed and verified by the parent, and
 - b. Determination by the court that the parent or juvenile has the ability to pay. **Ark. Code Ann. §9-27-316(b)(2) (Supp. 2007).**
5. Failure of juvenile's family to retain counsel for juvenile shall not deprive juvenile of the right to appointed counsel. **Ark. Code Ann. §9-27-316(b)(1) (Supp. 2007).**
6. Appointment of counsel shall be made sufficiently in advance of court appearance to allow adequate preparation and consultation with client. **Ark. Code Ann. §9-27-316(e) (Supp. 2007).**

D. Alleged Dependent-Neglected Juveniles' Right to Counsel

1. The court shall appoint an attorney ad litem who shall meet standards and qualifications established by the Arkansas Supreme Court to represent the best interest of the juvenile when a dependency-neglect petition is filed or when an emergency ex parte order is entered in a dependency-neglect case, whichever occurs earlier. **Ark. Code Ann. §9-27-316(f)(1) (Supp. 2007); Supreme Court Administrative Order Number 15.**

2. The court may appoint an attorney ad litem to represent the best interest of a juvenile involved in any case before the court and shall consider the juvenile's best interest in determining whether to appoint an attorney ad litem. **Ark. Code Ann. §9-27-316(f)(2) (Supp. 2007).**
3. Each attorney ad litem shall:
 - a. File written motions, responses or objections at all stages of the proceedings when necessary to protect the best interest of the juvenile;
 - b. Attend all hearings and participate in all telephone conferences with the court unless excused by the court; and
 - c. Present witnesses and exhibits when necessary to protect the juvenile's best interest. **Ark. Code Ann. §9-27-316(f)(3) (Supp. 2007).**
4. An attorney ad litem shall be provided access to all records relevant to the juvenile's case, including but not limited to:
 - a. school records,
 - b. medical records,
 - c. juvenile court records, and
 - d. DHHS records, to the extent permitted by federal law. **Ark. Code Ann. §9-27-316(f)(4) (Supp. 2007).**
5. If the juvenile's wishes differ from the attorney's determination of the juvenile's best interest, the attorney ad litem shall communicate the juvenile's wishes to the court in addition to presenting his determination of the juvenile's best interest. **Ark. Code Ann. §9-27-316(f)(5) (Supp. 2007).**

E. Court Appointed Special Advocate (CASA)

1. The court may appoint a volunteer CASA from a program which shall meet all state and national CASA standards to advocate for juveniles in dependency-neglect proceedings. **Ark. Code Ann. §9-27-316(g)(1) (Supp. 2007).**

2. No CASA shall be assigned a case before:
 - a. Completing a training program in compliance with national and state standards; and
 - b. Being approved by the local CASA program which will include appropriate criminal background and child abuse registry checks. **Ark. Code Ann. §9-27-316(g)(2) (Supp. 2007).**
3. Each CASA shall:
 - a. Investigate the case to which he or she is assigned to provide independent factual information to the court through the attorney ad litem or through court testimony and court reports.
 - (1) The CASA may testify if called as a witness.
 - (2) When the CASA prepares a written report for the court, the advocate shall provide all parties with a copy of the written report seven business days prior to the relevant hearing.
 - b. Monitor the case to which he/she is assigned to ensure compliance with the court's orders.
 - c. Assist the attorney ad litem in representing the juvenile's best interest. **Ark. Code Ann. §9-27-316(g)(3) (Supp. 2007).**
4. Upon presentation of an order of appointment, a CASA shall be provided access to all records relevant to the juvenile's case, including but not limited to:
 - a. school records,
 - b. medical records,
 - c. juvenile court records, and
 - d. DHHS records, to the extent permitted by federal law. **Ark. Code Ann. §9-27-316(g)(4) (Supp. 2007).**
5. A CASA is not a party to the case to which he or she is assigned and shall not call witnesses or examine witnesses. **Ark. Code Ann. §9-27-316(g)(5) (Supp. 2007).**
6. A CASA shall not be liable for damages for personal injury or property damage, pursuant to Ark. Code Ann. §§16-6-101 through 105. **Ark. Code Ann. §9-27-316(g)(6) (Supp. 2007).**

7. Except as provided by this subsection,, a CASA shall not disclose any confidential information or reports to anyone except as ordered by the court or otherwise provided by law. **Ark. Code Ann. §9-27-316(g)(7) (Supp. 2007).**

F. Parent’s and Guardian’s Right to Counsel

1. Parents and guardians have a right to counsel in all proceedings to remove custody from a parent or guardian or to terminate parental rights.
 - d. A parent or guardian shall be advised in the dependency-neglect petition or ex parte emergency order and at their first appearance before the court of right to counsel at all stages of the proceedings and the right to appointed counsel if indigent. **Ark. Code Ann. §9-27-316(h)(1)(A) (Supp. 2007).**
 - e. A court may appoint counsel for the parent or guardian from whom custody was removed in the ex parte emergency order. **Ark. Code Ann. §9-27-316(h)(1)(B) (Supp. 2007).**

*During the TPR appeal, appellant argued that the court erred in failing to appoint counsel at the adjudication hearing and that if counsel was waived it was not knowingly or intelligently made. Although this challenge was not timely, the Court reviewed the remainder of the case to ensure that appellant was not deprived of fundamental fairness leading up to the termination. The Supreme Court noted that appellant was appointed an attorney following the adjudication hearing. The Court also gave no consideration as to the testimony given by the appellant at the adjudication hearing because appellant waived her right to be represented by counsel at that hearing, and she did not appeal the resulting adjudication of dependency-neglect. **Jefferson v. Arkansas Dep’t of Human Servs., 356 Ark. 647, 158 S.W.3d 129 (2004).***

*Appellant’s claim that she was denied the right to effective assistance of counsel under the Sixth Amendment and that she was prejudiced by her first appointed counsel was not addressed in this case because appellant did not raise the issue with the trial court. However, the Court recognized a parent’s right to counsel for parents in termination proceedings includes the right to effective counsel and adopted the standard for ineffectiveness set out in *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* requires the defendant to prove:*

- ❶ *Counsel’s performance was deficient, and*

② *Counsel's deficient performance prejudiced the defendant to the extent of depriving him/her of a fair trial. Jones v. Ark. Dep't of Human Servs., ___ Ark. ___, ___ S.W.3d ___ (No. 04-426, Mar. 24, 2005).*

TPR reversed because trial judge erred in finding that appellant had waived her right to counsel. In order to establish a voluntary and intelligent waiver, the judge must:

- ① *Explain the desirability of having the assistance of counsel; and,*
- ② *Advise the parent of the drawbacks and disadvantages of self-representation so that the record will establish that he/she knows what he/she is doing and that he/she has made the choice with his/her eyes wide open. Battishill v. Arkansas Dept. Of Humans Servs., 78 Ark. App. 68, 82 S.W.3d 178 (2002).*

The Arkansas Supreme Court reversed the Court of Appeals and held that appellant's request to waive counsel was not unequivocal and, therefore, it would have been error for the trial court to accept that waiver, because her request did not satisfy constitutional standards for the waiver of counsel.

A waiver of counsel is valid only if:

- ① *Request is unequivocal and timely asserted;*
- ② *There has been a knowing and intelligent waiver of the right to counsel; and,*
- ③ *The defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. Bearden v. Arkansas Dep't of Human Servs., 344 Ark. 317, 42 S.W.3d 397 (2001).*

Counsel argued that absent a showing that his fee request was unreasonable he was entitled to the full amount requested. The decision to award attorney's fees and the amount to award are discretionary determinations that will be reversed only upon a finding that the trial court abused its discretion. Ruble v. Arkansas Dept. of Human Servs., 75 Ark. App. 321, 57 S.W.3d 233 (2001).

The Court held that requiring counsel to represent an indigent parent pro bono in a termination case amounts to an unconstitutional taking. Although termination cases are civil in nature, the same principles that require payment of attorney's fees for indigent criminal defense are applicable to termination cases. Baker v. Arkansas Dep't of Human Servs., 340 Ark. 42, 8 S.W.3d 499 (2000).

*This is a supplemental opinion granting petition for rehearing on the issue of indigent counsel fees in a termination of parental rights case. The parent's attorney argued that the Juvenile Court Representation fund is not the appropriate fund to be used for the payment of indigent parent's counsel in TPR cases. The Court agreed and stated that the claim is against the state. Thus, the state is responsible for payment of her fees and expenses for services performed on behalf of the state. The Court granted counsel fees and costs for work at the appellate level and remanded the matter to the trial court to be paid out of the Juvenile Court Representation Fund. In the event there are insufficient funds, the Court directed the attorney to seek compensation from the Arkansas Claims Commission. The Court invited the General Assembly to consider an alternative source during the next legislative session. **Baker v. Arkansas Dep't of Human Servs., 340 Ark. 408, 12 S.W.3d 200 (2000).***

*The right to an attorney and the appointment upon a determination of indigency are mandatory. It was an error to proceed at a hearing where the appellant requested representation and to require her to testify without representation; however, it was harmless in the limited circumstance of this case. The error was cured at the termination hearing where appellant was represented by counsel and where all the evidence presented at earlier hearings was presented. **Briscoe v. State, 323 Ark. 4, 912 S.W.2d 425 (1996).***

*Appellant's right to counsel was not violated where she was notified of her right to counsel and had obtained counsel to represent her; she did not object to the hearing commencing, nor did the attorney representing her at the subsequent hearing. **Nance v. Arkansas Dep't of Human Servs., 316 Ark. 43, 870 S.W.2d 721 (1994).***

2. Court shall appoint counsel in all proceedings to remove custody or terminate parental rights:
 - a. Upon parent or guardian's request, and
 - b. Court's determination of indigency. **Ark. Code Ann. §9-27-316(h)(2) (Supp. 2007).**
 - (1) No payment for attorney fees for a court proceeding for indigent parents or guardians shall be authorized unless an affidavit of indigence is completed and filed with the clerk of the court. **Ark. Code Ann. §9-27-316(h)(2)(C) (Supp. 2007).**

- (2) If the court terminates parental rights, no payment for attorney fees for appeals for indigent parents will be authorized unless a new affidavit of indigence is completed and filed with the clerk and a redetermination of indigence hearing is held. **Ark. Code Ann. §9-27-316(h)(2)(B) (Supp. 2007).**
3. Appointment of counsel shall be made sufficiently in advance of court appearance to allow adequate preparation and consultation with client. **Ark. Code Ann. §9-27-316(h)(4) (Supp. 2007).**
4. Court shall order financially able parents or guardians to pay all or part of reasonable attorney's fees and expenses for court-appointed representation of the parent or guardian:
 - a. Following a review by the court of an affidavit of financial means completed and verified by the parent, and
 - b. Determination by the court of an ability to pay. **Ark. Code Ann. §9-27-316(h)(3) (Supp. 2007).**
1. The parent or guardian's attorney shall be provided access to all relevant records, including but not limited to:
 - a. school records,
 - b. medical records,
 - c. juvenile court records, and
 - d. DHHS records to which they are entitled under state and federal law. **Ark. Code Ann. §9-27-316(h)(5) (Supp. 2007).**

G. Juvenile Court Representation Fund

1. All money collected by the clerk for representation in FINS, delinquency cases and in all proceedings to remove custody from a parent or guardian or to terminate parental rights pursuant to Ark. Code Ann. §9-27-316(b)(2) and (h)(3) shall be placed in this fund. **Ark. Code Ann. §9-27-316(b)(2) (Supp. 2007); Ark. Code Ann. §9-27-316(h)(3) (Supp. 2007).**

2. Court may direct that money from this fund be used to provide counsel for juveniles in delinquency and FINS cases and indigent parents or guardians in dependency-neglect cases as provided in Ark. Code Ann § 9-27-316(h)(Supp. 2007). **Ark. Code Ann. §9-27-316(b)(4) (Supp. 2007); Ark. Code Ann. §9-27-316(h)(3)(B)(i) (Supp. 2007).**
3. Money remaining in fund at end of fiscal year shall not revert to any other fund but shall carry over to next fiscal year. **Ark. Code Ann. §9-27-316(b)(5) (Supp. 2007).**
4. Upon a determination of indigency and a finding by the court that the fund does not have sufficient funds to pay reasonable attorney's fees and expenses incurred at the trial court level and that state funds have been exhausted, the court may order the county to pay such reasonable fees and expenses, until the state provides funding for such counsel. **Ark. Code Ann. §9-27-316(h)(3)(iii) (Supp. 2007).**

IN RE: QUALIFICATIONS and STANDARDS of
PRACTICE for ATTORNEYS AD LITEM and
INDIGENT COUNSEL APPOINTMENTS in
DEPENDENCY-NEGLECT CASES and
QUALIFICATION and STANDARDS of PRACTICE
for ATTORNEYS AD LITEM APPOINTMENTS in
DOMESTIC RELATIONS and GUARDIANSHIP CASES

___ S.W.3d ___

Supreme Court of Arkansas

Delivered September 21, 2001

Per Curiam. Act 708 of 1999 established a statewide system of contracts for attorneys ad litem and provided that the Arkansas Supreme Court adopt standards of practice and qualifications for service for all attorneys who seek to receive contracts to provide legal representation to children in dependency-neglect proceedings. Qualifications and Standards of Practice for Attorneys Ad Litem in dependency-neglect proceedings were adopted in a *per curiam* order dated June 24, 1999, effective January 1, 2000.

Act 708 of 1999 also established a program for the appointment and payment of attorneys in domestic relations and guardianship cases where custody is an issue and provided that the Arkansas Supreme Court, with the advice of judges, adopt standards of practice and qualifications for service for all attorneys seeking appointment to provide legal representation for children in these cases. "Qualifications and Standards of Practice for Attorney Ad Litem Appointments In Chancery and Guardianship Cases" were adopted in a *per curiam* order dated December 9, 1999, effective April 1, 2000.

In a *per curiam* order dated March 30, 2000, the Court adopted amendments to the *per curiam* orders of June 24, 1999, and December 9, 1999, to clarify issues with regard to the educational qualifications for attorneys ad litem in these cases.

Act 1267 of 2001 established a program for the appointment and payment of attorneys to represent indigent parents in dependency-neglect cases and provided that the Arkansas Supreme Court adopt qualifications and standards of practice for these attorneys. Act 987 of 2001 also amended A.C.A. § 9-27-401 to provide that the AOC may employ or enter into contracts with attorneys ad litem to represent children in dependency-neglect proceedings. Toward that end, the Arkansas Ad Hoc Committee on Foster Care and Adoption has submitted recommendations for qualifications and standards for attorneys seeking to represent indigent parents in dependency-neglect cases. The Committee has also recommended amendments to the qualifications and standards of practice for attorneys ad litem in dependency-neglect cases. Comment has been sought and received from attorneys and Juvenile Division Judges.

With respect to attorneys ad litem in domestic relations and guardianship cases, implementation of the standards and qualification requirements has revealed some necessary changes to the requirements as set out in the *pe.*

curiam opinions. In addition, implementation of Amendment 80 necessitates some revisions. Comment has been sought and received from the Arkansas Judicial Council's committee on attorneys ad litem.

Therefore, we adopt Administrative Order Number 15, effective immediately. The *per curiam* orders of June 24, 1999, December 9, 1999, and March 20, 2000 are hereby superceded by this Order.

ADMINISTRATIVE ORDER NUMBER 15

ATTORNEY QUALIFICATIONS AND STANDARDS

Section 1. Qualifications for attorneys appointed by the court to represent children and indigent parents in dependency-neglect cases:

a. An attorney shall be licensed and in good standing with the Arkansas Supreme Court

(1) Prior to appointment, an attorney shall have initial education to include approved legal education of not less than 10 hours in the two years prior to the date an attorney qualifies as a court-appointed attorney for children or indigent parents in dependency-neglect cases. Initial training must include

Child development.

Dynamics of abuse and neglect.

Attorney roles & responsibilities, including ethical considerations.

Relevant state law, federal law, case law, and rules.

Family dynamics, which may include but is not limited to, the following topics: substance abuse, domestic violence and mental health issues; and

Division of Children and Family Services (DCFS) policies and procedures

Additional initial legal education may include, but is not limited to

Grief and attachment.

Custody and visitation.

Resources and services; and

Trial and appellate advocacy

(2) The Administrative Office of the Courts (AOC) shall design and conduct programs for the initial 10 hours of legal education, either alone or in collaboration with other agencies or entities

(3) Following completion of the initial 10 hours of legal education, continuing legal education (CLE) shall include at least 4 hours per year related to representation in dependency-neglect cases which may include, but is not limited to, the subject categories listed in (b)(1). The 4 hours of CLE may be in any one of the specified categories in (b)(1) or in any combination thereof

(4) Both the initial 10 hours of education and the 4 hours of CLE shall be certified in accordance with the rules and regulations promulgated by the Continuing Legal Education Board. All educational hours shall be calculated with reference to the CLE reporting period of July 1 through June 30, as utilized for general CLE credit by the Continuing Legal Education Board. The CLE hours for attorneys may not be carried over from one CLE year to the next

(5) An attorney who is qualified for court appointment in dependency-neglect cases but who fails to acquire 4 hours of CLE required by June 30 of any year shall be subject to the pertinent compliance dates of Rule 5.(D) of the Arkansas Rules and Regulations for Minimum Continuing Legal Education. In accordance with Rule 5.(D), attorneys who sign an acknowledgment deficiency by August 31, and obtain their 4 hours by December 1 shall remain qualified. However, such attorneys shall not be subject to the provisions of Section 4 of the Regulations for Minimum Continuing Legal Education

(6) When an attorney is seeking to complete the 4-hour CLE requirement between June 30 and December 1 for the previous CLE year, he or she may remain as attorney on any pending cases for which appointment was made when the attorney was in compliance with the educational requirements. However, that attorney shall not accept appointment to any new cases until he or she is in full compliance with the CLE requirements

(7) An attorney who fails to complete 4 hours of CLE by December 1 is no longer qualified for court appointment in dependency-neglect cases. His or her name shall be removed from the list of qualified attorneys that is maintained and

distributed to the trial courts by the AOC. Such attorney can become qualified again only by completing 10 hours of CLE in the categories required for initial qualification

(8) Attorneys in compliance with the educational qualifications as an attorney ad litem for dependency-neglect cases as of July 1, 2001 shall be deemed to have met the initial educational qualifications to represent parents in dependency-neglect cases

c. Clinical prerequisite for new appointments in dependency-neglect cases

(1) Attorneys ad litem: Assistance in representation of a child with an experienced attorney in the following hearings

Emergency.

Adjudication/Disposition.

Review.

Permanency Planning; and

Termination of Parental Rights

(2) Parent counsel: Assistance in representation of a parent with an experienced attorney in the following hearings

Emergency.

Adjudication/Disposition.

Review.

Permanency Planning; and

Termination of Parental Rights

Section 2. Standards of practice for attorneys ad litem in dependency-neglect cases:

a. An attorney ad litem shall conduct personally or in conjunction with a trained Court Appointed Special Advocate (CASA) volunteer an independent investigation consisting of review of all relevant documents and records including but not limited to: police reports, DCF's records, medical records, school records, and court records. The ad litem shall interview the child, and in conjunction with a trained CASA volunteer, when one has been

appointed, shall interview the parents, foster parents, caseworker, service providers, school personnel and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child are mandatory

b. An attorney ad litem shall determine the best interest of a child by considering such factors as the child's age and sense of time, level of maturity, culture and ethnicity, degree of attachment to family members including siblings; as well as continuity, consistency, and the child's sense of belonging and identity

c. An attorney shall make earnest efforts to attend all case staffings and court-ordered mediation conferences and to meet with his or her client prior to every hearing. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court

d. An attorney ad litem shall explain the court proceedings and the role of the ad litem in terms that the child can understand

e. An attorney ad litem shall advocate for specific and appropriate services for the child and the child's family

f. An attorney ad litem shall monitor implementation of case plans and court orders

g. An attorney ad litem shall file appropriate pleadings on behalf of the child

h. An attorney ad litem shall review the progress of the child's case and shall advocate for timely hearings

i. An attorney ad litem shall request orders that are clear, specific, and, where appropriate, include a time line for assessment, services, placement, treatment and evaluation of the child and the child's family

j. Attorney-client or any other privilege shall not prevent the ad litem from sharing all information relevant to the best interest of the child with the court

k. An attorney ad litem, functioning as an arm of the court, is afforded immunity against ordinary negligence for actions taken in furtherance of his or her appointment

l. An attorney ad litem shall participate in 10 hours of initial legal education prior to appointment and shall participate in 4 hours of CLE each year thereafter

m. An attorney ad litem shall identify any potential or actual conflict of interest that would impair his or her ability to represent a client. The attorney shall notify the court as soon as practical of such conflict to allow the court to appoint another attorney for the client or for the client to retain counsel prior to the next hearing

n. A full-time attorney shall not have more than 75 dependency-neglect cases, and a part-time attorney shall not have more than 25 dependency-neglect cases. Any deviations from this standard must be approved by the Administrative Office of the Courts which shall consider the following, including but not limited to: the number of counties and geographic area in a judicial district, the experience and expertise of the attorney ad litem, area resources, the availability of CASA volunteers, the attorney's legal practice commitments and the proportion of the attorney's practice dedicated to representing children in dependency-neglect cases, the availability of qualified attorneys in the geographic area, and the availability of funding. An attorney who is within 5 cases of reaching the maximum caseload shall notify the Administrative Office of the Courts and the Juvenile Division Judge

o. An attorney shall not accept appointment of any case for which he or she cannot devote the requisite amount of time to comply with the above Standards of Practice and the Model Rules of Professional Conduct

Section 3. Standards of practice for attorneys appointed by the court to represent parents in dependency-neglect cases:

a. An attorney shall conduct a review of all relevant documents and records including but not limited to: police reports, DCF's records, medical records, and court records. An attorney shall interview all people having relevant knowledge to assist in representation, including but not limited to the investigator, OCA attorney or DCF's case worker, and service providers

b. An attorney shall make earnest efforts to attend all case staffings and court-ordered mediation conferences and to meet with his or her client prior to every hearing. An attorney shall attend all dependency-neglect court hearings until the case is closed or his or her client's parental rights have been terminated

c. An attorney shall diligently and zealously protect and advance the client's interests, rights and goals at all case staffings and in all court proceedings

d. An attorney shall advise and explain to the client each stage of the court proceedings and the likelihood of achieving the client's goals. An attorney, where appropriate, shall identify alternatives for the client to consider, including the client's rights regarding any possible appeal, and explain the risks, if any, inherent in the client's position

e. An attorney shall appear at all hearings and present all evidence and develop all issues to zealously advocate for his or her client and to further the client's goals

f. An attorney shall advocate for specific and appropriate services for the parent to further the client's goals

g. An attorney shall monitor implementation of case plans and court orders to further the client's goals

h. An attorney shall file appropriate pleadings to further the client's goals

i. An attorney shall review the progress of the client's case and shall advocate for timely hearings when necessary to further the client's goals

j. An attorney shall request orders that are clear, specific, and, where appropriate, include a time line for assessment, services, placement, and treatment

k. An attorney shall participate in 10 hours of initial legal education prior to appointment and shall participate in 4 hours of CLE each year thereafter

l. An attorney shall identify any potential or actual conflict of interest that would impair his or her ability to represent a client. The attorney shall notify the court as soon as practical of such conflict to allow the court to appoint another attorney for the client or for the client to retain counsel prior to the next hearing

m. An attorney shall not accept appointment of any case for which he or she cannot devote the requisite amount of time to comply with the above Standards of Practice and the Model Rules of Professional Conduct

Section 4. Qualifications for attorneys appointed by the court to represent children in domestic relations cases and guardianship cases when custody is an issue

a. An attorney shall be licensed and in good standing with the Arkansas Supreme Court

(1) Prior to appointment, an attorney shall have initial education to include approved legal education of not less than 10 hours in the two years prior to the date the attorney qualifies for appointment. Initial education shall include but is not limited to

Child development.

Ad litem roles and responsibilities, including ethical considerations.

Relevant substantive state, federal and case law.

Custody and visitation; and

Family dynamics, including substance abuse, domestic abuse, and mental health issues

(2) The Administrative Office of the Courts shall design and conduct programs for the initial 10 hours of legal education, either alone or in collaboration with other agencies or entities

(3) Continuing education required to maintain qualification as an attorney ad litem shall include 4 hours of annual education in any of the five subject-matter areas set out in (b)(1) above for initial training, or in other areas affecting the child and family. The 4 hours of CLE may be in any one of the specified categories or in any combination thereof

(4) Both the initial 10 hours of education and the 4 hours of CLE shall be certified as CLE in accordance with the rules and regulations promulgated by the Continuing Legal Education Board. All educational hours shall be calculated with reference to the CLE reporting period of July 1 through June 30, as utilized for general CLE credit by the Continuing Legal Education Board. The CLE hours for attorneys ad litem may not be carried over from one CLE year to the next

(5) An attorney who is qualified as an attorney ad litem but who fails to acquire 4 hours of CLE by June 30 of any year

shall be subject to the pertinent compliance dates of Rule 5.(D) of the Arkansas Rules and Regulations for Minimum Continuing Legal Education. In accordance with Rule 5.(D), attorneys who sign an acknowledgment of deficiency and obtain their four hours by December 1 shall remain qualified as attorneys ad litem. However, such attorneys shall not be subject to the provisions of Section 5 of the Regulations for Minimum Continuing Legal Education

(6) When an attorney ad litem is seeking to complete the 4-hour continuing education requirement between June 30 and December 1 for the previous CLE year, he or she may remain as attorney ad litem on any pending cases for which appointment was made when the attorney was in compliance with educational requirements. However, that attorney shall not accept appointment to any new cases until he or she is in full compliance with the CLE requirements

(7) An attorney who fails to complete 4 hours of CLE by December 1 is no longer qualified as an attorney ad litem. His or her name shall be removed from the list of qualified attorneys that is maintained and distributed to the trial courts by the AOC. Such attorney can become qualified again only by completing 10 hours in the categories required for initial qualification

Section 5. Standards of practice for attorneys ad litem in domestic relations cases and guardianship cases when custody is an issue

a. An attorney ad litem shall conduct an independent investigation consisting of review of all relevant documents and records. The attorney ad litem shall interview the child, parents, and others having relevant knowledge to assist in representation. Continuing investigation and regular contact with the child during the pendency of the action are mandatory. Upon entry of a final order, the attorney ad litem's obligation to represent the minor child shall end, unless directed otherwise by the court

b. An attorney ad litem shall determine the best interest of a child by considering such custody criteria as

(1) *Moral Fitness*: factors: integrity, character, compassion, sobriety,

religious training and practice, a newly acquired partner regarding

the preceding elements.

(2) *Stability* factors: emotional stability, work stability, financial stability,

residence and school stability, health, partner stability,

(3) *Love and Affection* factors: attention given, discipline, attitude toward

education, social attitude, attitude toward access of the other party to

the child, and attitude toward cooperation with the other party regarding

the child's needs.

(4) *Other Relevant Information* regarding the *child* such as stated preference,

age, sex, health, testing and evaluation, child care arrangements, and

regarding the *home* such as its location, size, and family composition

c. An attorney ad litem shall appear at all hearings to represent the best interest of the child. All relevant facts should be presented to the court and if the child's wishes differ from the ad litem's determination of the child's best interest, the ad litem shall communicate the child's wishes to the court, as well as the recommendations of the ad litem

d. An attorney ad litem shall file appropriate pleadings on behalf of the child, call witnesses, participate fully in examination of witnesses, present relevant evidence, and advocate for timely hearings

e. An attorney ad litem shall explain to the child the court proceedings and the role of the ad litem in terms that the child can understand

f. An attorney ad litem shall make recommendations to the court for specific and appropriate services for the child and the child's family. All recommendations shall likewise be communicated to the attorneys for the parties, or if a party is *pro se*, then to the party

g. An attorney ad litem shall not be prevented by any privilege, including the lawyer-client privilege, from sharing with the court all information relevant to the best interest of the child

h. An attorney shall not accept appointment to any case for which he or she cannot devote the requisite amount of time to comply with these standards of practice and the Model Rules of Professional Conduct

**FY 2008 GUIDELINES FOR PAYMENT OF ATTORNEYS FEES AND EXPENSES
FOR INDIGENT PARENT COUNSEL D-N CASES**

1. Upon determination by the Circuit Court, Juvenile Division Judge that a parent in a dependency-neglect case is indigent, the judge may order the payment of attorney's fees and expenses to be paid by the Administrative Office of the Courts from the funds allocated for his/her judicial district. Nothing shall prevent the court from requiring the parties to pay all or part of the fees and expenses, if they are financially able.
2. The judges in each judicial district will be limited to state funds allocated to each district based upon a funding formula adopted by the Juvenile Judges Committee of the Arkansas Judicial Council. The AOC will maintain and distribute the status of funds available to each judicial district. This accounting shall be distributed to the juvenile division judges on a monthly basis and to the Arkansas Supreme Court on a quarterly basis.
3. To be considered for reimbursement, the attorney must meet the qualifications and standards of practice adopted by the Arkansas Supreme Court at the time of appointment. The AOC will distribute a list of qualified attorneys to the judges. In addition, the AOC will post the list of qualified attorneys, the qualifications and standards of practice, and relevant forms on the Arkansas judiciary web site.
4. The AOC will provide all qualified attorneys with a copy of instructions for payment, a W-9 form and a brief statistical survey which will include information about the type of case and services provided.
5. No attorney's fees to be paid from the appropriation shall exceed \$75 per hour. In addition, the court may award out-of-pocket expenses, long-distance telephone calls, and mileage at the state rate, witness and subpoena fees, and other incidental costs associated with representation.

6. In order to receive state reimbursement, all bills must **be received by the AOC no later than 30 days from the date of the work performed.**

7. Pursuant to Act 1990 of 2005, an affidavit of indigency must be completed and filed with the clerk before payment.

8. In transition from reimbursement to contracts, attorneys will be limited to the judicial district monthly allocation that has been apportioned to each judicial district. No attorney fees and expenses will be paid by the AOC in excess of the judicial district's monthly allocation.

9. The judge shall review an attorney's itemized billing statement and shall approve an attorney's fees and expenses which shall be set forth in the order for payment.

10. The AOC will process payment upon receipt from the attorney of the following:

- ▶ Billing Cover Sheet (completed and signed)
- ▶ File-marked order for reimbursement
- ▶ Detailed billing statement attached to order
- ▶ W-9 form (if not previously submitted)
- ▶ Final Statistical Report (due prior to last payment on case)

11. The attorney shall forward all documentation to Gabrielle Russ by mail at the AOC, Division of Dependency-Neglect Representation, Justice Building, 625 Marshall, LR, AR 72201 or fax to (501) 682-2662.

For further information, please contact Gabrielle.Russ@arkansas.gov.

AOC 6/2007

VIII. WAIVER OF RIGHT TO COUNSEL

A. Miranda Rights

1. A law enforcement officer who takes a juvenile into custody for a delinquent or criminal offense shall not question the juvenile until the law enforcement officer has advised the juvenile of his/her Miranda rights in the juvenile's own language and the right to speak to his/her custodial parent, guardian or custodian or to have that person present. **Ark. Code Ann. §9-27-317(i)(2)(A-B) (Repl. 2002).**
2. **"Miranda rights"** means the requirement set out in *Miranda v. Arizona*, 384 U.S. 436 (1966), for law enforcement officers to clearly inform an accused, including a juvenile taken into custody for a delinquent act or a criminal offense, including that:
 - a. The juvenile has the right to remain silent;
 - b. Anything the juvenile says will be used against him/her in court;
 - c. The juvenile has the right to consult with a lawyer and to have the lawyer with him/her during interrogation; and
 - d. If the juvenile is indigent, a lawyer will be appointed to represent him/her. **Ark. Code Ann. §9-27-303(35) (Supp. 2007).**

B. Court Finding

1. After questioning, the court must find by clear and convincing evidence that the:
 - a. Juvenile understands the implications of the right to counsel; **Ark. Code Ann. §9-27-317(a)(1) (Repl. 2002).**
 - b. Juvenile freely, voluntarily, and intelligently waives right to counsel; and **Ark. Code Ann. §9-27-317(a)(2) (Repl. 2002).**
 - c. Parent, guardian or custodian, or counsel agreed with the decision to waive the juvenile's right to counsel. **Ark. Code Ann. §9-27-317(a)(3) (Repl. 2002).**
 - (1) Agreement accepted by the court only if the court finds that such person:
 - (a) freely, voluntarily, and intelligently made the decision to agree to juvenile's waiver of counsel;

- (b) has no adverse interest to juvenile; and
- (c) consulted with juvenile about waiver of counsel. **Ark Code Ann. §9-27-317(b) (Repl. 2002).**

*It was unnecessary for the parent or guardian to consent to the juvenile's waiver of the right to counsel in connection with her custodial statement. **Matthews v. State, 67 Ark. 35, 991 S.W.2d 639 (1999).***

*A parent must consent to the juvenile's right to waive counsel pursuant to Ark. Code Ann. § 9-27-317(a)(3) (Repl. 1998). This provision only applies when the juvenile is charged in juvenile court, not when he or she is charged in circuit court. **Conner v. State, 334 Ark. 457, 978 S.W.2d 300 (1998); Misskelly v. State, 323 Ark. 449, 915 S.W.2d 702 (1996), cert. denied, 519 U.S. 898 (1996); Sims v. State, 320 Ark. 528, 900 S.W.2d 508 (1995).***

- d. The court shall consider all circumstances of the waiver including:
 - (1) The juvenile's physical, mental and emotional maturity;
 - (2) Whether juvenile and parent or guardian ad litem understood the consequences of the waiver;
 - (3) Whether the parent, guardian or custodian understood the consequences of the waiver in cases where the parent, guardian or custodian agreed with the juvenile's waiver of the right to counsel;
 - (4) Whether the juvenile and parent were informed of the alleged delinquent act;
 - (5) Whether the waiver was a result of any coercion, force or inducement; and
 - (6) Whether the juvenile and parent or guardian were advised of juvenile's right to remain silent and to be appointed counsel and had waived such rights. **Ark. Code Ann. §9-27-317(c)(1-6) (Repl. 2002).**

*Based on the totality of the circumstances, the initial statements made to the police without Miranda warnings were not involuntary so as to render the second warned statements inadmissible. Although appellants were minors and they were interviewed at the police station, they were interviewed in the presence of their caretakers and there was no evidence of any improper tactics to compel them to speak. **Dye v. State, 69 Ark. App. 15, 9 S.W.3d 539 (2000).***

*Based on the totality of the circumstances the juvenile's custodial statement was voluntary based on the following: the juvenile was four days from his fourteenth birthday when he was questioned; there was no evidence that he had below average I.Q.; he had completed the sixth grade and could read and write; the detention was not long; and there was no evidence of threats, violence, false statements, psychological tactics, promises or other devices to obtain his confession. He made a knowing and intelligent waiver of his Miranda rights based on his age, experience, education, background and intelligence. In addition there was no evidence that he was under the influence of drugs or alcohol at the time he waived his rights. **Miller v. State, 338 Ark. 445, 994 S.W.2d 476 (1999).***

*Appellant contended that her statement was not the product of a knowing and intelligent waiver due to her young age and due to it being made without a parent present. Appellant's age is a factor in determining the voluntariness of the waiver; however, based on the totality of the circumstances the trial court's decision was not clearly erroneous. **Matthews v. State, 67 Ark. App. 35, 991 S.W.2d 639 (1999).***

*The court looks at the totality of the circumstances in determining whether a waiver of counsel was voluntarily, knowingly, and intelligently given. **Humphrey v. State, 327 Ark. 753, 940 S.W.2d 860 (1997); Johnson v. State, 307 Ark. 525, 823 S.W.2d 440 (1992).***

*The Court found that an inquiry as to the waiver of counsel includes: 1) whether the waiver was "voluntary" in the sense that it was the product of a free and deliberate choice rather than by intimidation, coercion, or deception, and 2) whether the waiver was made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. A custodial statement is presumptively involuntary and the state has the burden to prove by a preponderance of the evidence that a custodial statement was given voluntarily, and was knowingly and intelligently made. The Court considers the following factors to determine if the confession was voluntary: age, education, intelligence of the accused, lack of advice of his constitutional rights, length of detention, repeated and prolonged nature of questioning, or use of physical punishment. **Humphrey v. State, 327 Ark. 753, 940 S.W.2d 860 (1997).***

*The Court considers whether the special rights accorded to a juvenile by statute were observed by authorities in deciding whether, according to the totality of the circumstances, a confession was freely and voluntarily given. **Isbell v. State, 326 Ark. 17, 931 S.W.2d 74 (1996).***

A defendant may waive his right to remain silent and his right to counsel only if the waiver is made voluntarily, knowingly, and intelligently. Custodial statements are presumed involuntary and the state has the burden of proving otherwise. Factors in determining the voluntariness of a custodial statement include: the age, education, and intelligence of the accused, the length of the detention during which the statement was given, the use of repeated or prolonged questioning, the use of mental punishment or coercion, and the advice or lack of advice of an accused's constitutional rights.

The Court will make an independent determination based on the totality of the circumstances and will reverse only if the decision was clearly against the preponderance of the evidence. The court enumerated the factors to be considered in a juvenile's waiver set forth at Ark. Code Ann. § 9-27-317.

*Despite the juvenile's alleged mental deficiencies, the Arkansas Supreme Court has upheld a suspect's Miranda waiver even when the suspect was determined to be intellectually impaired. Although age and mental capacity were factors to consider, the trial court did not err in concluding that these factors rendered appellant's confession inadmissible. **Ingram v. State, 53 Ark. App. 77, 918 S.W.2d 724 (1996).***

C. Juvenile Waiver of Counsel

1. All waivers shall be in writing and signed by juvenile, except when a waiver is given in the presence of the court. **Ark. Code Ann. §9-27-317(h)(1) (Repl. 2002).**

*Appellant was convicted of capital felony murder and sentenced to life without parole. The Court stated that when an appellant is ultimately charged in circuit court and is ultimately tried there, the failure of the law enforcement officers to obtain the consent of appellant's parents to his waiver of right to counsel does not bar admission of appellant's confession. **Sims v. State, 320 Ark. 528, 900 S.W.2d 508 (1995).***

***Note:** Although Act 68 of 1994 amended Ark. Code Ann. § 9-27-317(f) to no longer require a parent to sign a juvenile's waiver of counsel, Ark. Code Ann. § 9-27-317(a)(3) requires the court to find by clear and convincing evidence that the parent, guardian, custodian or counsel agreed with the decision to waive the juvenile's right to counsel.*

*The appellant argued that his confession was inadmissible at the transfer hearing because neither of his parents had signed a written waiver of his right to counsel as required by Ark. Code Ann § 9-27-317(f). The appellant relied on *Rhoades v. State*, 315 Ark. 658, 869 S.W.2d 698 (1994), where the juvenile was transferred to juvenile court and he was adjudicated a delinquent. The court held that the Arkansas Juvenile Code applied in the *Rhoades* case at the time the juvenile gave his*

confession and that the law enforcement officers' failure to comply with Ark. Code Ann. § 9-27-317 barred the juvenile's confession at the adjudicatory hearing.

*Since the appellant was charged in circuit court and will ultimately be tried in circuit court, the failure to obtain the consent of the parents did not bar the juvenile's confession. Further, the court stated that even if there was an error in admitting the confession, the appellant could not demonstrate prejudice. **Ring v. State, 320 Ark. 128, 894 S.W.2d 944 (1995).***

*Ark. Code Ann. § 9-27-317 sets out the procedures required when obtaining a waiver, which includes a written and signed waiver of the right to counsel signed by the juvenile and his parent, guardian or custodian. Where appellant had not been charged with a felony in circuit court as an adult when law officers interrogated him and obtained his confession, the Juvenile Code applied at the time he gave his statement. Therefore, appellant's statement was inadmissible at trial because the law enforcement officer's conduct failed to comply fully with the right-to-counsel and waiver provisions required by the Juvenile Code. **Rhoades v. State, 315 Ark. 658, 869 S.W.2d 698 (1994)***

D. No Waiver of Counsel

1. No waiver of counsel shall be accepted in any case:
 - a. When the parent, guardian or custodian has:
 - (1) Filed a petition against juvenile;
 - (2) Initiated a petition against juvenile; or
 - (3) Requested juvenile's removal from home. **Ark. Code Ann. §9-27-317(d) (Repl. 2002).**
 - b. When there is a reasonable likelihood that juvenile will be committed to an institution. **Ark. Code Ann. §9-27-317(e) (Repl. 2002).**
 - c. When a juvenile has been designated as an extended jurisdiction juvenile offender. **Ark. Code Ann. §9-27-317(f) (Repl. 2002).**
 - d. When a juvenile is in DHS custody, including DYS. **Ark. Code Ann. §9-27-317(g) (Repl. 2002).**

E. Parent Waiver of Counsel

TPR reversed because trial judge erred in finding that appellant had waived her right to counsel. In order to establish a voluntary and intelligent waiver, the judge must:

① *Explain the desirability of having the assistance of counsel; and,*

② *Advise the parent of the drawbacks and disadvantages of self-representation so that the record will establish that he/she knows what he/she is doing and that he/she has made the choice with his/her eyes wide open. **Battishill v. Arkansas Dep't of Human Servs., 78 Ark. App. 68, 82 S.W.3d 178 (2002).***

The Arkansas Supreme Court reversed the Court of Appeals and held that appellant's request to waive counsel was not unequivocal and, therefore, it would have been error for the trial court to accept that waiver, because her request did not satisfy constitutional standards for the waiver of counsel.

Waiver of counsel valid only if:

① *Request is unequivocal and timely asserted;*

② *There has been a knowing and intelligent waiver of the right to counsel; and,*

③ *The defendant has not engaged in conduct that would prevent the fair and orderly exposition of the issues. **Bearden v. Arkansas Dep't of Human Servs., 344 Ark. 317, 42 S.W.3d 397 (2001).***

IX. DHS CASE PLANS

A. Development

1. A case plan shall be developed in:
 - a. All dependency-neglect cases; and
 - b. Any case involving an out-of-home placement. **Ark. Code Ann. §9-27-402(a) (Repl. 2002).**
2. DHS shall be responsible for developing case plans in all dependency-neglect cases, and in FINS or delinquency cases when custody is transferred to the agency, pursuant to Ark. Code Ann. §9-27-328. **Ark. Code Ann. §9-27-402(a) (Repl. 2002).**
3. The case plan shall be developed in consultation with the:
 - a. Juvenile's parent, guardian, or custodian;
 - (1) If the parents are unwilling or unable to participate in the development of the case plan, the department shall document that unwillingness or inability and provide this written documentation to the parent, if available.
 - (2) A parent's incarceration, by itself, does not make a parent unavailable to participate in the development of a case plan.
 - b. Juvenile, if appropriate;
 - c. Juvenile's foster parents;
 - d. CASA, if appointed to case;
 - e. Juvenile's attorney ad litem; and
 - f. All parties' attorney(s). **Ark. Code Ann. §9-27-402(a)(1)(A) (Repl. 2002).**

B. Filed with Court

1. The case plan shall be developed and filed with the court no later than 30 days after the date the petition was filed or the juvenile was first placed out of home, whichever is sooner. **Ark. Code Ann. §9-27-402(a)(2)(A) (Repl. 2002).**

2. If DHS does not have sufficient information prior to the adjudication hearing to complete all of the case plan, it shall complete those parts for which information is available. **Ark. Code Ann. §9-27-402(a)(2)(B) (Repl. 2002).**
3. All parts of the case plan shall be completed and filed with the court 30 days after the adjudication hearing. **Ark. Code Ann. §9-27-402(a)(2)(C) (Repl. 2002).**

C. Signed and Distribution

Case plans shall be signed and distributed to all parties and distributed to the juvenile's attorney ad litem, CASA, if appointed, and foster parents, if available. **Ark. Code Ann. §9-27-402(a)(3) (Repl. 2002).**

D. Modifications

- a. Case plans shall be subject to modification based on changing circumstances. **Ark. Code Ann. §9-27-402(a)(4)(A) (Repl. 2002).**
- b. All parties to the case plan shall be notified of any substantive change to the case plan. **Ark. Code Ann. §9-27-402(a)(4)(B) (Repl. 2002).**
- c. A substantive change to a case plan includes, but is not limited to changes:
 - (1) in juvenile's placement;
 - (2) in the visitation rights of any party; or
 - (3) in the goal of the plan. **Ark. Code Ann. §9-27-402(a)(4)(C) (Repl. 2002).**

E. Case Plan Contents for In-Home Services

The case plan shall include at a minimum:

- a. A description of the problems being addressed;
- b. A description of the services to be provided to the family and juvenile specifically addressing the identified problems and time frames for providing services;
- c. A description of any reasonable accommodations made to parents in accordance with the Americans with Disabilities Act to assure to all the parents meaningful access to services;

- d. The name of an individual known to be or who is named as the father or possible father of the juvenile and whose paternity of the juvenile has not been judicially determined; and
- e. A description of how the juvenile's health and safety will be addressed. **Ark. Code Ann. §9-27-402(b) (Repl. 2002).**

F. Case Plan Contents for Out-of-Home Placement Services

The case plan must include at a minimum:

- a. A description of the problems being addressed;
- b. A description of the services to be provided to the family and juvenile specifically addressing the identified problems and time frames for providing services;
- c. A description of any reasonable accommodations made to parents in accordance with the Americans with Disabilities Act to assure to all the parents meaningful access to services;
- d. The name of an individual known to be or who is named as the father or possible father of the juvenile and whose paternity of the juvenile has not been judicially determined;
- e. A description of the permanency goal;
- f. The specific reasons for the placement of the juvenile in care outside the home, including a description of the problems or conditions in the home of the parent, guardian, or custodian which necessitated removal of the juvenile, and the remediation of which will determine the return of the juvenile to the home;
- g. A description of the type of out-of-home placement selected for the juvenile including a discussion of the appropriateness of the placement;
- h. A plan for addressing the needs of the juvenile while the placement, with an emphasis on the health and safety safeguards in place for the child, including a discussion of the services provided within the last six (6) months;
- i. The specific actions to be taken by the parent, guardian, or custodian of the juvenile to eliminate or correct the identified problems or conditions and the period during which the actions are to be taken;

The plan may include any person or agency who shall agree to and be responsible for the provision of social and other family services to the juvenile or the parent, guardian, or custodian of the juvenile.

- j. The visitation rights and obligations of the parent, guardian, or custodian and the state agency during the period the juvenile is in the out-of-home placement;
- k. The social and other family services to be provided to the parent, guardian, or custodian of the juvenile, and foster parent, if any, during the period the juvenile is in placement and a timetable for the provision of those services;

The purposes of services shall be to promote the availability to the juvenile of a continuous and stable living environment, promote family autonomy, strengthen family life where possible, and promote the reunification of the juvenile with the parent, guardian or custodian.

- l. To the extent available and accessible, the health and education records of the juvenile, pursuant to 42 U.S.C. 675(1);
- m. A description of the financial support obligation to the juvenile, including health insurance of the juvenile's parent, parents, or guardian;
- n. A description of the location of siblings. If siblings have been separated, a statement of the reasons for separation and the efforts that have been and will be made to enable the siblings to maintain regular contact while separated and to be reunited as soon as possible;
- o. When appropriate for a juvenile age sixteen (16) and over, the case plan must also include a written description of the programs and services which will help the juvenile prepare for the transition from foster care to independent living; and
- p. A written notice to the parent(s) that failure of the parent(s) to comply substantially with the case plan may result in the termination of parental rights, and that a material failure to comply substantially may result in the filing of a petition for termination of parental rights sooner than the compliance periods set forth in the case plan itself. **Ark. Code Ann. §9-27-402(c) (Repl. 2002).**

G. Court Approval Required

The case plan is subject to court review and approval. **Ark. Code Ann. §9-27-402(d) (Repl. 2002).**

H. Participation Not Admission

A parent's, guardian's or custodian's participation in the development or the acceptance of a case plan shall not constitute an admission of dependency-neglect. **Ark. Code Ann. §9-27-402(e) (Repl. 2002).**

X. DIVERSION

A. Diversion Requirements

1. Delinquency Diversion - the prosecuting attorney may attempt to make a delinquency diversion upon:
 - a. Consultation with intake officer;
 - b. Determination that diversion is in the best interest of the juvenile and community; and
 - c. Consent of the juvenile and his parent, guardian or custodian. **Ark. Code Ann. §9-27-323(a) (Supp. 2007).**

2. FINS Diversion - the intake officer may make a FINS diversion upon:
 - a. Determination that diversion is in the best interest of the juvenile and community;
 - b. Consent of petitioner; and
 - c. Consent of juvenile and his parent, guardian or custodian. **Ark. Code Ann. §9-27-323(b) (Supp. 2007).**

3. Diversion Conditions
 - a. Juvenile admits involvement in delinquent or FINS act.
 - b. Intake officer shall advise juvenile and parent of right to refuse diversion and right to demand filing of petition.
 - c. Juvenile shall enter diversion agreement voluntarily and intelligently with advice of counsel, or consent of parent, guardian or custodian, if no counsel.
 - d. Supervision or referral of juvenile to public or private agency for services shall not exceed 6 months.
 - e. All other diversion agreements shall not exceed nine months.
 - f. Juvenile and parent, guardian or custodian have the right to terminate diversion agreement at any time and to request filing of petition. **Ark. Code Ann. §9-27-323(c) (Supp. 2007).**

B. Diversion Agreement Terms

1. Agreement shall:
 - a. Be in writing in simple, ordinary and understandable language;
 - b. State that agreement was entered into voluntarily by juvenile;
 - c. Name attorney or others who advised juvenile to enter agreement;
 - d. Be signed by:
 - (1) all parties to agreement, and
 - (2) prosecutor, if delinquent act would constitute a felony if committed by an adult, or
 - (3) prosecuting authority if truancy case. **Ark. Code Ann. §9-27-323(d)(1) (Supp. 2007).**
2. Diversion agreement shall be limited to:
 - a. Non-judicial probation under supervision of intake or probation officer for a period during which the juvenile may be required to comply with specified conditions concerning his conduct and activities;
 - b. Participation in a court-approved education, counseling or treatment program; or
 - c. Participation in a court-approved Teen Court in a delinquency case **Ark. Code Ann. §9-27-323(e) (Supp. 2007).**
3. Copies of diversion agreement shall be given to the juvenile, juvenile's counsel, juvenile's parent(s) and the intake officer for case file. **Ark. Code Ann. §9-27-323(d)(2) (Supp. 2007).**

C. Diversion Fee

1. A juvenile intake or probation officer may charge a diversion fee only after review of an affidavit of financial means and a determination of ability to pay. **Ark. Code Ann. §9-27-323(i)(1) (Supp. 2007).**
 - a. The diversion fee shall not exceed \$20 a month. **Ark. Code Ann. §9-27-323(i)(2) (Supp. 2007).**

- b. The court may direct that the fees be collected by the officer, the sheriff, or court clerk in the county in which the fee is charged. **Ark. Code Ann. §9-27-323(i)(3) (Supp. 2007).**
 - (1) The person designated to collect diversion fees shall maintain receipts and account for all incoming fees and shall deposit the fees at least weekly in the county treasury of the county where the fees are collected and the diversion services provided. **Ark. Code Ann. §9-27-323(i)(4) (Supp. 2007).**
 - (2) The diversion fees shall be deposited in the account with the juvenile service fee in accordance to Ark. Code Ann. §16-13-326. **Ark. Code Ann. §9-27-323(i)(5) (Supp. 2007).**
 - (3) Judicial districts with more than one county may designate the treasurer of one county as the depository of all the juvenile fees; however, the treasurer shall maintain separate account for the fees collected and expended in each county. **Ark. Code Ann. §9-27-323(j)(1-2) (Supp. 2007).**
 - (4) Money remaining at the end of the fiscal year shall not revert to any other fund but shall carry over to the next fiscal year. **Ark. Code Ann. §9-27-323(j)(3) (Supp. 2007).**
- c. These funds shall be used by agreement of the judges who hear juvenile cases and the quorum court to provide services and supplies to juveniles at the discretion of the juvenile division of circuit court. **Ark. Code Ann. §9-27-323(j)(4) (Supp. 2007).**

D. Diversion Agreement Termination

- 1. The diversion agreement may be terminated by the juvenile and parent at any time **Ark. Code Ann. §9-27-323(c)(6) (Supp. 2007).**
- 2. The diversion agreement may be terminated by prosecutor in a delinquency case or petitioner in a FINS case if during diversion agreement period the:
 - a. Juvenile or parent, guardian, or custodian declines to participate in diversion;
 - b. Juvenile fails without reasonable excuse to attend a scheduled conference;
 - c. Juvenile appears unable or unwilling to benefit from diversion; or

- d. Intake officer obtains new information indicating that diversion efforts are not in best interests of juvenile or society. **Ark. Code Ann. §9-27-323(g) (Supp. 2007).**

E. Petition

1. Prosecutor or petitioner may file petition based on the events out of the original complaint only during period for which diversion agreement was entered into.
2. Juvenile's compliance with proper and reasonable terms of agreement is grounds for dismissal of the petition. **Ark. Code Ann. §9-27-323(f) (Supp. 2007).**

F. Diversion Completion

1. Juvenile shall be dismissed without further proceedings;
2. Intake officer shall provide written notice of dismissal to juvenile and parent, guardian or custodian; and
3. Complaint and agreement may be expunged by the court from the juvenile's file. **Ark. Code Ann. §9-27-323(h) (Supp. 2007).**

Note: The Circuit Court, Juvenile Division Judge is not involved in the diversion process and should not even know about a diversion. If a diversion agreement is terminated and a petition filed, the juvenile may appear before that judge for adjudication. If the judge were aware of the diversion, he or she would also be aware that the juvenile had admitted complicity in the delinquent or FINS act.

XI. DETENTION

A. Time Constraints

1. Intake officer shall make detention decision within 24 hours after juvenile is taken into custody for an act that would be a felony if committed by an adult, except as provided by Ark. Code Ann. §9-27-313(d)(1). **Ark. Code Ann. §9-27-313(d)(2) (Supp. 2007).**
2. Upon receiving notice that a juvenile has been taken into custody on an allegation of delinquency, the intake officer shall immediately notify the juvenile's parent, guardian or custodian of the location at which the juvenile is being held and the reasons for the juvenile's detention, if such notification has not previously taken place. **Ark. Code Ann. §9-27-322(a) (Supp. 2007).**
3. When a juvenile is detained, the intake officer shall immediately make every effort possible to notify the juvenile's custodial parent, guardian, or custodian. **Ark. Code Ann. §9-27-313(d)(5) (Supp. 2007).**
4. When a juvenile is taken into custody on an allegation of a violation of probation or violation of a court order, a detention hearing shall be held by the court as soon as possible, but no later than 72 hours after juvenile is taken into custody or if 72 hours ends on Saturday, Sunday or holiday, on the next business day. Otherwise the juvenile shall be released. **Ark. Code Ann. §9-27-326(a) (Supp. 2007).**
5. The juvenile shall be released from custody, detention, or shelter care if the delinquency petition is not filed within 24 hours after detention hearing or 96 hours after juvenile is taken into custody, whichever is sooner. **Ark. Code Ann. §9-27-313(f) (Supp. 2007).**

B. Detention Limitations

1. Juveniles alleged or adjudicated dependent-neglected or FINS shall not be placed or detained in a:
 - a. Secure detention facility;
 - b. Facility utilized for detaining alleged or adjudicated juvenile delinquents; or
 - c. Facility utilized for detaining adults charged with or convicted of a crime. **Ark. Code Ann. §9-27-336(a) (Supp. 2007).**

2. FINS detention exceptions:

- a. When a juvenile has been away from home for more than 24 hours and when the parent, guardian or other person contacted lives beyond a 50-mile driving distance or out of state. **Ark. Code Ann. §9-27-336(a)(1)(A) (Supp. 2007).**
- (1) Juvenile may be held in custody in a juvenile detention facility for purposes of identification, processing, or arranging for release or transfer to an alternative facility. Such holding shall be limited to the minimum time necessary to complete these actions and shall not occur in any facility utilized for incarceration of adults. **Ark. Code Ann. §9-27-336(a)(1)(B) (Supp. 2007).**
 - (2) Juvenile shall be separated from detained juveniles charged or held for delinquency. Juvenile may not be held for more than 6 hours if the parent, guardian, or other person contacted lives in the state, or 24 hours, excluding weekends and holidays, if the parent, guardian, or other person contacted lives out of state. **Ark. Code Ann. §9-27-336(a)(1)(C) (Supp. 2007).**
- b. An adjudicated FINS may be held in a juvenile detention facility when the court finds that the juvenile violated a valid court order.
- (1) A valid court order shall include any order of a circuit court judge to a juvenile who has been brought before the court and made subject to a court order. The juvenile who is the subject of the order shall receive full due process rights.
 - (2) A juvenile held under this subsection shall be separated from detained juveniles charged or held for delinquency. Such holding shall not occur in any facility utilized for incarceration of adults. **Ark. Code Ann. §9-27-336(a)(2) (Supp. 2007).**

The trial court committed a FINS juvenile to DYS upon finding that the juvenile was in criminal contempt and for violation of a DYS aftercare plan for a prior commitment from another jurisdiction. DHS filed a motion to set aside the commitment order arguing that the juvenile had not been found guilty of a crime and had not been adjudicated delinquent. An emergency writ of habeas corpus petition was filed in the Saline County Circuit Court where the juvenile was being held, but it was denied.

The Supreme Court found that criminal contempt is a crime in the ordinary sense, but held that the juvenile had been denied the right of due process in reaching that conclusion. Ark. Code Ann. § 9-27-336(a) provides the FINS contempt detention exception. The court must find that the juvenile violated a valid court order and the juvenile shall receive full due process rights. Appellant argued that the juvenile was never served with a copy of the petition or a written order to show cause and he was not provided defense counsel.

*Ark. Code Ann. §9-27-316 makes it clear that in both delinquency and FINS cases a juvenile has a right to counsel and to an attorney ad litem who represents the best interests of the juvenile, but that this is not intended to be the same person. Because the juvenile was denied counsel, the trial court exceeded its authority and the order was thus invalid. The petitioner's writ of habeas corpus was granted. Since the writ of habeas is granted the writ of certiorari is moot. **Arkansas Dep't of Human Servs. v. Mainard, et al., 358 Ark. 204, ___ S.W.3d ___ (2004).***

3. Juveniles shall not be placed or confined in adult jail or lock-up except when:
 - a. Juvenile formally transferred from juvenile division of circuit court to the criminal division of circuit court and against whom felony charges have been filed; **Ark. Code Ann. §9-27-336(b)(1) (Supp. 2007).**
 - b. Juvenile for whom prosecutor has discretion to charge as adult and felony charges have been filed in circuit, criminal division; **Ark. Code Ann. §9-27-336(b)(1) (Supp. 2007).**

***Note:** Under both the preceding provisions of the juvenile code and federal law, a juvenile who will be tried as an adult may be jailed as an adult. 28 C.F.R. 31.303(e)(2) (7/1/90). However, the Arkansas Jail Standards require that pretrial detainees under 18 years of age be separated by sight and sound from adult pretrial detainees or convicted persons.*

- c. An alleged delinquent juvenile may be held in adult jail or lock-up for up to 6 hours, for purposes of identification, processing or arranging for release or transfer, provided juvenile is separated by sight and sound from adults. Holding shall be limited to minimum time necessary and shall not include transportation time to an alternative facility. **Ark. Code Ann. §9-27-336(b)(2) (Supp. 2007).**
 - d. An alleged delinquent juvenile may be held in adult jail or lock-up awaiting initial appearance before judge for up to 24 hours (excluding weekends and holidays) if all the following conditions exist:

- (1) alleged act would be a misdemeanor or felony if committed by an adult on violation of Ark. Code Ann. §5-73-119 (minor in possession of a handgun);
- (2) geographic area with jurisdiction over juvenile is outside metropolitan statistical area, pursuant to Bureau of Census' current designation;

Note: Counties within metropolitan statistical areas where this holding is not available, are Benton, Cleveland, Craighead, Crawford, Crittenden, Faulkner, Franklin, Garland, Grant, Jefferson, Lincoln, Lonoke, Madison, Miller, Perry, Poinsett, Pulaski, Saline, Sebastian, and Washington.

Crittenden County cannot avail itself to the exception in Ark. Code Ann. §9-27-336(b)(3)(A) because it is not outside a metropolitan statistical area. Op. Att’y Gen. No. 95-090 (1995).

- (3) no acceptable alternative placement exists; and
 - (4) juvenile is separated by sight and sound from adults. **Ark. Code Ann. §9-27-336(b)(3)(A) (Supp. 2007).**
- e. A juvenile awaiting an initial appearance and being held pursuant to the above 24 hour exception may be held for an additional period, not to exceed 24 hours, if the following conditions exist:
- (1) conditions of distance or lack of highway, road, or other ground transportation do not allow for court appearance within 24 hours;
 - (2) all the above conditions set forth in Ark. Code Ann. §9-27-336(b)(3) exist;
 - (3) criteria will be adopted by the Governor or his designee to establish what distance, highway or road conditions or ground transportation limitations will provide a basis for holding a juvenile in adult jail or lockup under this exception. **Ark. Code Ann. § 9-27-336(b)(3)(B) (Supp. 2007).**

C. Detention Release

A detention facility shall not release a serious offender in order to house a more serious offender, except by order of the judge who committed the more serious offender. **Ark. Code Ann. §9-27-336(d) (Supp. 2007).**

XII. HEARINGS OVERVIEW

A. Notice of Hearing

1. Contents of notice
 - a. Describes the nature of hearing; and
 - b. Indicates time, date and place of hearing; and
 - c. Advises of right to counsel and appointed counsel if indigent. **Ark. Code Ann. § 9-27-303(37)(A) (Supp. 2007).**
2. Notice shall be served in manner provided by the Ark. R. Civ. P. 5. **Ark. Code Ann. § 9-27-303(37)(B) (Supp. 2007).**
3. DHS shall provide notice of any review or hearing to foster parents and pre-adoptive parents of a child in DHS custody. **Ark. Code Ann. § 9-27-325(l)(l) (Supp. 2007).**
4. Relative care givers shall be given notice by the original petitioner in the juvenile matter. **Ark. Code Ann. § 9-27-325(l)(2) (Supp. 2007).**
5. Foster parents adoptive parents, and relative care givers shall not be made parties to the review or hearing solely on the basis of their right to notice and the opportunity to be heard. **Ark. Code Ann. § 9-27-325(l)(3)(B) (Supp. 2007).**
6. A grandparent shall be entitled to notice and shall be granted an opportunity to be heard in any dependency-neglect proceeding involving a grandchild who is twelve months of age or younger when:
 - a. The grandchild resides with this grandparent for at least six continuous months prior to his or her first birthday;
 - b. The grandparent was the primary care giver for and financial supporter of the grandchild during the time the grandchild resided with the grandparent;
 - c. The continuous custody occurred within one year of the date the child custody proceeding was initiated; and
 - d. Notice to a grandparent under this subsection shall be given by DHS. **Ark. Code Ann. § 9-27-325(l)(3)(B)(m)(1)(A) (Supp. 2007).**
7. A grandparent shall be entitled to notice and shall be granted an opportunity to be heard in any dependency-neglect proceeding involving a grandchild who is twelve months of age or older when the:

- a. Grandchild resides with this grandparent for at least one continuous year regardless of age;
- b. Grandparent was the primary care giver for and financial supporter of the grandchild during the time the grandchild resided with the grandparent; and
- c. Continuous custody occurred within one year of the date the child custody proceeding was initiated. **Ark. Code Ann. § 9-27-325(l)(3)(B)(m)(1)(B) (Supp. 2007).**

For purposes of this subsection, “grandparent” does not mean a parent of a putative father of the child. **Ark. Code Ann. § 9-27-325(l)(3)(B)(m)(2) (Supp. 2007).**

B. Right To Jury

1. Only extended juvenile jurisdiction offenders have a right to a jury trial.
 - a. The juvenile shall be advised of this right by the court following the determination that the juvenile shall be tried as an extended juvenile jurisdiction offender.
 - b. This right may be waived by a juvenile only after being advised of his rights and after consultation with his attorney.
 - c. The waiver shall be in writing and signed by the juvenile’s attorney. **Ark. Code Ann. § 9-27-325(a) (Supp. 2007).**

*The U.S. Supreme Court held that juvenile proceedings are not criminal proceedings within the meaning of the Sixth Amendment. The applicable standard in juvenile proceedings is fundamental fairness. While notice, right to counsel, right to confrontation and cross-examination, and the burden of proof flow from Due Process, a jury trial is not a necessary component of the fact-finding process. **McKeiver v. Pennsylvania, 403 U.S. 528 (1971).***

*The Arkansas Court of Appeals held that the Juvenile Code of 1989 does not represent a “substitute for prosecution,” requiring a jury trial for an alleged delinquent; and that the due process standard of fundamental fairness is maintained without affording a jury trial. **Valdez v. State, 33 Ark. App. 94, 801 S.W.2d 659 (1991).***

C. Pleadings & Notice of Appearance

1. Defendants not required to file written responsive pleading in order to be heard by court. **Ark. Code Ann. § 9-27-325(b)(1) (Supp. 2007).**

2. In dependency-neglect procedures, retained counsel shall file a notice of appearance upon acceptance of representation and serve a copy to the petitioner. **Ark. Code Ann. § 9-27-325(b)(2) (Supp. 2007).**

D. Defendants & Witnesses

1. At hearing, court may:
 - a. Proceed only if juvenile is present or excused for good cause; or
 - b. Continue the case upon determination that presence of an adult defendant is necessary. **Ark. Code Ann. § 9-27-325(c)(2) (Supp. 2007).**
2. After determination that a necessary party is not present, the court may issue:
 - a. Contempt order if juvenile was served with notice to appear, or
 - b. Order to appear with time and place of hearing if juvenile was served with notice of hearing. **Ark. Code Ann. § 9-27-325(c)(2) (Supp. 2007).**
3. All parties shall have the right to compel attendance of witnesses in accordance with the Arkansas Rules of Civil Procedure and the Arkansas Rules of Criminal Procedure. **Ark. Code Ann. § 9-27-325(g) (Supp. 2007).**

E. Court of Record

1. Records of proceedings shall be kept in accordance with rules promulgated by the Arkansas Supreme Court. **Ark. Code Ann. § 9-27-325(d) (Supp. 2007).**
2. Unless waived on the record by the parties, it shall be the duty of any circuit court to require that a verbatim record be made of all proceedings pertaining to any contested matter before it. **Supreme Court Administrative Order Number 4.**

F. Rules

1. Unless otherwise indicated, the Arkansas Rules of Evidence apply. **Ark. Code Ann. § 9-27-325(e) (Supp. 2007).**

Note: Ark. Code Ann. § 9-27-315(e) states that probable cause hearings are miscellaneous hearings. Therefore the Rules of Evidence are not applicable.

*The child's statement to a DHS employee that her father abused her does not qualify as an admission by a party opponent under Rule 801(d). Admissions of one party are generally not receivable against a co-party where, although nominally on the same side in the litigation, the two have adverse interests. **Cochran and A.N.C. v. Ark. Dep't of Human Servs., Division of Children & Family Servs., and SCAN, Inc., 44 Ark. App. 105, 865 S.W.2d 651 (1993).***

2. The Rules of Civil Procedure shall apply to all proceedings. **Ark. Code Ann. § 9-27-325(f) (Supp. 2007).**
3. The Rules of Criminal Procedure shall apply to delinquency proceedings. **Ark. Code Ann. § 9-27-325(f) (Supp. 2007).**

The Arkansas Rules of Criminal Procedure apply to delinquency proceedings and failure to renew the directed verdict motion at the close of all the evidence waived any sufficiency challenge on appeal. Jones v. State, 347 Ark. 409, 64 S.W.3d 728 (2002).

Pursuant to Ark. R. Crim. P. 33.1(b), failure to make a timely motion for dismissal at the close of the evidence waives any right to challenge the sufficiency of the evidence. If properly preserved for review, there was sufficient evidence to find the juvenile delinquent for possession of a controlled substance with intent to deliver where the juvenile was in close proximity and accessible to the methamphetamine, he was driving and he told the officers, "the stuff was not his," indicating guilty knowledge of its presence. J.R. v. State, 73 Ark. App. 194, 40 S.W.3d 342 (2001).

The juvenile defendant may not appeal from a plea of guilty or nolo contendere, except as provided by Ark. R. Crim. P. 24.3(b) which provides that a defendant may enter a guilty plea conditioned on the reversal of a pretrial determination of a motion to suppress illegally obtained evidence. These guilty pleas do not fall within the rule. Consequently, Ark. R. Crim P. 36.1 precluded the court from hearing the appeals. Mason v. State, 323 Ark. 361, 914 S.W.2d 751 (1996).

G. Burden of Proof

1. Preponderance of the evidence applies to the following hearings:
 - a. Dependency-Neglect; **Ark. Code Ann. § 9-27-325(h)(2)(C) (Supp. 2007).**
 - b. Families In Need of Services (FINS); **Ark. Code Ann. § 9-27-325(h)(2)(C) (Supp. 2007).**
 - c. Probation Revocation; **Ark. Code Ann. § 9-27-325(h)(2)(C) (Supp. 2007).**
 - d. EJJ Designation; and **Ark. Code Ann. § 9-27-503(b) (Repl. 2002).**
 - e. EJJ Review. **Ark. Code Ann. § 9-27-5079(b) (Supp. 2007); Ark. Code Ann. § 9-27-509(b)(3) (Repl. 2002).**
2. Clear and convincing evidence applies to the following hearings:

- a. Termination of Parental Rights (TPR); **Ark. Code Ann. § 9-27-325(h)(2)(C) (Supp. 2007).**

The U.S. Supreme Court held that before a state may sever the rights of parents to their natural child, Due Process requires that the state support its allegations by at least clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745 (1982).

- b. Transfer; **Ark. Code Ann. § 9-27-325(h)(2)(C) (Supp. 2007).**

The burden of proof in a hearing on the transfer of a case from circuit court to juvenile court is "clear and convincing evidence." A trial court's decision to try a juvenile as an adult must be supported by clear and convincing evidence. Heagerty v. State, 335 Ark. 520, 983 S.W.2d 908 (1998); Heagerty v. State, 62 Ark. App. 283, 971 S.W. 2d 793 (1998); Jones v. State, 332 Ark. 617, 967 S.W.2d 559 (1998); Rhodes v. State, 332 Ark. 516, 967 S.W.2d 550 (1998); Wright v. State, 331 Ark. 173, 959 S.W.2d 50 (1998).

- c. No Reunification Services; and **Ark. Code Ann. § 9-27-325(h)(2)(C) (Supp. 2007); Ark. Code Ann. § 9-27-303(46)(C) (Supp. 2007); Ark. Code Ann. § 9-27-327(a)(2)(B)(ii) (Supp. 2007); Ark. Code Ann. § 9-27-329(c)(5)(B) (Supp. 2007).**

- d. Juvenile Sex Offender Registration. **Ark. Code Ann. § 9-27-356(f)(2) (Supp. 2007).**

3. Beyond a Reasonable Doubt in the following hearings:

- a. Delinquency Adjudication; and **Ark. Code Ann. § 9-27-356(h)(2)(A) (Supp. 2007).**
- b. EJJ Adjudication. **Ark. Code Ann. § 9-27-505(f) (Supp. 2007).**

The U.S. Supreme Court held that Due Process explicitly protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which the defendant is charged. This burden extends to children as well as adults. In Re Winship, 397 U.S. 358 (1970).

H. Open v. Closed Hearings

1. Court has discretion to conduct closed hearings except:

- a. A juvenile has a right to open hearing in delinquency proceedings.

*A gag order that prohibited the media from photographing juveniles and their families in public places around the courthouse, even though the proceeding was open to the public and a photograph of a juvenile had been published, was overbroad and a prior restraint in violation of the First Amendment; the statutory policy prohibiting revelation of the name and identity of the juvenile had already been thwarted. Pursuant to Administrative Order Number 6, the trial judge has the authority to exclude photographs in areas immediately adjacent to her courtroom but it does not include public streets and sidewalks outside the courthouse. **Arkansas Democrat-Gazette v. Zimmerman**, 341 Ark. 771, 20 S.W.3d 301 (2000).*

- b. Adoption hearings shall be closed as provided in the revised Uniform Adoption Act.
- c. All hearings involving allegations and reports of child maltreatment and all hearings involving cases of children in foster care shall be closed. **Ark. Code Ann. § 9-27-325(i) (Supp. 2007).**

I. Foster Parents, Pre-adoptive Parents' and Custodial Relative Rights

1. DHS shall provide notice to foster parents and pre-adoptive parents of any hearing with respect to a child in their care. The petitioner shall provide such notice to relative care givers. **Ark. Code Ann. § 9-27-325(l)(1-2) (Supp. 2007).**
2. Foster parents, pre-adoptive parents and relative care givers shall have the right to be heard in any proceeding and the court shall allow them the opportunity to be heard at any proceeding concerning a child in their care. **Ark. Code Ann. § 9-27-325(l)(3)(A-C) (Supp. 2007).**
3. Foster parents, pre-adoptive parents, and relative care givers shall not be made parties solely on the basis of their right to notice and to be heard. **Ark. Code Ann. § 9-27-325(l)(3)(B) (Supp. 2007).**

J. 72-Hour Hold

A juvenile division of circuit court judge during juvenile proceedings concerning the child or siblings of the child may take a child into protective custody if:

1. The child is dependent-neglected as defined by **Ark. Code Ann. § 9-27-303(18)**

(Supp. 2007);

2. The child is dependent as defined by **Ark. Code Ann. § 9-27-303(17) (Supp. 2007)**; or
3. Circumstances or conditions of the child are such that continuing in his/her place of residence or in the care and custody of the parent, guardian or custodian or caretaker presents an immediate danger of severe maltreatment. **Ark. Code Ann. § 12-12-516(a) (Supp. 2007)**.

Severe Maltreatment means sexual abuse, sexual exploitation, acts or omissions which may or do result in death, abuse involving the use of a deadly weapon as defined by the Arkansas Criminal Code § 5-1-102, bone fracture, internal injuries, burns, immersions, suffocation, abandonment, medical diagnosis of failure to thrive or causing substantial and observable change in the behavior or demeanor of the child. **Ark. Code Ann. § 12-12-503(16) (Supp. 2007)**.

K. Fitness to Proceed

Except as provided by Ark. Code Ann. § 9-27-502 (Supp. 2007) in EJJ cases, in a juvenile delinquency proceeding where the juvenile's fitness to proceed is put at issue by a party or the court, the provisions of Ark. Code Ann. § 5-2-301 shall apply. **Ark. Code Ann. § 9-27-325(j) (Supp. 2007)**.

*A juvenile has a due process right to have his competency determined prior to adjudication. **Golden v. State, 341 Ark. 656, 21 S.W.3d 801(2000)**.*

L. Defenses

In delinquency proceedings, juveniles are entitled to all defenses available to defendants in circuit court. **Ark. Code Ann. § 9-27-325(k) (Supp. 2007)**.

Note: Act 987 of 2001, Section 3 amended Ark. Code Ann. § 9-27-325(k) to provide for the mental disease or defect (insanity) defenses after the following cases were handed down:

*The trial court did not violate the juvenile's right to equal protection when it refused to allow the juvenile to plead not guilty by reason of mental disease or defect. **B.C. v. State, 344 Ark. 385, 40 S.W.3d 315 (2001)**.*

*Neither due process nor equal protection entitles a juvenile in juvenile court the right to the insanity defense. Insanity is not a defense in juvenile proceedings because there is no statutory authority or case law for the defense, therefore, a juvenile defendant may not assert the defense. **Golden v. State, 341 Ark. 656, 21 S.W.3d 801(2000)**.*

M. Double Jeopardy

1. No juvenile subjected to adjudication pursuant to delinquency petition shall be tried later on criminal charges based upon facts alleged in delinquency petition. **Ark. Code Ann. § 9-27-319(a) (Repl. 2002).**

*The U.S. Supreme Court held that double jeopardy applies to juvenile delinquency adjudications and that jeopardy attaches when the juvenile court, as the trier of the facts, begins to hear the evidence at the adjudicatory hearing. **Breed v. Jones, 421 U.S. 519 (1975).***

2. No juvenile tried for violation of criminal laws shall be subjected later to delinquency proceeding arising out of facts which formed basis of criminal charges. **Ark. Code Ann. § 9-27-319(b) (Repl. 2002).**

N. Admissibility of Evidence

1. Juvenile adjudications of delinquency for offense for which juvenile could have been tried as an adult may be made available to the prosecutor:
 - a. For use at sentencing if juvenile is subsequently tried as an adult; and
 - b. To determine if juvenile should be tried as an adult. **Ark. Code Ann. § 9-27-309(a)(2) (Supp. 2007); Ark. Code Ann. § 9-27-345 (Repl. 2002).**
2. No other evidence adduced against juvenile in any proceeding under the juvenile code, nor the fact of adjudication or disposition, shall be admissible evidence against such juvenile in any civil, criminal or other proceeding. **Ark. Code Ann. § 9-27-345 (Repl. 2002).**

3. Home Studies

*The Court held that the trial court did not abuse its discretion in refusing to admit a Colorado home study into evidence in absence of someone who could be cross-examined as to its contents. **Arkansas Dep't of Human Servs. v. Huff, 347 Ark. 553, 655 S.W.3d 880 (2002).***

4. Drug Testing

- a. Upon motion of any party the court may order the father, mother or child to submit to scientific testing for drug or alcohol abuse. **Ark. Code Ann. § 9-27-325(e)(2)(A) (Supp. 2007).**
- b. A written report of the test results prepared by the person conducting the test or under whose supervision or direction the test was performed, certified by an affidavit before a notary public may be introduced evidence without calling the witness unless a motion challenging the test procedures or results

has been filed within 30 days before the hearing and bond is posted to cover cost of the person's appearance to testify. **Ark. Code Ann. § 9-27-325(e)(2)(B) (Supp. 2007).**

- c. If contested, documentation of the chain of custody of samples taken from test subjects shall be verified by affidavit of one person witnessing the procedure or extraction, packaging and mailing of samples and one person signing for the samples where the samples are subject to testing procedures. Submission of these affidavits with test results shall be competent evidence to establish chain of custody of specimens. **Ark. Code Ann. § 9-27-325(e)(2)(C) (Supp. 2007).**
- d. If a party refuses court ordered scientific testing for drug or alcohol abuse, that refusal shall be disclosed at trial and may be considered civil contempt of court. **Ark. Code Ann. § 9-27-325(e)(2)(D) (Supp. 2007).**

O. Interstate Compact Placement of Children (ICPC)

In response to *Arkansas Dep't of Human Servs. v Huff*, 347 Ark. 553, 655 S.W.3d 880 (2002), Act 1309 of 2003 was amended in Senate Judiciary to amend the ICPC.

- 1. **Placement** means the arrangement for care of a child in the home of his/her parent, other relative, or non-agency guardian in a receiving state. . . . **Ark. Code Ann. § 9-27-201, Article II (d)(2) (Supp. 2007).**
- 2. **Priority placement** was added and means whenever a court, upon request or on its own motion or where court approval is required, determines that a proposed priority placement of a child from 1 state into another state is necessary because:
 - a. the child is under two;
 - b. the child is in an emergency shelter;
 - c. or the court finds that the child has spent a substantial time in the home of the proposed placement recipient.

The state agency has 30 days to complete a request for a priority placement. Request for placement shall not be expedited or given priority except as outlined in this subsection. **Ark. Code Ann. § 9-27-201, Article II (f) (Supp. 2007).**

- 3. **Judicial Review:** It also provides that if the home study is denied, the sending state shall present the study to the judge who shall review the study and make specific findings of fact regarding the concerns outlined in the home study. If the court finds

that the health and safety concerns cannot be addressed or cured by services, the court will not make the placement. **Ark. Code Ann. § 9-27-201, Article IV (e) (Supp. 2007).**

At a probable cause hearing the AAL recommended that the child be returned to the home of the paternal grandparents. OCC objected and requested a home study pursuant to ICPC, but stated when asked by the judge that the only services DCFS would offer the mother would be parenting classes. DHHS argued that the court abused its discretion by not complying with ICPC. The Court stated that the Arkansas Supreme Court made it clear in Huff that ICPC is limited to placement of a child in foster care or dispositions preliminary to adoption. DHHS argued that amendments to ICPC post Huff to the definition of foster care to include a child parent(s) or relative had remedied Huff. The Court stated that the new definition makes it clear that whether a situation is considered foster care depends not upon the relationship of the care giver, but upon the reason for the placement. The circuit court did not place the child in foster care with anyone, it restored custody and ICPC does not apply. Arkansas Dep't of Human Servs. v. Jones., 97Ark. App. 267, ___ S.W. 3d (2007).

The Court found that ICPC was intended to govern the placement of children in substitute arrangements for parental care, such as foster care or adoption. ICPC does not apply when a child is returned by the sending state to a natural parent residing in another state. Arkansas Dep't of Human Servs. v. Huff, 347 Ark. 553, 655 S.W.3d 880 (2002).

P. Mediation

1. The court may order any juvenile case or controversy pending before it to mediation. **Ark. Code Ann. § 16-7-202(b) (Supp. 2007).**
2. If the court orders mediation the parties may:
 - a. choose an appropriate mediator from the Arkansas Alternative Dispute Resolution Commission roster (a mediator who meets the commission's requirements for that type of case); or
 - b. select a mediator not on the commission's roster IF approved by the court. **Ark. Code Ann. § 16-7-202(c)(2) (Supp. 2007).**
3. A party may move to dispense with the order to mediate for good cause shown, which may include but is not limited to, a party's inability to pay for the costs of mediation. **Ark. Code Ann. § 16-7-202(d) (Supp. 2007).**

4. A communication relating to the subject matter of any dispute made by a participant in a dispute resolution process, whether before or after the institution of formal judicial proceedings, is confidential and is not subject to disclosure and may not be used as evidence against a participant in any judicial or administrative proceeding except when it conflicts with other legal requirements for disclosure of communications or materials. **Ark. Code Ann. § 16-7-206(a) (Repl. 2002).**

The issue of confidentiality may be presented to the court having jurisdiction of the proceedings to determine, in camera, whether the facts, circumstances, and context of the communications or materials sought to be disclosed warrant a protective order of the court or whether the communications or materials are subject to disclosure. **Ark. Code Ann. § 16-7-206(c) (Repl. 2002).**

5. Any record or writing made at a dispute resolution process is confidential, and the participants or third party or parties facilitating the process shall not be required to testify in any proceedings related to or arising out of the matter in dispute or be subject to process requiring disclosure or production of information or data relating to or arising out of the matter in dispute. **Ark. Code Ann. § 16-7-206(b) (Repl. 2002).**

Q. Arkansas Youth Mediation Program

1. The Arkansas Youth Mediation Program operates from the law schools at the University of Arkansas Fayetteville School of Law and the University of Arkansas at Little Rock School of Law. **Ark. Code Ann. § 9-31-404(a)(2) (Supp. 2007).**
2. The mediation program provides training and technical assistance to circuit courts as the court deems appropriate to mediate juvenile delinquency cases and family in need of services cases; **Ark. Code Ann. § 9-31-404(b)(3) (Supp. 2007);** and dependency-neglect cases. **Ark. Code Ann. § 9-31-404(b)(4) (Supp. 2007).**
3. The mediation program also offers law school courses and continuing education programs for lawyers and other professionals throughout Arkansas. **Ark. Code Ann. § 9-31-404(b)(5) (Supp. 2007).**

DETENTION HEARING CHECKLIST

A.C.A. §9-27-303; -313; -322; -326; -331

Purpose of Detention Hearing:

- To determine whether the juvenile alleged or adjudicated delinquent should be released or held prior to adjudication or disposition.

Time Constraints:

- ⊖ Juvenile Intake Officer shall make a detention decision within 24 hours after the juvenile is taken into custody for an act that would be a felony except for weapon offenses listed in A.C.A. §9-27-313(d)(1)(A) which require automatic detention.
- ⊖ Detention Hearing shall be held as soon as possible, but no later than 72 hours after the juvenile is taken into custody. If the 72 hours ends on a holiday or weekend then the hearing must be held on the next business day.
- ⊖ Juvenile shall be released if delinquency petition is not filed within 24 hours after the detention hearing or within 96 hours after the juvenile is taken into custody.

Present at Hearing:

- ✓ Judge
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Juvenile
- ✓ Law Enforcement Officer
- ✓ Prosecutor
- ✓ Court Reporter

Burden of Proof

- Petitioner's burden to show by clear and convincing evidence that restraint of liberty is necessary and no less-restrictive alternative will reduce the risk of flight, serious harm to property; or physical safety of the juvenile or others.

Court Shall:

❶ Inform the juvenile of the following:

- Reasons continued detention is sought;
- Juvenile's Fifth Amendment Right against self-incrimination;
- Juvenile's right to counsel; and
- Juvenile's right to communicate with an attorney or parent/guardian before hearing proceeds.

- ❷ Admit testimony and evidence relevant only to determine whether probable cause exists that:
 - Juvenile committed the alleged offense, and
 - Detention is necessary
- ❸ Assess the following factors to determine whether to release the juvenile prior to further hearings:
 - place and length of residence;
 - family relationships;
 - references;
 - school attendance;
 - past and present employment;
 - juvenile and criminal records;
 - juvenile's character and reputation;
 - nature of charge and mitigating or aggravating circumstances;
 - whether decision is necessary to prevent imminent bodily harm to juvenile or another;
 - possibility of additional violations if juvenile is released;
 - factors which indicate that juvenile is likely to appear as required; and
 - Whether conditions should be imposed on juvenile's release.
- ❹ Release the juvenile upon finding no probable cause exist that juvenile committed the alleged offense
- ❺ Upon finding detention not necessary, release the juvenile
 - Upon juvenile's recognizance;
 - Upon an order to appear;
 - To parent upon written promise to bring to court
 - To qualified person or agency agreeing to supervise and assist juvenile in appearing for court;
 - Under supervision of probation officer or other public official;
 - Upon reasonable restrictions to ensure appearance and on juvenile's activities movements, associations and residences;
 - Upon bond to parents.

XIII . DELINQUENCY PROCEEDINGS

A. Detention Hearings

1. Purpose

To determine a whether juvenile taken into custody on an allegation of delinquency, violation of probation, or violation of a court order should be released or held prior to the substantive hearing. **Ark. Code Ann. §9-27-303(20) (Supp. 2007); Ark. Code Ann. §9-27-326(a) (Supp. 2007).**

2. Notice

- a. Prior written notice of the time, place, and purpose of the hearing shall be given to the juvenile, juvenile’s attorney, and juvenile’s parent, guardian, or custodian. **Ark. Code Ann. §9-27-326(b)(1-3) (Supp. 2007).**
- b. Hearing may proceed without notice to parent if the court finds that, after a reasonable diligent effort, petitioner was unable to notify parent. **Ark. Code Ann. §9-27-326(b)(3) (Supp. 2007).**

3. Time Constraints

The hearing shall be held as soon as possible, but no later than 72 hours after juvenile is taken into custody on an allegation of delinquency, violation of probation, or violation of a court order. **Ark. Code Ann. §9-27-326(a) (Supp. 2007).**

- (1) If the 72 hours ends on a weekend or holiday, the hearing shall be held on the next business day or the juvenile shall be released **Ark. Code Ann. §9-27-326(a) (Supp. 2007).**
- (2) If the juvenile is taken into custody on an alleged delinquency and no delinquency petition is filed within 24 hours after a detention hearing or 96 hours after juvenile is taken into custody, whichever is sooner, the juvenile shall be discharged from custody, detention, or shelter care. **Ark. Code Ann. § 9-27-313(f) (Supp. 2007).**

4. Burden of Proof

Petitioner has the burden to show by clear and convincing evidence that restraint on liberty is necessary, and no less restrictive alternative will reduce the risk of flight, serious harm to property, or the physical safety of juvenile or others. **Ark. Code Ann. §9-27-326(c) (Supp. 2007).**

5. Court's Duties:

- a. During the Detention Hearing the court shall inform juvenile of the:
 - (1) reasons continued detention is sought;
 - (2) juvenile's Fifth Amendment right against self-incrimination;
 - (3) juvenile's right to counsel; and
 - (4) juvenile's right to communicate with attorney or parent, guardian or custodian before hearing proceeds further and that reasonable means will be provided for such communication. **Ark. Code Ann. §9-27-326(d)(1) (Supp. 2007).**

- b. The court shall admit testimony and evidence relevant only to determine whether probable cause exists that the juvenile committed alleged offense, and that detention is necessary. **Ark. Code Ann. §9-27-326(d)(2) (Supp. 2007).**

- c. The court shall assess the following factors to determine whether to release juvenile prior to further hearings:
 - (1) place and length of residence;
 - (2) family relationships;
 - (3) references;
 - (4) school attendance;
 - (5) past and present employment;
 - (6) juvenile and criminal records;
 - (7) juvenile's character and reputation;
 - (8) nature of charge being brought and any mitigating or aggravating circumstances;
 - (9) whether detention is necessary to prevent imminent bodily harm to juvenile or another;
 - (10) possibility of additional violations if juvenile is released;

- (11) factors which indicate that juvenile is likely to appear as required;&
 - (12) whether conditions should be imposed on juvenile's release. **Ark. Code Ann. §9-27-326(d)(3) (Supp. 2007).**
- d. The court shall release the juvenile upon finding no probable cause exists that juvenile committed alleged offense. **Ark. Code Ann. § 9-27-326(e)(1) (Supp. 2007).**
- e. Upon finding detention unnecessary, the court shall release juvenile:
- (1) upon juvenile's recognizance;
 - (2) upon an order to appear;
 - (3) to parent upon written promise to bring juvenile before court when required;
 - (4) to qualified person or agency (not DHHS) agreeing to supervise and assist juvenile in appearing in court;
 - (5) under supervision of probation officer or other public official (not DHHS);
 - (6) upon reasonable restrictions on juvenile's activities, movements, associations and residences;
 - (7) upon bond to parent, guardian, or custodian; or
 - (8) upon finding that bond is only means of insuring juvenile's appearance, the court may require an unsecured bond in an amount set by the court; or.
 - (i) The bond may be accompanied by a deposit of cash or security equal to 10% of the face amount set by the court which shall be returned if juvenile does not default on conditions under bond; or
 - (ii) The bond may be secured by deposit of full amount in cash, property or obligation of qualified securities.
 - (9) under reasonable restrictions to insure appearance of juvenile's activities. **Ark. Code Ann. §9-27-326(e)(2-3) (Supp. 2007).**

- f. If the juvenile is in DHS custody as a result of a FINS or D-N petition and the court does not detain the juvenile, placement decisions shall left to the judge with the FINS or D-N case. **Ark. Code Ann. §9-27-326(f)(1) (Supp. 2007).**

The prosecutor shall file entry of the delinquency order within 10 days in the juvenile's FINS or D-N case. **Ark. Code Ann. §9-27-326(f)(2) (Supp. 2007).**

7. **DHHS Investigation**

- a. If the court releases the juvenile the court may, if necessary for the best interest of the juvenile, require DHHS to immediately initiate an investigation as to whether juvenile is in immediate danger or a situation exists whereby the juvenile is dependent-neglected. **Ark. Code Ann. §9-27-326(e)(5)(A) (Supp. 2007).**
- b. The court shall not place pre-adjudicated juveniles in DHHS custody except as provided by Ark. Code Ann. § 12-12-516(a) concerning the judges authority to impose a 72-hour hold. **Ark. Code Ann. §9-27-326(e)(5)(B) (Supp. 2007).**

8. **Modification Order**

The court may modify orders of conditional release upon notice, hearing, and good cause shown. **Ark. Code Ann. §9-27-326(e)(4) (Supp. 2007).**

DHS' appeal of the juvenile court's order to place a juvenile in DHS custody at a detention hearing was dismissed for lack of standing. Any relief to which DHS must be entitled must be afforded to the trial court. If DHS contends that the juvenile court is without jurisdiction to place the juvenile in its custody or has exercised a power not authorized by law, its remedy is to seek relief by way of a collateral attack upon the judgment through a writ of prohibition or a petition for writ of certiorari. Arkansas Dep't of Human Servs. v. Strickland, 62 Ark. App. 215, 970 S.W.2d 311 (1998).

A detention order is not a final order; therefore, it is not appealable. An order is final if it dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. The order must put the judge's directive into execution, ending the litigation, or a separable branch of it. Two justices concurred and reported that the court could reach the detention issue on direct appeal of an adjudication order. K.W. v. State, 327 Ark. 205, 937 S.W.2d 658 (1997).

*The U.S. Supreme Court upheld a New York statute which authorized pre-trial detention upon a court's finding a serious risk that, before the next court date, the juvenile may commit an act which, if committed by an adult, would constitute a crime. The Court stated that preventive detention serves the state's interest of protecting both the juvenile and society and is compatible with fundamental fairness required by Due Process. The Court further found that the provisions for notice, a hearing prior to detention, and a formal probable cause hearing held within a short time thereafter, were sufficient procedural safeguards. **Schall v. Martin, 467 U.S. 253 (1984).***

TRANSFER HEARING CHECKLIST

A.C.A. §9-27-318

Petitioners:

- Any party or upon the motion of the court

Purpose of Adjudication & Disposition:

- To determine whether the juvenile should be charged in the Juvenile Division or Criminal Division of Circuit Court

Time Constraints:

- 🕒 If juvenile is in detention, the transfer hearing shall be held within 30 days and no longer than 90 days from the date of the motion to transfer jurisdiction to either the Juvenile or Criminal Division of Circuit Court

Present at Hearing:

- ✓ Judge
- ✓ Prosecuting Attorney
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Juvenile
- ✓ Court Reporter

Burden of Proof:

- ✓ Clear & Convincing Evidence

Transfer Factors:

- Seriousness of alleged offense and whether the protection of society requires prosecution in the criminal division of circuit court;
- Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- The culpability of the juvenile, including the level of planning and participation in the alleged offense;

- The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- Whether there are facilities or programs available to the judge of the juvenile division of circuit court which are likely to rehabilitate the juvenile prior to the expiration of the juvenile division of circuit court's jurisdiction;
- Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
- Any other factors deemed relevant by the judge.

Transfer Order

- If the Criminal Division transfers a juvenile age 14 or 17 to Juvenile Division, the court MAY enter an order to transfer as an extended juvenile jurisdiction case.
- If a juvenile age 14 or 15 is found guilty of an offense other than an offense listed in subsection (b) or (c)(2) the judge shall enter a juvenile disposition pursuant to A.C.A. 9-27-330.
- If the case is transferred to another court, any bail or appearance bond given for the appearance of the juvenile shall continue in effect in the court to which the case is transferred.
- Any party may appeal from an order granting or denying the transfer of a case from one division of circuit court to another division of circuit court having jurisdiction over the matter.

B. Transfer Hearings

1. Purpose

The court shall conduct a Transfer Hearing to determine whether to try a juvenile as a delinquent or as a criminal defendant and transfer the case to another division of circuit court. **Ark. Code Ann. §9-27-318(e) (Supp. 2007).**

Note: Pursuant to Ark. Code Ann. §9-27-318(m), a juvenile court may conduct a transfer hearing and an extended juvenile jurisdiction hearing at the same time.

2. Motion to Transfer

- a. Upon the motion of the court or any party, the judge of the division of circuit court in which a delinquency petition or criminal charges have been filed shall conduct a hearing to determine whether to transfer the case to another division of circuit court. **Ark. Code Ann. §9-27-318(e) (Supp. 2007).**

The juvenile court does not have authority to sua sponte transfer jurisdiction to circuit court. Chavez v. State, 71 Ark. App. 29, 25 S.W.3d 431 (2000).

The 10-day response requirement of Ark. R. Civ. P. 6(c) is not inflexible. A four-day notice of transfer hearing was a technical error that did not prejudice the defendant. A 3-justice dissent opined that the transfer from juvenile court to circuit court is a serious matter and that procedural rules must be followed when "fundamental due process is at issue." Smith v. State, 307 Ark. 223, 818 S.W.2d 945 (1991).

The party seeking the transfer has the burden of proof. Wright v. State, 331 Ark. 173, 959 S.W.2d 50 (1998).

3. Time Constraints

Transfer hearing must be held within 30 days, if the juvenile is detained or no longer than 90 days from the date of the transfer motion. **Ark. Code Ann. §9-27-318(f) (Supp. 2007).**

4. Burden of Proof

The burden of proof at a Transfer Hearing is clear and convincing evidence. **Ark. Code Ann. §9-27-318(h)(2) (Supp. 2007); Ark. Code Ann. §9-27-325(h)(2)(C) (Supp. 2007).**

5. Transfer Hearing Factors

The court shall consider all the following factors in making a decision to retain jurisdiction or transfer the case:

- (1) the seriousness of the alleged offense and whether the protection of society requires prosecution in criminal division of circuit court;
- (2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- (3) whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
- (4) the culpability of the juvenile including the level of planning and participation in the alleged offense;
- (5) the previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- (6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living or desire to be treated as an adult;
- (7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the juvenile's 21st birthday;
- (8) whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- (9) written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
- (10) any other factor deemed relevant by the judge. **Ark. Code Ann. §9-27-318(g) (Supp. 2007).**

There was clear and convincing evidence to support the trial court's finding that the appellant, who was fourteen at the time of the alleged offense and charged with capital murder, should be charged as an adult. Appellant lacked standing to challenge the constitutionality of the sentencing authorized by Ark. Code Ann. § 9-27-318, because there had been no finding of guilt and appellant had not been sentenced.

Appellant argued that his Fifth Amendment right was violated because he was forced to incriminate himself at the transfer hearing. However, there is nothing in the statute that requires the defendant to testify, and in fact the defendant did not testify at the hearing. Moreover, appellant did not argue that he declined to provide testimony that might have persuaded the trial court to transfer his case to the juvenile division because of his fear of self-incrimination.

*Finally, appellant argued an equal protection violation based on the alleged impermissible classification between juveniles charged as adults and juveniles in the transfer statute. The equal protection clause permits classifications that have a rational basis and that are reasonably related to a legitimate governmental purpose. Appellant failed to demonstrate that the transfer statute is arbitrary or irrational. **Otis v. State, 355 Ark. 590, 142 S.W.3d 615 (2004).***

*The trial court must consider all ten factors at Ark. Code Ann. § 9-27-318(g). The circuit court's failure to specifically mention certain evidence presented by the defendant does not mean that the court ignored it or failed to consider the evidence. **Beulah v. State, 344 Ark. 528, 42 S.W.3d 461 (2001).***

*Appellant argued that the circuit court considered improper evidence, including hearsay and a confession that was not voluntarily, knowingly, and intelligently given. The court found that even if the hearsay statements should not have been admitted, appellant was not prejudiced because there was sufficient testimony to establish the serious and violent nature of the crimes. The court also held that it was not an error for the court to consider the allegedly involuntary confession at the transfer hearing. Transfer hearings are held for the purpose of determining jurisdiction and the statute does not suggest that the trial court should consider motions to suppress at these hearings. **Witherspoon v. State, 74 Ark. App. 151, 46 S.W.3d 549 (2001).***

*It was not necessary for the findings of fact to explicitly detail rulings on the ten statutory factors because the record supported that the trial court considered the statutory factors. In considering [Ark. Code Ann. § 9-27-318] subsection (g)(5) regarding the previous history of the juvenile, the court was correct in considering the juvenile's entire background. **Jongewaard v. State, 71 Ark. App. 269, 29 S.W.3d 758 (2000).***

Appellant was sixteen at the time he was charged in circuit court with residential burglary, rape and first degree terroristic threatening. He appealed the circuit court's denial of his motion to transfer his case to juvenile court. He argued that the court failed to offer any evidence regarding the seriousness of the charged offenses and the court failed

*to make written findings to support its decision. The Arkansas Court of Appeals held that the trial court was not clearly erroneous where there was evidence in the record of a repetitive pattern of offenses, the past rehabilitative efforts had proved unsuccessful, and the pattern of offenses had become increasingly more serious. **Box v. State**, 71 Ark. App. 403, 30 S.W.3d 754 (2000).*

*The trial court has a duty to review the filing in adult court based upon the criteria set out in Juvenile Code. **Pennington v. State**, 305 Ark. 312, 807 S.W.2d 660 (1991); **Banks v. State**, 306 Ark. 273, 813 S.W.2d 256(1991).*

6. Court Findings

- a. The court shall make written findings on all the factors set forth in subsection (g). **Ark. Code Ann. §9-27-318(h)(1) (Supp. 2007).**

***Note:** Act 1166 of 2003 amended Ark. Code Ann. § 9-27-318(h)(1) to require **written findings of all the transfer factors**. The following cases were decided under prior law.*

*The trial court must consider all ten factors at Ark. Code Ann. § 9-27-318(g). However, it is not required to enumerate all ten factors in the findings. The circuit court's failure to specifically mention certain evidence presented by the defendant does not mean that the court ignored it or failed to consider the evidence. **Beulah v. State**, 344 Ark. 528, 42 S.W.3d 461 (2001).*

*The appellant failed to raise below the issue of the court's failure to make written findings. **Box v. State**, 71 Ark. App. 403, 30 S.W.3d 754 (2000).*

*The trial court did not err when the findings of fact did not explicitly detail the ruling on the ten enumerated factors. **Jongewaard v. State**, 71 Ark. App. 269, 29 S.W.3d 758 (2000).*

- b. Upon a finding by clear and convincing evidence that juvenile should be transferred to another division of circuit court, the court shall enter an order to that effect. **Ark. Code Ann. §9-27-318(h)(2) (Supp. 2007).**

***Note:** cases that under law prior to 2003 that juvenile should be tried as an adult: **Heagerty v. State**, 62 Ark. App. 283, 971 S.W.2d 793 (1998); **Jones v. State**, 332 Ark. 617, 967 S.W.2d 559 (1998); **Rhodes v. State**, 332 Ark. 516, 967 S.W.2d 550 (1998); **Wright v. State**, 331 Ark. 173, 959 S.W.2d 50 (1998).*

- c. Upon a finding by the criminal division of circuit court that a juvenile ages 14 through 17 and charged with a crime in Ark. Code Ann. §9-27-318(c)(2) should be transferred to the juvenile division of circuit court, the judge may

transfer the case as an extended juvenile jurisdiction case. **Ark. Code Ann. §9-27-318(i) (Supp. 2007).**

Note: the following case was decided under law prior to 2003 when EJJ was only available to juveniles up to the age of 15. Act 1809 of 2003 extended the age of EJJ offenders to the age of 17.

*The circuit court transferred a case to juvenile court as an extended juvenile jurisdiction case (EJJ). The juvenile was 16 at the time of the alleged offense and was charged with a terroristic act and first-degree battery. After learning that EJJ was not available, the judge entered an order to rescind the transfer order. The Court found that it lacked appellate jurisdiction because of the state's failure to appeal the original transfer order and the circuit court's ensuing lack of jurisdiction. **Thomas v. State, 345 Ark. 236, 45 S.W.3d 818 (2001).***

- d. If a juvenile age 14 or 15 is found guilty in the criminal division of circuit court for an offense other than those listed in Ark. Code Ann. §9-27-318(b) or (c)(2), the judge shall enter a juvenile delinquency disposition pursuant to Ark. Code. Ann. §9-27-330. **Ark. Code Ann. §9-27-318(j) (Supp. 2007).**

7. Bail or Bond

Upon transfer to another division of circuit court, any bail or appearance bond shall continue in effect in the division to which the case is transferred. **Ark. Code Ann. §9-27-318(k) (Supp. 2007).**

8. Appeal

Any party may appeal an order granting or denying transfer. **Ark. Code Ann. § 9-27-318(l) (Supp. 2007).**

*The court adopted a prospective rule that an appeal from an order concerning a juvenile transfer from one court to another court with jurisdiction must be considered by way of an interlocutory appeal. A juvenile cannot challenge transfer orders from juvenile to circuit court on direct appeal from a judgment or conviction of the circuit court. **Hamilton v. State, 320 Ark. 346, 896 S.W.2d 877 (1995); Sims v. State, 320 Ark. 528, 900 S.W.2d 508 (1995).***

*Appeal did not satisfy Rule 36.10, which requires prejudicial error. **State v. Gray, 319 Ark. 356, 891 S.W.2d 376 (1995).***

The first case in which the U.S. Supreme Court addressed the rights of a juvenile accused of a crime was a waiver case. The Court held that a condition to a valid waiver from juvenile court to adult court is that a juvenile is entitled to a hearing and right to counsel at hearing. A waiver hearing must measure up to essentials of Due Process and fair treatment.

Kent involved construction of the Juvenile Court Act of the District of Columbia. The Supreme Court attached a policy memorandum dated November 30, 1959, to its opinion in Kent. The memorandum had been prepared by the Judge of the Juvenile Court of the District of Columbia in consultation with the Chief Judge and other D.C. judges, the U.S. Attorney, and other concerned groups.

It set out the following factors for a judge to consider in deciding whether to waive juvenile court jurisdiction and to transfer to adult court:

- *The seriousness of the alleged offense to the community and whether the protection of community requires a waiver;*
- *Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;*
- *Whether the alleged offense was against persons or property - greater weight if against persons, especially if person was injured;*
- *Prospective merit of complaint - is there likely to be an indictment by grand jury;*
- *Desirability of trial and disposition if others involved are adults who will be charged in adult court;*
- *Sophistication and maturity of juvenile, including home environment, mental situation, emotional attitude and pattern of living;*
- *Previous record and history of juvenile;*
- *The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation for the juvenile. **Kent v. United States, 383 U.S. 541 (1966).***

DELINQUENCY ADJUDICATION & DISPOSITION CHECKLIST

A.C.A. §9-27-310; -329; -330; -331

Petitioners:

- Only the prosecuting attorney can file a delinquency or probation revocation petition

Purpose of Adjudication & Disposition:

- To determine whether the allegations in the petition are substantiated by the evidence.
- To enter orders consistent with the disposition alternatives

Time Constraints:

- ⊖ If juvenile is in detention, the adjudication shall be held within 14 days from the date of the detention hearing unless waived by the juvenile or good cause shown for a continuance
- ⊖ Any predisposition reports shall be provided in writing to all parties and counsel at least 2 days prior to the disposition hearing.
- ⊖ If juvenile remains in detention following adjudication, the disposition hearing shall be held no later than 14 days following the adjudication hearing

Present at Hearing:

- ✓ Judge
- ✓ Prosecuting Attorney
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Juvenile
- ✓ Service Providers
- ✓ Court Reporter

Adjudication Burden of Proof:

- ✓ Beyond A Reasonable Doubt

Issues:

- ✓ Have all the parties been identified and properly served?
- ✓ Have the allegations in petition been substantiated by the proof?
- ✓ Is child delinquent as defined at A.C.A. §9-27-303(15)?
- ✓ What services are needed to assist the juvenile and family?
- ✓ If the juvenile cannot remain at home, what are least restrictive disposition consistent with the welfare of juvenile and the public?

Court's Delinquency Disposition Options:

- Transfer custody to, licensed agency responsible for care of juveniles, relative or other individual;
- DYS Commitment indeterminate period not exceeding 2 years (can order additional time prior to expiration of commitment order);
- Place juvenile in juvenile detention for indeterminate period of time not to exceed 90 days;
- Place juvenile on probation not to exceed 2 years;
- Place juvenile on residential detention with electronic monitoring;
- Order physical, psychiatric or psychological evaluations of juvenile and/or juvenile's family;
- Grant permanent custody;
- Order parent/guardian to attend parental responsibility training;
- Order juvenile to perform up to 160 hours of community service;
- Order DF&A to suspend or restrict the juvenile's driving privileges;
- Order restitution up to \$10,000;
- Order probation fee up to \$20 a month
- Order court cost of \$35;
- Order fine up to \$500; or
- Order juvenile and/or juvenile's parents/guardians/custodian to be liable for cost of electronic monitoring, DYS commitment or juvenile detention

Dispositions for Weapon Delinquency Adjudication:

- DYS Commitment;
- Place juvenile in juvenile detention for indeterminate period of time not to exceed 90 days;
- Place juvenile on residential detention with electronic monitoring

Dispositions for Escape Delinquency Adjudication:

- DYS Commitment with placement in a more restricted facility, or if escaped from the most restrictive facility the juvenile shall complete the remainder of his/her commitment in that or a similar facility

C. Adjudication

1. Purpose

To determine whether the allegations in petition are substantiated by proof. **Ark. Code Ann. §9-27-303(4) (Supp. 2007); Ark. Code Ann. § 9-27-327(a)(1)(A) (Supp. 2007).**

2. Time Constraints

If a juvenile is in detention, the Adjudication Hearing shall be held no later than 14 days from the date of the Detention Hearing unless waived by juvenile or good cause is shown for continuance. **Ark. Code Ann. §9-27-327(b) (Supp. 2007).**

*Arkansas Court of Appeals found that failure to conduct adjudication hearing within 14 days of detention hearing did not result in loss of court's jurisdiction. **Robinson v. State, 41 Ark. App. 20, 847 S.W.2d 49 (1993).***

3. Rules

- a. Unless otherwise indicated, the Arkansas Rules of Evidence apply. **Ark. Code Ann. §9-27-325(e)(1) (Supp. 2007).**
- b. The Arkansas Rules of Civil Procedure shall apply to all proceedings, except as otherwise provided. **Ark. Code Ann. § 9-27-325(f) (Supp. 2007).**

***Note:** There are no exceptions in the juvenile code with regard to delinquency proceedings.*

- c. The Rules of Criminal Procedure shall apply to delinquency proceedings. **Ark. Code Ann. §9-27-325(f) (Supp. 2007).**

*The Arkansas Rules of Criminal Procedure apply to delinquency proceedings and failure to renew the directed verdict motion at the close of all the evidence waived any sufficiency challenge on appeal. **Jones v. State, 347 Ark. 409, 64 S.W.3d 728 (2002).***

Pursuant to Ark. R. Crim. P. 33.1(b), failure to make a timely motion for dismissal at the close of the evidence waives any right to challenge the sufficiency of the evidence. If properly preserved for review, there was sufficient evidence to find the juvenile delinquent for possession of a controlled substance with intent to deliver where the juvenile was in close proximity and accessible to the methamphetamine, he was driving and he told the officers, "the stuff was not his"

indicating guilty knowledge of its presence. J.R. v. State, 73 Ark. App. 194, 40 S.W.3d 342 (2001).

The juvenile defendant may not appeal from a plea of guilty or nolo contendere, except as provided by Ark. R. Crim. P. 24.3(b) which provides that a defendant may enter a guilty plea conditioned on the reversal of a pretrial determination of a motion to suppress illegally obtained evidence. These guilty pleas do not fall within the rule. Consequently, Rule 36.1 precluded the court from hearing the appeals. Mason v. State, 323 Ark. 361, 914 S.W.2d 751 (1996).

4. Burden of Proof

Beyond a reasonable doubt in delinquency hearings. **Ark. Code Ann. §9-27-325(h)(2)(A) (Supp. 2007).**

The U.S. Supreme Court held that Due Process explicitly protects against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which the defendant is charged. This burden extends to children as well as adults. In Re Winship, 397 U.S. 358 (1970).

5. Fitness to Proceed

Except as provided by Ark. Code Ann. §9-27-502, when a juvenile is charged as an EJJ offender, in any juvenile delinquency proceeding where the juvenile's fitness to proceed is put at issue by a party or the court, the provisions of Ark. Code Ann. §5-2-301 shall apply. **Ark. Code Ann. §9-27-325(j) (Supp. 2007).**

A juvenile has a due process right to have his competency determined prior to adjudication. Golden v. State, 341 Ark. 656, 21 S.W.3d 801(2000).

Appellant argued that the trial court erred by not considering whether the juvenile was competent to stand trial. The issue of competency was not reached because it was not properly raised with the trial court. K.M., Father of J.M. v. State, 335 Ark. 85, 983 S.W.2d 93 (1998).

6. Defenses

In delinquency proceedings, juveniles are entitled to all defenses available to defendants in circuit court. **Ark. Code Ann. §9-27-325(k) (Supp. 2007).**

Note: Act 987 of 2001, Section 3, amended Ark. Code Ann. § 9-27-325(k) to provide that delinquents were entitled to all defenses, including lack of capacity, after the following cases were handed down:

*The trial court did not violate the juvenile's right to equal protection when it refused to allow the juvenile to plead not guilty by reason of mental disease or defect. **B.C. v. State, 344 Ark. 385, 40 S.W.3d 315 (2001).***

*Neither due process nor equal protection entitles a juvenile in juvenile court the right to the insanity defense. Insanity is not a defense in juvenile proceedings because there is no statutory authority or case law for the defense, therefore, a juvenile defendant may not assert the defense. **Golden v. State, 341 Ark. 656, 21 S.W.3d 801(2000).***

*Appellant argued that trial court failed to consider evidence of his mental state during the adjudication and to determine whether he was able to conform his conduct to the requirements of the law at the time of the incident. A defendant may assert the insanity defense only if the State has conferred the right by statute. Nothing in the juvenile code or criminal code suggests that the insanity defense applies to juveniles under the age of 14. The issue of whether the equal protection clause was violated was not reached because it was not properly preserved for appeal. **K.M. Father of J.M. v. State, 335 Ark. 85, 983 S.W.2d 93 (1998).***

*Appeal of juvenile court's order adjudicating a juvenile delinquent for being a minor in possession of a handgun. The appellant raised an affirmative defense, under Ark. Code Ann. § 5-73-119(c)(1), arguing that he had a possessory interest in the property because he resided on his mother's property and maintained access at all times (which gave him a certain degree of control over the property). The court held that the affirmative defense of possessory interest was applicable to the juvenile. **Lucas v. State, 319 Ark. 752, 894 S.W.2d 891 (1995).***

7. Delinquency Adjudication Subject to Sex & Child Offender Assessment

- a. The court shall order a juvenile to submit to a Sex Offender Screening and Risk Assessment if the juvenile is found delinquent of the following offenses:
 - (1) Rape;
 - (2) Sexual assault in the first degree;
 - (3) Sexual assault in the second degree;

- (4) Incest; or
 - (5) Engaging children in sexually explicit conduct for use in visual or print medium. Ark. Code Ann §5-27-303. **Ark. Code Ann. §9-27-356(a) (Supp. 2007).**
- b. The court may order a Sex Offender Screening and Risk Assessment if a juvenile is adjudicated delinquent for any offense with an underlying sexually motivated component. **Ark. Code Ann. §9-27-356(b)(1) (Supp. 2007).**
 - c. The judge may order reassessment of the Sex Offender Screening and Risk Assessment at any time during the judge’s jurisdiction over the juvenile. **Ark. Code Ann. §9-27-356(c) (Supp. 2007).**

8. Court Ordered Safety Plans Mandated to Schools

- a. When a court orders that a juvenile have a safety plan that restricts or requires supervised contact with another juvenile or juveniles the court shall direct that a copy of the safety plan and a copy of the court order regarding the safety plan be provided to the superintendent and the school counselor where the juvenile is enrolled. **Ark. Code Ann. §9-27-352(d)(1) (Supp. 2007).**

Safety Plan means a plan ordered by the court to be developed for an adjudicated delinquent sex offender who is at moderate or high risk of re-offending for the purposes of Ark. Code Ann. §9-27-356(c) (Supp. 2007). **Ark. Code Ann. §9-27-303(49) (Supp. 2007).**

- b. When a court order amends or removes the safety plan the court shall direct that a copy of the order be provided to the school superintendent and the school counselor where the juvenile is enrolled. **Ark. Code Ann. §9-27-352(d)(2) (Supp. 2007).**

9. Delinquency Adjudications Subject to DNA Samples

- a. A juvenile adjudicated delinquent for the following offenses shall have a deoxyribonucleic acid (DNA) sample drawn:
 - (1) Rape;
 - (2) Sexual assault in the first degree;
 - (3) Sexual assault in the second degree;

- (4) Incest;
 - (5) Capital murder;
 - (6) Murder in the first degree;
 - (7) Murder in the second degree;
 - (8) Kidnapping;
 - (9) Aggravated robbery; and
 - (10) Terroristic act. **Ark. Code Ann. §9-27-357(a) (Supp. 2007).**
- b. The court shall order a \$250 fine, unless the court finds that the fine would cause undue hardship. **Ark. Code Ann. §9-27-357(b) (Supp. 2007).**
- c. The DNA sample shall be drawn either:
- (1) upon intake at a juvenile detention facility;
 - (2) upon intake at a DYS facility; or
 - (3) if the juvenile is not placed in a facility, the probation officer shall ensure that the DNA sample is drawn. **Ark. Code Ann. §9-27-357(c) (Supp. 2007).**
- d. All DNA samples shall be taken in accordance with the regulations promulgated by the State Crime Laboratory. **Ark. Code Ann. §9-27-357(d) (Supp. 2007).**

10. Studies & Reports

- a. Court may order studies, evaluations, or predisposition reports, if needed and bear on the disposition, following adjudication. **Ark. Code Ann. §9-27-327(d) (Supp. 2007).**
- b. Reports shall be written and be provided to all parties at least two days prior to disposition hearing. **Ark. Code Ann. §9-27-327(e)(1) (Supp. 2007).**
- c. All parties shall be given a fair opportunity to controvert any part of reports. **Ark. Code Ann. §9-27-327(e)(2) (Supp. 2007).**

11. Delinquency Cases

Closing Argument

Delinquency adjudication reversed because defendant was denied an opportunity to make a closing argument. A juvenile defendant in a jury or bench trial has a fundamental right to make a closing argument under the Fourteenth Amendment. S.S. v. State, 93 Ark. 173, 217 S.W.3d 172 (2005).

Hearsay

Delinquency adjudication affirmed based on check forgery. Appellant argued that the trial court erred in allowing hearsay testimony about her identification in reference to a picture in a yearbook. Hearsay is not violated when a witness testifies about a physical object which was not presented in court. Further, the statements were not offered for the truth of the matter asserted but to explain the employee's conduct. Taylor v. State, 88 Ark. App.269, 197 S.W.3d 31 (2004).

Rape Shield

Rape Shield statute did not violate separation of power's doctrine and did not apply to juvenile delinquency proceedings. Potential prejudice to victim, who was under 14, outweighed any relevance of evidence in a delinquency proceeding as to whether or not the victim engaged in sexual intercourse or deviate sexual activity with a person less than 14 years old. Failure of trial court to conduct risk assessment was moot because juvenile was not prejudiced. M.M. v. State, 350 Ark. 328, 88 S.W.3d 406 (2002).

First Amendment - Threat

The Court found that the juvenile's rap lyrics constituted a true threat and was not protected by the First Amendment. The Court adopted an objective test on how a reasonable person would have taken the statement and used the following Dinwiddie factors adopted by the Eighth Circuit to determine if the "true threat" exception was applicable:

- *the reaction of the recipient of the threat and other listeners;*
- *whether the threat was conditional;*
- *whether the maker of the threat had made similar statements to the victim in the past;*
- *whether the threat was communicated directly to its victim; and*
- *whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.*

This list is not exhaustive, and the presence or absence of any one of its elements need not be dispositive. United States v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996). Jones v. State, 347 Ark. 409, 40 S.W. 3d 342 (2002).

*The Court reversed a delinquency adjudication finding that A.C.A. § 6-17-106, which makes it a misdemeanor for a person to abuse or insult a public school teacher who is performing normal and regular or assigned school responsibilities, is an unconstitutional infringement on the First Amendment and the Due Process Clause of the Fourteenth Amendment. **Shoemaker v. State**, 343 Ark. 727, 38 S.W. 3d 350 (2001).*

***Note:** In response to this case the legislature amended A.C.A. §6-17-106 to provide that it is unlawful, during regular school hours and in a place where a public school employee is required to be, for any person to address a school employee using language that is calculated to:*

- *cause a breach of peace;*
- *materially and substantially interfere with the operation of the school; or*
- *arouse the person to whom it is addressed to anger, to the extent likely to cause imminent retaliation. **ACT 1565 of 2001.***

Accomplice

*Delinquency adjudication upheld. The Arkansas Court of Appeals found sufficient evidence to support a finding that the juvenile was an accomplice to felony criminal mischief charges. An accomplice is one who directly participates in the commission of the offense or who, with the purpose of promoting or facilitating the commission of the offense, aids, agrees to aid or attempts to aid the other person in committing the offense. An accomplice is criminally liable for the conduct of others. The relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in the proximity of the crime, the opportunity to commit the crime and the association with a person involved in the crime in a manner suggestive of joint participation. **Pack v. State**, 73 Ark. App. 123, 41 S.W.3d 409 (2001).*

*Delinquency adjudication was upheld based on the testimony from the appellant's accomplices because the accomplice-corroboration rule at Ark. Code Ann. § 16-89-111(e)(1) does not apply to juvenile proceedings. **Swanner v. State**, 73 Ark. App. 4, 37 S.W.3d 697 (2001); **Munhall v. State**, 337 Ark. 41, 986 S.W. 2d 863 (1999).*

***Note:** Act 903 of 2001 amended Ark. Code Ann. § 16-89-111(e)(1) to add that an adjudication of delinquency for a felony cannot be based on the testimony of an accomplice unless corroborated by other evidence tending to connect the juvenile to the commission of the offense.*

Victim Impact Evidence

Note: Act 1809 of 2003 amended Ark. Code Ann. § 9-27-329(f) to allow victim impact statements at disposition hearings. The trial court erred in allowing victim impact evidence because it is applicable to criminal, not juvenile proceedings.

However, the appellant failed to show how he was prejudiced by the victim impact testimony. **Hunter v. State**, 341 Ark. 665, 19 S.W.3d 607 (2000).

Sufficiency of the Evidence

Reversed and remanded delinquency adjudication for harassment holding that the juvenile's statement was not likely to invoke violence or a disorderly response. The trial court's reliance on "what wasn't said" was not sufficient. Unspoken words do not constitute harassment because silence is not likely to provoke a violent or disorderly response. **Hunt v. State**, (05-178; August 21, 2005).

Delinquency adjudication reversed where appellant was charged and found delinquent for terroristic threatening in the first degree for having a "Hit List (To Shoot List)" naming fellow students in a notebook at school that a teacher discovered. The Court relied on *Knight v. State*, 25 Ark. App. 353 (1988) that the gravamen of the offense is communication. Evidence of the list was insufficient to find that the appellant had the purpose of terrorizing another. **Roberts v. State**, 78 Ark. App. 103, 78 S.W. 3d 103 (2002).

The evidence was sufficient to support appellant's delinquency adjudication for capital murder and attempted capital murder based on the appellant's confession and an arson investigator's testimony that the fire was started with an accelerant and was not an accident. **Matthews v. State**, 67 Ark. App. 35, 991 S.W.2d 639 (1999).

Delinquency adjudication upheld where the Arkansas Court of Appeals found sufficient evidence to support a finding that the juvenile was an accomplice to felony criminal mischief charges. An accomplice is one who directly participates in the commission of the offense or who, with the purpose of promoting or facilitating the commission of the offense, aids, agrees to aid or attempts to aid the other person in committing the offense. An accomplice is criminally liable for the conduct of others. The relevant factors in determining the connection of an accomplice to a crime are the presence of the accused in the proximity of the crime, the opportunity to commit the crime and the association with a person involved in the crime in a manner suggestive of joint participation. **Pack v. State**, 73 Ark. App. 123, 41 S.W.3d 409 (2001).

Appellant argued that the trial court did not consider evidence of the juvenile's mental state to negate the required intent to commit the crime of second-degree

battery. The only intent required is the intent to cause physical injury. The State presented substantial evidence to support the trial court's finding that the appellant had the requisite intent to commit the crime. **K.M. Father of J.M. v. State, 335 Ark. 85, 983 S.W.2d 93 (1998).**

Appellant was charged with Ark. Code Ann. § 5-73-121 for having a knife three-and-a-half inches long with the purpose to employ the weapon against a person. The statute provides that if a person carries a knife with a blade three-and-a-half inches long or longer, this fact shall be prima facie proof that the knife carried is a weapon. Appellant argued that the juvenile court erred in not requiring proof of intent to possess the knife as a weapon and that the statute impermissibly shifts the burden of proof to him, violating his due process rights.

The threshold inquiry is whether the presumption is mandatory or permissive. As long as the presumption is permissive and there is a rational connection between the fact proved and the fact presumed there is no merit to the appellant's contention that the burden was impermissibly shifted to him. In the light most favorable to the state, the juvenile court did not err in its finding of delinquency. **Garcia v. State, 333 Ark. 26, 969 S.W.2d 591 (1998).**

Appellant was adjudicated delinquent for criminal mischief in the first degree for wrecking a car. He argued that the trial court erred in denying his motion for directed verdict because there was not sufficient evidence to prove he purposely destroyed or damaged the car. While the evidence was not sufficient to show that appellant willfully intended to wreck and damage the car, the court found that there was enough evidence to find that he acted recklessly. The court modified the basis for the trial court's finding of delinquency to criminal mischief in the second degree and remanded the case to the trial court for assessment of the penalty. **McGill v. State, 60 Ark. App. 246, 962 S.W.2d 382 (1998).**

Appellant was adjudicated delinquent for second-degree assault. Appellant argued that there was insufficient evidence to support the trial court's determination that he committed second-degree assault. A person commits second-degree assault if he recklessly engages in conduct which creates a substantial risk of physical injury to another person. The fact that the juvenile's actions created a substantial risk that the teacher's aide could have fallen and injured herself is sufficient to sustain the trial court's findings. **Walker v. State, 330 Ark. 652, 955 S.W.2d 905 (1997).**

The appellant was adjudicated delinquent for possession of marijuana. The evidence included an assistant principal's testimony that a drug-sniffing dog stopped at the juvenile's locker and that a bag containing a "green leafy substance" was found

along with a pipe. There was also testimony that the juvenile admitted that the substance was his. A stipulated exhibit, prepared by a chemist, was also introduced that provided that the presence or absence of THC could not be confirmed by the test, although visual inspection and the chemical test yielded results consistent with the presence of marijuana. The juvenile moved to dismiss on the basis that the statutory definition of marijuana requires the state to prove the presence of THC and that it failed to do so. The Court held that there was substantial evidence to support the juvenile's adjudication. Lay testimony may provide substantial evidence of the identity of a controlled substance, even in the absence of expert chemical analysis. **Springston v. State, 327 Ark. 90, 936 S.W.2d 550 (1997).**

The Court affirmed the trial court's order adjudicating a juvenile as delinquent for committing the crime of rape. Appellant argued that the trial court erred in denying his directed verdict motions. A motion for a directed verdict is a challenge to the sufficiency of the evidence. In reviewing the sufficiency of the evidence on appeal the Court will view the evidence in the light most favorable to the State and affirm if the verdict is supported by substantial evidence. Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resort to speculation or conjecture. Further, appellant, who was two years, four months and one day older than the victim on the date of the offense, could not avail himself to the affirmative defense set forth in Ark. Code Ann. 5-14-103(a)(3) because he was more than two years older than the victim. **W.D. v. State, 55 Ark. App. 88, 931 S.W.2d 790 (1996).**

Appellant was convicted of being a minor in possession of a handgun on school property. The court reversed the trial court finding that the evidence failed to link the appellant to constructive possession of the handgun. Constructive possession can be implied where the contraband was found in a place immediately and exclusively accessible to the accused and subject to his control. It may be established by circumstantial evidence, but when such evidence is relied on for conviction, it must indicate guilt and exclude every other reasonable hypothesis. **Knight v. State, 51 Ark. App. 60, 908 S.W. 2d 664 (1995).**

Although two juveniles brought a handgun to school which could not be fired because parts were missing, the juvenile judge correctly found that Ark. Code Ann. 5-73-119(a)(1)(A) and (a)(2)(A) refer to the type of ammunition which can be fired from the gun, and not whether the gun itself was capable of being fired.

Penal statutes must be strictly construed in favor of the defendant, but that does not override the consideration statutory construction ascertain the intent of the legislature to insure the safety in public schools. The gun in question was designed to fire rimfire and center-fire ammunition. The fact that it could not be fired when

confiscated is irrelevant, and to hold otherwise would thwart legislative intent. S.T. and C.B. v. State, 318 Ark. 499, 885 S.W. 2d 885 (1995).

Appellant was charged with theft of property and appealed his delinquency adjudication. Convictions will be affirmed if supported by substantial evidence. Substantial evidence is that which is of sufficient force and character to compel a conclusion one way or the other without resorting to speculation or conjecture. The court upheld the delinquency adjudication; however, three judges dissented finding that they could not conclude from the evidence that the appellant committed theft of property. C. H., Jr. v State, 51 Ark. App. 153, 912 S.W.2d 942 (1995).

Appellant was charged with theft by receiving, battery in the first degree, and carrying a weapon. Appellant appealed the weapons charge and argued that the state's evidence was insufficient. Circumstantial evidence is sufficient to support a hypothesis consistent with innocence as determined by the trier of fact. Viewing the evidence in the state's favor, the record reflected that the appellant possessed a knife bearing a double-edge with a five-inch blade concealed under his shirt. Based on the evidence, the juvenile court was affirmed. Nesdahl v. State, 319 Ark. 277, 890 S.W.2d 596 (1995).

Appealable Order

Appellant appealed his adjudication of delinquency for sexual abuse in the first degree and failure to appear. The court found that this order was not appealable because it was not a final order since a subsequent disposition hearing was scheduled. Daniel v. State, 64 Ark. App. 98, 983 S.W.2d 146 (1998)

D. Delinquency Dispositions

1. Purpose

Hearing following adjudication to determine what action will be taken and to enter orders consistent with the disposition alternatives. **Ark. Code Ann. § 9-27-303(22) (Supp. 2007); Ark. Code Ann. §9-27-329(a) (Supp. 2007).**

2. Time Constraints

If juvenile is in detention following the Adjudication Hearing, the Disposition Hearing shall be held no more than 14 days following the Adjudication Hearing. **Ark. Code Ann. §9-27-329(b) (Supp. 2007).**

Note: Most disposition hearings immediately follow the adjudication hearing.

3. Evidence

- a. Unless otherwise indicated, the Arkansas Rules of Evidence apply. **Ark. Code Ann. §9-27-325(e) (Supp. 2007).**
- b. The court may enter into evidence any victim impact statements, studies or reports which have been ordered, even though they are not admissible at the adjudication hearing. **Ark. Code Ann. §9-27-329(f) (Supp. 2007).**
- c. In considering the disposition alternatives the court shall give preference to the least restrictive disposition consistent with the best interests and welfare of the juvenile and the public. **Ark. Code Ann. §9-27-3290(d) (Supp. 2007).**

E. Delinquency Disposition Alternatives

After juvenile is adjudicated delinquent, court may make any of the following dispositions, based on the best interest of the juvenile: **Ark. Code Ann. §9-27-330(a)(Supp. 2007)**

1. Transfer Legal Custody

a. The court may transfer legal custody of juvenile to any licensed agency responsible for care of delinquent juveniles, to relatives, or to other individuals **Ark. Code Ann. §9-27-330(a)(1)(A) (Supp. 2007)**.

- (1) Prior to the court placing a juvenile in a residential placement the court shall comply with the mental health assessments required by Act 1959 of 2005. **Ark. Code Ann. §9-27-602 (Supp. 2007); Ark. Code Ann. §9-27-603 (Supp. 2007);**

Note: For detailed information on the mental health assessments required see XIX. MISCELLANEOUS D. Mental Health Assessments.

- (2) Custody may only be transferred to a relative or other individual only after a home study of the placement is conducted by DHHS or a licensed certified social worker and submitted to the court in writing and the court determines that the placement is in the best interest of the juvenile **Ark. Code Ann. §9-27-331(h) (Supp. 2007)**.
- (3) Transfer of custody **shall not** include placement of adjudicated delinquents into foster care, except as provided by Ark. Code Ann. §12-12-516 (72-hour hold provision). **Ark. Code Ann. §9-27-330(a)(1)(C) (Supp. 2007)**.
- (4) Custody of a juvenile **shall not** be transferred to DHHS (foster care) when a delinquency petition or case has been converted to a FINS petition or case. **Ark. Code Ann. §9-27-331(j) (Supp. 2007)**.
- (5) If an adjudicated delinquent is also in DHHS custody (foster care) pursuant to a FINS or dependency-neglect petition and the court does not commit the juvenile to a facility exclusively for delinquents like DYS, detention, or C-Step, then any issue regarding placement of that juvenile shall be addressed in the original dependency-neglect or FINS case. **Ark. Code Ann. §9-27-331(i) (Supp. 2007)**.

2. DYS Commitment

- a. The court may commit the juvenile to a youth services center, using the Risk Assessment System for Arkansas Juvenile Offenders distributed and administered by the Administrative Office of the Courts. **Ark. Code Ann. §9-27-330(a)(1)(B) (Supp. 2007).**
- b. No court may commit a juvenile found solely in criminal contempt to DYS. **Ark. Code Ann. §9-27-331(j) (Supp. 2007); Ark. Code Ann. §9-28-208(a)(2) (Supp. 2007).**
- c. In the commitment order the court may recommend that a juvenile be placed in a community-based program instead of a youth services center, and shall make specific findings in support of such a placement in the order. **Ark. Code Ann. §9-27-330(a)(1)(B)(iii) (Supp. 2007).**

*DHS appealed the court's order that a juvenile committed to the Youth Services Center be placed in a serious offender program. Although Ark. Code Ann. §9-27-330 provides for the commitment to the Youth Services Center, it makes no provision for placement in a serious offender program. The court found that General Assembly intended to confer the board, not the court, with the authority to determine the program or facility suitable for juveniles committed to the Youth Services Center. **Arkansas Dep't. of Human Servs. v. State, Harbin and Joseph, 319 Ark. 749, 894 S.W.2d 592 (1995).***

***Note:** Ark. Code Ann. §9-28-209 grants DYS the authority to make placement decisions once a juvenile is committed to DYS.*

- d. The order of commitment to DYS shall state that the juvenile was found delinquent or to have committed a crime and the underlying facts of the adjudication. **Ark. Code Ann. §9-28-208(a) (Supp. 2007).**
- e. Prior or upon commitment to DYS, the court shall transmit the following information to the division:
 - (1) a copy of the commitment order;
 - (2) a copy of the risk assessment;
 - (3) records or information pertaining to the juvenile compiled by the juvenile intake or probation officer that shall include:
 - (a) information on the juvenile's background, history and behavioral tendencies and family status;
 - (b) the reasons for commitment;

- (c) the name of the school in which the juvenile is currently or was last enrolled;
 - (d) the juvenile's offense history;
 - (e) the juvenile's placement history;
 - (f) a copy of all psychological or psychiatric evaluations or examinations performed on the juvenile admitted into evidence or ordered by the court while under the court's jurisdiction or supervision of court staff;
 - (g) a comprehensive list of all medications taken by the juvenile; and
 - (h) a comprehensive list of all medical treatment currently being provided to the juvenile. **Ark. Code Ann. §9-27-208(b) (Supp. 2007).**
- f. Upon receiving an order of commitment with recommendations for placement in a community-based program, DYS shall consider the recommendations of the committing court in making its placement to a youth services center or to a community-based alternative. **Ark. Code Ann. §9-27-330(a)(1)(B)(iv) (Supp. 2007); Ark. Code Ann. §9-28-208(e) (Supp. 2007).**
- g. The court may place the juvenile on probation and require the juvenile to follow the terms of probation or the terms of a DYS aftercare plan upon release from DYS. **Ark. Code Ann. §9-27-330(a)(1)(B)(v)(a) (Supp. 2007).**
- (1) DYS or the prosecuting attorney in the county in which the juvenile was committed may petition the court for a hearing regarding the juvenile's aftercare violation.
 - (2) Upon a finding by a preponderance of the evidence that the juvenile did commit an aftercare violation the division or the prosecutor may request detention or re-commitment to DYS. **Ark. Code Ann. §9-27-330(a)(1)(B)(v)(b-c) (Supp. 2007).**
- h. Order of commitment shall remain in effect for an indeterminate period not exceeding two years, subject to extension by committing court for additional periods of one year up to the juvenile's 21st birthday if the court finds such extension necessary to safeguard the welfare of the juvenile or the public interest. **Ark. Code Ann. §9-27-331(a)(2-3) (Supp. 2007); Ark. Code Ann. §9-28-208(c) (Supp. 2007).**
- i. Facility to which juvenile is committed shall prepare a written case plan within 30 days of the juvenile's commitment that shall:

- (1) state the treatment plan for juvenile;
- (2) state the anticipated length of commitment;
- (3) state recommendations for the most appropriate post-commitment placement; and

If the juvenile cannot return home because of child maltreatment DYS shall immediately notify OCC, and DHHS shall petition the court to determine the issue of custody. **Ark. Code Ann. §9-27-331(f)(3)(B) (Supp. 2007).**

- (4) specify post-commitment services, if any, which should be provided by DHHS. **Ark. Code Ann. §9-27-331(f) (Supp. 2007).**
- j. A copy of the written plan shall be:
- (1) submitted to committing court for review;
 - (2) provided to custodian of juvenile; and
 - (3) filed with any court files with a pending dependency-neglect or FINS action concerning the juvenile. **Ark. Code Ann. §9-27-331(g) (Supp. 2007).**
- k. The court may recommend juvenile's release at any time by making a written request to DYS, including the reasons release is deemed in the best interests of the juvenile and society. **Ark. Code Ann. §9-27-331(a)(4) (Supp. 2007).**
- l. Length of commitment and final decision to release shall be the exclusive responsibility of DYS, except in EJJ cases. **Ark. Code Ann. §9-27-331(a)(5) (Supp. 2007).**

3. Order Evaluations

- a. The court may order the juvenile or members of the juvenile's family to submit to physical, psychiatric or psychological evaluations. **Ark. Code Ann. §9-27-330(a)(2) (Supp. 2007).**
- b. Evaluation, counseling or treatment of family members may be ordered only after the court's finding such necessary for treatment or rehabilitation of the juvenile. **Ark. Code Ann. §9-27-331(d) (Supp. 2007).**

4. Permanent Custody

- a. The court may grant permanent custody to an individual upon proof that:

- (1) the parent or guardian from whom the juvenile has been removed has not complied with the orders of the court; and
- (2) no further services or periodic review are required. **Ark. Code Ann. §9-27-330(a)(3) (Supp. 2007).**

5. Probation

- a. The court may place the juvenile on probation under terms and conditions prescribed by the court. **Ark. Code Ann. §9-27-330(a)(4)(A) (Supp. 2007).**
- b. The court shall have the right to require the juvenile to attend high school or make satisfactory progress toward a general education development certificate. **Ark. Code Ann. §9-27-330(a)(4)(B)(i) (Supp. 2007).**
- c. The court shall have the right to revoke probation if the juvenile fails to regularly attend high school classes or if satisfactory progress toward a general education development certificate is not being made. **Ark. Code Ann. §9-27-330(a)(4)(B)(i) (Supp. 2007).**
- d. Unless otherwise stated and excluding Extended Juvenile Jurisdiction (EJJ) offenders, probation orders shall remain in effect for indeterminate period not exceeding two years from date order entered. **Ark. Code Ann. §9-27-331(c)(1) (Supp. 2007).**
- e. Prior to expiration of probation, the court may extend the order for an additional year if it finds extension necessary to safeguard welfare of juvenile; or the interest of public. **Ark. Code Ann. §9-27-331(c)(3) (Supp. 2007).**

*Appellant argued that the court lacked jurisdiction to revoke his suspended sentence where the revocation petition was filed and heard outside the period of suspension. Appellant's reliance on the criminal code is misplaced; the juvenile code governs. Ark. Code Ann. § 9-27-331(c) provides that an order of probation shall remain in effect for an indeterminate period not to exceed two years. Since the probationary period had not expired the court had the authority to revoke probation upon the filing of a petition. **Byrd v. State, 84 Ark. App. 203, 138 S.W.3d 309 (2003).***

- f. Conditions of probation shall be given to the juvenile in writing and explained to juvenile and parent by the probation officer in the initial conference following the disposition hearing. **Ark. Code Ann. §9-27-339(a) (Repl. 2002).**

- g. Any violation of a condition of probation may be reported to the prosecutor who may petition the court for revocation of probation. **Ark. Code Ann. §9-27-339(b)(Repl. 2002).**
- h. Juvenile shall be released from probation upon expiration of order or upon a finding by court that the purpose of the order has been achieved. **Ark. Code Ann. §9-27-331(c)(2) (Supp. 2007).**

6. Probation Fee

Court may order fees not to exceed \$20.00 per month. **Ark. Code Ann. §9-27-330(a)(5) (Supp. 2007).**

Note: Acts 61 and 62 of 1994 amended Ark. Code Ann. §16-13-326(a) substituting "juvenile fee" for "probation fee" and "services provided to juveniles by the court" for "probation services."

7. Court Cost

Court may assess a court cost of no more than \$35.00 to be paid by the juvenile, his/her parent, both parents, or guardian **Ark. Code Ann. §9-27-330(a)(6) (Supp. 2007).**

8. Restitution

- a. Court may order restitution (not to exceed \$10,000 per victim) to be paid by the juvenile, a parent, both parents, the guardian, or custodian. **Ark. Code Ann. §9-27-330(a)(7)(A) (Supp. 2007); Ark. Code Ann. §9-27-331(e)(1) (Supp. 2007).**
- b. The prosecutor must prove the following by a preponderance of the evidence that the specific damages were caused by the juvenile, and that the juvenile's actions were the proximate cause of the damage. **Ark. Code Ann. §9-27-331(e)(1) (Supp. 2007).**
- c. If the amount of restitution exceeds \$10,000 for any individual victim, the court shall enter a restitution order of \$10,000 in favor of the victim. **Ark. Code Ann. §9-27-331(e)(2) (Supp. 2007).**
- d. Nothing prevents a person or entity from seeking a recovery for damages in excess of \$10,000 under other law. **Ark. Code Ann. §9-27-331(e)(2) (Supp. 2007).**

The trial court ordered appellants to make restitution on destroyed property in an amount exceeding \$2,000.00 pursuant to Acts 61 and 62 of 1994, which raised the limit to \$10,000.00. However, the

*property was destroyed on April 2, 1994, and the new legislation did not take effect until August 26, 1994. Restitution is a penalty that falls within the Constitutional prohibition of ex post facto laws, and therefore, an increase in the amount of restitution constitutes the increase of a penalty. The scheme of the legislation is punitive because it allows for revocation of probation if restitution is not paid. The statutory limits on restitution apply to each victim. Further, the proof admitted of one victim's damages was hearsay because the only evidence presented was an invoice for repairs. **Eichelberger and Elam v. State, 323 Ark. 551, 916 S.W.2d 109 (1996).***

*The Arkansas Supreme Court held that the \$2,000 limit on restitution applies only to "one loss" and not to a "multiplicity of crimes." Note: The \$2,000 cap has been deleted. **Leach v. State, 307 Ark. 201, 819 S.W.2d 1 (1991).***

- e. If the custodian is the State of Arkansas, both liability and the amount which may be assessed shall be determined by the Arkansas State Claims Commission. **Ark. Code Ann. §9-27-330(a)(7)(B) (Supp. 2007).**
- f. The court shall consider the following in determining the amount of restitution:
 - (1) if the juvenile is to be responsible for the restitution, by agreement between the juvenile and the victim;
 - (2) if the parent or parents are to be responsible for the restitution, by agreement between the parent or parents and the victim;
 - (3) if the juvenile and the parent or parents are to be responsible for the restitution, by agreement between the juvenile, his parent or parents, and the victim; or
 - (4) at a hearing the prosecutor must prove the restitution amount by a preponderance of the evidence. **Ark. Code Ann. §9-27-330(d)(1)(A) (Supp. 2007).**
- g. Restitution shall be made immediately, unless the court determines that the parties should be given a specified time to pay or should be allowed to pay in specified installments. **Ark. Code Ann. §9-27-330(d)(1)(B) (Supp. 2007).**
- h. In determining if restitution should be paid and by whom, as well as the method and amount of payment, the court shall take into account:

- (1) the financial resources of the juvenile, his parent, both parents, or the guardian, and the burden such payment will impose with regard to the other obligations of the paying party;
 - (2) the ability to pay restitution on an installment basis or on other conditions to be fixed by the court;
 - (3) the rehabilitative effect of the payment of restitution and the method of payment; and
 - (4) the past efforts of the parent, both parents, or the guardian to correct the delinquent juvenile's conduct;
 - (5) if the parent is a noncustodial parent, the opportunity the parent has had to correct the delinquent juvenile's conduct; and
 - (6) any other factors the court deems relevant **Ark. Code Ann. §9-27-330(d)(1)(C) (Supp. 2007)**.
- i. If the juvenile is placed on probation, any restitution ordered under this section may be a condition of the probation. **Ark. Code Ann. §9-27-330(d)(2) (Supp. 2007)**.
 - j. When an order of restitution is entered, it may be collected by any means authorized for the enforcement of money judgments in civil actions, and it shall constitute a lien on the real and personal property of the persons and entities the order of restitution is directed upon in the same manner and to the same extent as a money judgment in a civil action. **Ark. Code Ann. §9-27-330(e) (Supp. 2007)**.
 - k. The judgment entered by the court may be in favor of the state, the victim, or any other appropriate beneficiary. The judgment may be discharged by a settlement between the parties ordered to pay restitution and the beneficiaries of the judgment. **Ark. Code Ann. §9-27-330(f) (Supp. 2007)**.
 - l. The court shall determine priority among multiple beneficiaries on the basis of the seriousness of the harm each suffered, their other resources, and other equitable factors. **Ark. Code Ann. §9-27-330(g) (Supp. 2007)**.
 - m. If more than one juvenile is adjudicated delinquent of an offense for which there is a judgment under this section, the juveniles are jointly and severally liable for the judgment unless the court determines otherwise. **Ark. Code Ann. §9-27-330(h) (Supp. 2007)**.
 - n. A judgment under this section does not bar a remedy available in a civil action under other law. **Ark. Code Ann. §9-27-330(i)(1) (Supp. 2007)**.

- o. A payment under this section must be credited against a money judgment obtained by the beneficiary of the payment in a civil action. **Ark. Code Ann. §9-27-330(i)(2) (Supp. 2007).**
- p. A determination under this section and the fact that payment was or was not ordered or made are not admissible in evidence in a civil action and do not affect the merits of the civil action. **Ark. Code Ann. §9-27-330(i)(3) (Supp. 2007).**

9. Fine

The court may order a fine not to exceed \$500.00 to be paid by the juvenile, parent(s), or the guardian. **Ark. Code Ann. §9-27-330(a)(8) (Supp. 2007).**

10. Community Service

- a. The court may order that the juvenile, his/her parent(s), or guardian(s) to perform court-approved volunteer community service.
- b. Community service, not to exceed 160 hours, designed to contribute to the rehabilitation of the juvenile or to the ability of the parent or guardian to provide proper parental care and supervision of the juvenile. **Ark. Code Ann. §9-27-330(a)(9) (Supp. 2007).**

11. Parent Training

- a. The court may order that the parent(s) or guardian(s) of the juvenile attend a court-approved parental responsibility training program, if available. **Ark. Code Ann. §9-27-330(a)(10)(A) (Supp. 2007).**
- b. The court may make reasonable orders requiring proof of completion of such training program within a certain time period and payment of a fee covering the cost of the training program. **Ark. Code Ann. §9-27-330(a)(10)(B) (Supp. 2007).**
- c. The court may provide that any violation of such orders shall subject the parent, both parents, or guardian(s) to the contempt sanctions of the court. **Ark. Code Ann. §9-27-330(a)(10)(C) (Supp. 2007).**

12. Detention

- a. The court may order that the juvenile remain in a juvenile detention facility for an indeterminate period, not to exceed 90 days. **Ark. Code Ann. §9-27-330(a)(11)(A)(i) (Supp. 2007).**

- b. The court may further order that the juvenile be eligible for work release or to attend school or other educational or vocational training. **Ark. Code Ann. §9-27-330(a)(11)(A)(ii) (Supp. 2007).**
- c. The juvenile detention facility shall afford opportunities for education, recreation, and other rehabilitative services to adjudicated delinquents. **Ark. Code Ann. §9-27-330(a)(11)(B) (Supp. 2007).**

13. Electronic Monitoring - Residential Detention

The court may place the juvenile on residential detention with electronic monitoring, either in the juvenile's home or in another facility as ordered by the court. **Ark. Code Ann. §9-27-330(a)(12) (Supp. 2007).**

14. Cost Liability

- a. Order the parent(s) or guardian(s) of any juvenile adjudicated delinquent and committed to a youth services center or detained in a juvenile detention facility to be liable for the cost of the commitment, detention, or electronic monitoring. **Ark. Code Ann. §9-27-330(a)(13)(A) (Supp. 2007).**
- b. The court shall take into account the financial ability of the parent, both parents, or the guardian to pay for such commitment, detention, or electronic monitoring. **Ark. Code Ann. §9-27-330(a)(13)(B)(i) (Supp. 2007).**
- c. The court shall take into account the past efforts of the parent, both parents, or the guardian to correct the delinquent juvenile's conduct. **Ark. Code Ann. §9-27-330(a)(13)(B)(ii) (Supp. 2007).**
- d. The court shall take into account, if the parent is a noncustodial parent, the opportunity the parent has had to correct the delinquent juvenile's conduct. **Ark. Code Ann. §9-27-330(a)(13)(B)(iii) (Supp. 2007).**
- e. The court shall take into account any other factors the court deems relevant. **Ark. Code Ann. §9-27-330(a)(13)(B)(iv) (Supp. 2007).**

15. Suspend Driving Privileges

- a. The court may order the Department of Finance and Administration (DF&A) to suspend the driving privileges of any juvenile adjudicated delinquent. **Ark. Code Ann. §9-27-330(a)(15)(A) (Supp. 2007).**

- b. The order shall be prepared and transmitted to the DF&A within 24 hours after the juvenile has been found delinquent and is to have his driving privileges suspended. **Ark. Code Ann. §9-27-330(a)(15)(B) (Supp. 2007).**
- c. The court may provide in the order for the issuance of a restricted driving permit to allow driving to and from a place of employment or driving to and from school or for other circumstances. **Ark. Code Ann. §9-27-330(a)(15) (C) (Supp. 2007).**

16. Medical Information to DYS or Detention

When a juvenile is committed to a youth services center (DYS) or detained in a juvenile detention facility and the juvenile is covered by private insurance, order the parent or guardian to provide a copy of the health insurance policy and pharmacy card when available to the center or facility that has custody of the juvenile. **Ark. Code Ann. §9-27-330(a)(14) (Supp. 2007).**

17. Jurisdiction Retention

The court shall specifically retain jurisdiction to amend or modify any orders pursuant to this section. **Ark. Code Ann. §9-27-330(b) (Supp. 2007).**

F. Delinquency Dispositions for Weapon Adjudications

1. When a juvenile is adjudicated delinquent for possession of a handgun, criminal use of prohibited weapons, or possession of a defaced firearm the court shall:
 - a. Commit the juvenile to a juvenile detention facility, as provided in subdivision (a)(11) of this section;
 - b. Commit to DYS as provided in subdivision (a)(1) of this section; or
 - c. Place the juvenile on residential detention, as provided in subdivision (a)(12) of this section. **Ark. Code Ann. §9-27-330(c)(1) (Supp. 2007).**
2. The court may take into consideration any pre-adjudication detention period served by the juvenile and sentence the juvenile to such time served. **Ark. Code Ann. §9-27-330(c)(2) (Supp. 2007).**

G. Delinquency Disposition for Escape Adjudications

1. When a juvenile is adjudicated for first degree escape or second degree escape the court shall commit the juvenile to DYS and the juvenile shall be placed in a more restricted facility in order to complete the remaining term of his commitment. **Ark. Code Ann. §9-28-214(b) (Repl. 2002).**
2. If the juvenile escaped from the most restrictive facility, the juvenile shall complete the remaining term of his commitment at that or a similar facility **Ark. Code Ann. §9-28-214(b) (Repl. 2002).**
3. The juvenile may receive credit for time served. **Ark. Code Ann. §9-28-214(c) (Repl. 2002).**

SEX OFFENDER REGISTRATION HEARING CHECKLIST

A.C.A. §9-27-356

Petitioner:

Prosecutor if a juvenile has been found delinquent for:

- Rape;
- Sexual assault in the first degree;
- Sexual assault in the second degree;
- Incest; or
- Engaging children in sexually explicit conduct for use in visual or print medium.

Purpose of Adjudication & Disposition:

To determine whether the juvenile should register as a sex offender.

Time Constraints:

- ⊙ The registration hearing shall be held within 90 days of the motion to register the juvenile as a sex offender.

Present at Hearing:

- ✓ Judge
- ✓ Juvenile
- ✓ Prosecuting Attorney
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Service Providers
- ✓ Sex Offender Assessment Representatives
- ✓ Court Reporter

Burden of Proof:

- ✓ Clear & Convincing Evidence

Registration Factors:

- Seriousness of alleged offense;
- The protection of society;
- The level of planning and participation in the offense;
- The previous sex offender history of the juvenile, including whether the juvenile has been adjudicated for prior sex offenses;
- Whether there are facilities or programs available to the court that are likely to rehabilitate the juvenile prior to the expiration of court's jurisdiction;
- The Sex Offender Assessment and other relevant written reports or other materials relating to the juvenile's mental, physical, educational, and social history; and
- Any other factors deemed relevant by the court.

Registration Order

- The court shall make written findings on all the factors.
- Upon a finding by clear and convincing evidence that the juvenile should or should not be registered as a sex offender the court shall enter an order to that effect.
- The court may order a sex offender registration upon recommendation by the Sex Offender Assessment Committee and following a registration hearing, if a juvenile is adjudicated delinquent for any offense with an underlying sexually motivated component.

H. Sex Offender Registration Hearing

1. Purpose

To determine if juvenile adjudicated should register as a sex offender. **Ark. Code Ann. §9-27-356 (b)(2) and (d) (Supp. 2007).**

2. Time Constraints

The court shall conduct a hearing within 90 days of the sex offender registration motion. **Ark. Code Ann. §9-27-356(e)(1) (Supp. 2007).**

3. Petition

The prosecutor may file a petition requesting a juvenile to register as a sex offender. **Ark. Code Ann. § 9-27-356(d) (Supp. 2007).**

4. Right To Counsel

The juvenile shall be represented by counsel at the Sex Offender Registration Hearing. **Ark. Code Ann. §9-27-356(e)(2)(A) (Supp. 2007).**

5. Burden of Proof

Clear and convincing evidence **Ark. Code Ann. § 9-27-356(f)(2) (Supp. 2007).**

6. Registration Hearing Factors

a. Court shall consider the following factors in making a decision to require the juvenile to register as a delinquent sex offender:

- (1) the seriousness of the offense;
- (2) the protection of society;
- (3) the level of planning and participation in the offense;
- (4) the previous sex offender history of the juvenile, including whether the juvenile has been adjudicated for prior sex offenses;
- (5) whether there are facilities or programs available to the court that are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction;
- (6) the sex offender assessment and other relevant written reports or other materials relating to the juvenile's mental, physical, educational and social history; and

(7) any other factors deemed relevant by the court. **Ark. Code Ann. §9-27-356(e)(2)(A) (Supp. 2007).**

b. A juvenile's right against self-incrimination, the refusal to admit to the offense at the adjudication or in the assessment process shall not be used against the juvenile in the court's registration decision. **Ark. Code Ann. §9-27-356(e)(2)(B) (Supp. 2007).**

7. Court Findings

a. The court may require registration following an assessment and a hearing for juveniles adjudicated for the sex offenses listed in Ark. Code. Ann. §9-27-356(a). **Ark. Code Ann. §9-27-356(a) and (f)(2) (Supp. 2007).**

b. The court may require a juvenile adjudicated delinquent for an offense with a sexually motivated component to register upon recommendation of the Sex Offender Assessment Committee and following a hearing. **Ark. Code Ann. §9-27-356(b) (Supp. 2007).**

c. The court shall make written findings on all the factors set forth in subsection (e). **Ark. Code Ann. §9-27-356(f)(1) (Supp. 2007).**

d.. Upon a finding by clear and convincing evidence that juvenile should or should not be registered as a sex offender, the court shall enter order to that effect. **Ark. Code Ann. §9-27-356(f)(2) (Supp. 2007).**

8. Registration Process

a. When the court orders a juvenile to register, the judge shall order either DYS or juvenile probation to complete the registration process by:

(1) completing the Juvenile Sex Offender Registration Form;

(2) providing a copy of the Sex Offender Registration Order, Fact Sheet, Registration Form and Juvenile Sex Offender Rights and Responsibilities Form to the juvenile and his/her parent, guardian or custodian and explaining this information to the juvenile and his/her parent, guardian or custodian;

(3) mailing a copy of registration court order, Fact Sheet and Registration Form to ACIC, Sex Offender Registry Manager, One Capitol Mall 4D-200, LR, AR 72201;

(4) providing law enforcement agencies, where the juvenile resides, a copy of the Sex Offender Registration Form; and

(5) ensuring that copies of all documents are forwarded to the court for placement in the court file. **Ark. Code Ann. §9-27-356(g) (Supp. 2007).**

b. If the court orders the juvenile to register as a sex offender, juveniles are subject to the registration requirements set forth in Ark. Code Ann. §§ 12-12-904, -906, -908, 909 and 912. **Ark. Code Ann. §9-27-356(k) (Supp. 2007).**

9. Registration Removal

a. A juvenile may petition the court to have his/her name removed from the sex offender register at any time while the court has jurisdiction or until the juvenile turns 21. **Ark. Code Ann. §9-27-356(h) (Supp. 2007).**

b. Court shall remove the juvenile's name from the sex offender register upon proof by a preponderance of the evidence that the juvenile does not pose a threat of safety to others. **Ark. Code Ann. §9-27-356(i) (Supp. 2007).**

c. If the court does not order removal, the juvenile shall remain on the sex offender register for 10 years from the last date on which the juvenile was adjudicated delinquent or found guilty as an adult for a sex offense or until the juvenile turns 21, whichever is longer. **Ark. Code Ann. §9-27-356(j) (Supp. 2007).**

DELINQUENCY PROBATION REVOCATION

A.C.A. §9-27-339

Petitioners:

- Only the prosecuting attorney can file a probation revocation petition

Purpose of Adjudication & Disposition:

- To determine whether the allegations in the petition are substantiated by the evidence.

Time Constraints:

- ⌚ If juvenile is taken into custody on an allegation of a probation violation a detention hearing shall be held as soon as possible but no later than 72 hours (excluding weekends and holidays) after the juvenile was taken into custody
- ⌚ A revocation hearing shall be set within a reasonable time after the filing of the petition or within 14 days if the juvenile has been detained as a result of the revocation petition

Present at Hearing:

- ✓ Judge
- ✓ Prosecuting Attorney
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Juvenile
- ✓ Service Providers
- ✓ Court Reporter

Burden of Proof:

- ✓ Preponderance of the Evidence

Issues:

- ✓ Did the juvenile receive proper notice and due process of probation revocation?
- ✓ Did juvenile violate the terms of his/her probation
- ✓ Nonpayment of restitution, fines or court costs may constitute a violation unless the juvenile shows that the default was not attributable to a purposeful refusal to obey the court or was not due to a failure to make a good faith effort to obtain funds for payment
- ✓ Court shall consider juvenile's employment status, earning ability, financial resources, willfulness of failure to pay and any other circumstances bearing on ability to pay

Court's Probation Revocation Options:

- Extend probation;
- Impose additional probation conditions;
- Make any disposition that could have been imposed at the time probation was ordered; or
 - Transfer custody to DHS, licensed agency responsible for care of juveniles, relative or other individual;
 - DYS Commitment indeterminate period not exceeding 2 years (can order additional time prior to expiration of commitment order);
 - Place juvenile in juvenile detention for indeterminate period of time not to exceed 90 days;
 - Place juvenile on probation not to exceed 2 years;
 - Place juvenile on residential detention with electronic monitoring;
 - Order physical, psychiatric or psychological evaluations of juvenile and/or juvenile's family;
 - Grant permanent custody;
 - Order parent/guardian to attend parental responsibility training;
 - Order juvenile to perform up to 160 hours of community service;
 - Order DF&A to suspend or restrict the juvenile's driving privileges;
 - Order restitution up to \$10,000;
 - Order probation fee up to \$20 a month
 - Order court cost of \$35;
 - Order fine up to \$500; or
 - Order juvenile and/or juvenile's parents/guardians/custodian to be liable for cost of DYS commitment, juvenile detention, or electronic monitoring
- Commit juvenile to a juvenile detention facility for an indeterminate period not to exceed 90 days.

I. Revocation Of Probation Hearings

1. Purpose

To determine if the juvenile violated terms and conditions of probation. **Ark. Code Ann. §9-27-339(e) (Repl. 2002).**

2. Time Constraints

- a. When juvenile is taken into custody on an allegation of a violation of probation or violation of a court order, a detention hearing shall be held by the court as soon as possible, but no later than 72 hours after juvenile is taken into custody, or if 72 hours ends on Saturday, Sunday or holiday, on next business day. Otherwise the juvenile shall be released. **Ark. Code Ann. §9-27-326(a) (Supp. 2007).**
- b. The Probation Revocation Hearing shall be held within a reasonable time after a petition is filed or within 14 days if juvenile is detained as a result of the filing of a petition for revocation. **Ark. Code Ann. §9-27-339(d) (Repl. 2002).**

3. Petition

- a. The petition shall contain specific factual allegations of each condition violated. **Ark. Code Ann. §9-27-339(b) (Repl. 2002).**
- b. The petition shall be served upon juvenile, juvenile's attorney and juvenile's parent, guardian, or custodian. **Ark. Code Ann. §9-27-339(c) (Repl. 2002).**

4. Burden of Proof

The prosecutor has the burden of proof by a preponderance of the evidence that the juvenile violated the terms and conditions of probation. **Ark. Code Ann. §9-27-339(e) (Repl. 2002); Ark. Code Ann. §9-27-325(h)(2)(B) (Supp. 2007).**

- (1) Nonpayment of restitution, fines or court costs may constitute violation of probation unless the juvenile proves that his default was not attributable to a purposeful refusal to obey the court or was not due to a failure on his part to make a good faith effort to obtain funds required for payment. **Ark. Code Ann. §9-27-339(f)(1) (Repl. 2002).**
- (2) Court shall consider juvenile's employment status, earning ability, financial resources, willfulness of juvenile's failure to pay, and any other circumstances that may have a bearing on juvenile's ability to pay. **Ark. Code Ann. §9-27-339(f)(2) (Repl. 2002).**

- (3) If court determines the juvenile's default in payment is excusable, the court may enter an order allowing the juvenile additional time for payment, reducing the amount of each installment, or revoking the fine, costs, retribution, or unpaid portion in whole or in part. **Ark. Code Ann. §9-27-339(f)(3) (Repl. 2002).**

5. Court's Options

- a. Upon finding juvenile violated the terms and conditions of probation:
 - (1) Extend probation;
 - (2) Impose additional conditions of probation;
 - (3) Make any disposition that could have been made at time probation was imposed; or

*Ark. Code Ann. § 9-27-339(e)(3) provides the court the authority upon revocation to make any disposition that could have been made at the time probation was imposed including detention and probation. **Byrd v. State, 84 Ark. App. 203, 138 S.W.3d 309 (2003).***

Note: See delinquency dispositions at pages XIII-21 through -31

- (4) Commit the juvenile to a juvenile detention facility for an indeterminate period not to exceed 90 days. **Ark. Code Ann. §9-27-339(e) (Repl. 2002).**

*An adjudicated delinquent was ordered on probation and ordered to pay restitution. Subsequently the juvenile's probation was revoked due to possession of a controlled substance and the trial court ordered 90 days of detention. The detention order disposed of the probation revocation pursuant to Ark. Code Ann. §9-27-339. The trial court lacked jurisdiction to enter a subsequent order to pay restitution which constituted a second disposition of the same petition. **Bailey v. State, 348 Ark. 524, 74 S.W. 3d 622 (2002).***

XIV. EXTENDED JUVENILE JURISDICTION (EJJ) PROCEEDINGS

A. Extended Juvenile Jurisdiction (EJJ) Designation

1. The state may request an EJJ designation in a delinquency petition or file a separate motion if the:
 - a. Juvenile, under the age of 13 at the time of the alleged offense, is charged with:
 - (1) capital murder, or
 - (2) murder in the first degree, and
 - (3) the state has overcome presumptions of lack of fitness to proceed and lack of capacity as set forth in Ark. Code Ann. §9-27-502. **Ark. Code Ann. §9-27-501(a)(1) (Supp. 2007).**
 - b. Juvenile, age 13 at the time of the alleged offense, is charged with:
 - (1) capital murder, or
 - (2) murder in the first degree.
 - c. Juveniles age 13 at the time of the alleged offense shall have an evaluation pursuant to Ark. Code Ann. §9-27-502 and the burden will be upon the juvenile to establish lack of fitness to proceed and lack of capacity. **Ark. Code Ann. §9-27-501(a)(2) (Supp. 2007).**
 - d. Juveniles ages 14 through 17 at the time of the alleged offense, are charged with any of the crimes listed in Ark. Code Ann. §9-27-318(b)(1) and (c)(2). **Ark. Code Ann. § 9-27-501(a)(3) and (a)4) (Supp. 2007).**
2. The juvenile's attorney may file a motion to request EJJ if the state could have requested EJJ under subsection (a) of § 9-27-501. **Ark. Code Ann. §9-27-501(b) (Supp. 2007).**

B. Right to Counsel

1. An extended juvenile jurisdiction offender shall have a right to counsel at every stage of the proceedings, including all reviews. **Ark. Code Ann. §9-27-316(a)(2); (Supp. 2007); Ark. Code Ann. §9-27-504(a) (Repl. 2002).**
2. This right to counsel cannot be waived. **Ark. Code Ann. §9-27-504(b) (Repl. 2002).**

EJJ FITNESS TO PROCEED & LACK OF CAPACITY CHECKLIST

A.C.A. §9-27-502

Application:

- Presumption that juveniles under the age of 13 at time of alleged offense and charged with capital murder or 1st degree murder are unfit and lack capacity.
- Juvenile delinquency proceeding where EJJ designation has been requested and party intends to raise lack of capacity as an affirmative defense.

Purpose of Proceeding:

- To determine whether the juvenile is fit to proceed.
- To determine whether the juvenile had the capacity to engaged in the conduct charged.

Time Constraints:

- ⌚ Evaluations shall be filed with the court and distributed to the parties within 90 days from the date of order requesting evaluation.
- ⌚ Within 30 days of receipt of evaluation report the court shall determine where the juvenile is fit to proceed.
- ⌚ Designation Hearing time limitations (30 days if detained and no longer than 90 days following petition or motion) shall be tolled during pendency of competency issues.

Present at Hearing:

- ✓ Judge
- ✓ Prosecuting Attorney
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Evaluator
- ✓ Court Reporter

Burden of Proof: Preponderance of the Evidence

Fitness To Proceed:

- Parties may stipulate to findings and conclusions of evaluation report and court may enter order with respect to fitness based on report
- If no stipulation, the prosecutor is required to prove the juvenile:
 - ➊ understands the charges and potential consequences;
 - ➋ understands the trial process and proceedings against him/her; and
 - ➌ is able to participate with and assist his/her attorney in his/her defense.

Court Finding Not Fit:

- Commit to State Hospital or residential treatment facility for period not to exceed 9 months.
- If fitness not restored within 9 months, convert to FINS petition.

Court Finding Fit To Proceed – Capacity Issue

- Court shall conduct a hearing and the state is required to prove that at the time the juvenile engaged in the conduct charged he/she had the capacity to:
 - ➊ Possess the necessary mental state required for the offense charged;
 - ➋ Conform his/her conduct to the requirements of the law; and
 - ➌ Appreciate the criminality of his/her conduct
- Court shall consider written findings of examiner and shall issue a written order
- Court may find that the state did not meet its burden with regard to the capacity of the charged offense or a lesser included offense and shall convert to a FINS petition
- Court may find that the state did not meet its burden with regard to the capacity of the charged offense but that the juvenile had the capacity for a lesser included offense and shall convert the EJJ to a delinquency petition
- Court may find that the state met its burden and shall schedule a EJJ Designation Hearing
- A finding that a juvenile had the capacity of the charged EJJ offense does not prevent the defendant from raising the affirmative defense of lack of capacity at a subsequent adjudication hearing.

C. Competency: Fitness to Proceed – Lack of Capacity

1. A juvenile’s fitness to proceed may be put in issue by any party or the court in any delinquency proceeding; and **Ark. Code Ann. §9-27-502(a) (Supp. 2007)**.
2. In any juvenile delinquency proceedings where extended juvenile jurisdiction designation has been requested by any party and a party intends to raise lack of capacity as an affirmative defense. **Ark. Code Ann. §9-27-502(a) (Supp. 2007)**.
3. For a juvenile under the age of 13 at the time of the alleged offense and who is charged with capital murder or murder in the first degree, there shall be a presumption that:
 - (1) the juvenile is unfit to proceed; and
 - (2) he/she lacked capacity to:
 - (a) possess the necessary mental state required for the offense charged;
 - (b) conform his conduct to the requirements of law; and
 - (c) appreciate the criminality of his conduct. **Ark. Code Ann. §9-27-502(b)(1)(A) (Supp. 2007)**.
4. The prosecution must overcome these presumptions by a preponderance of the evidence. **Ark. Code Ann. §9-27-502(b)(1)(B) (Supp. 2007)**.
5. Evaluation
 - a. The court shall order an evaluation for such juveniles under the age of 13 and who are charged with capital murder or murder in the first degree to be performed in accordance with Ark. Code Ann. § 5-2-305(b), by a psychiatrist or a clinical psychologist who is specifically qualified by training and experience in the evaluation of juveniles. **Ark. Code Ann. §9-27-502(b)(2)(A) (Supp. 2007)**.
 - b. Upon an order for evaluation, all proceedings shall be suspended and the period of delay until the juvenile is determined fit to proceed shall constitute an excluded period for the speedy trial provisions of Rule 28 of the Arkansas Rules of Criminal Procedure. **Ark. Code Ann. §9-27-502(b)(2)(B) (Supp. 2007)**.
 - c. The court shall require the prosecuting attorney to provide to the examiner any information relevant to the evaluation, including, but not limited to:
 - (1) the names and addresses of all attorneys involved;

- (2) information about the alleged offense; and
 - (3) any information about the juvenile's background that the prosecutor deems relevant. **Ark. Code Ann. §9-27-502(b)(3) (Supp. 2007).**
 - (3) This information must be provided to the examiner within ten days after the court order for the evaluation and, when possible, this information shall be received prior to the juvenile's admission to the facility providing the inpatient evaluation. **Ark. Code Ann. §9-27-502(b)(5) (Supp. 2007).**
- d. The court may require the attorney for the juvenile to provide any available information relevant to the evaluation, including, but not limited to:
- (1) psychiatric record,
 - (2) school records, and
 - (3) medical records. **Ark. Code Ann. §9-27-502(b)(4) (Supp. 2007).**
 - (4) This information must be provided to the examiner within ten days after the court order for the evaluation and, when possible, this information shall be received prior to the juvenile's admission to the facility providing the inpatient evaluation. **Ark. Code Ann. §9-27-502(b)(5) (Supp. 2007).**
- e. In reaching an opinion as to the juvenile's fitness to proceed, the examiner shall consider and make written findings regarding whether the juvenile's capabilities entail:
- (1) an ability to understand and appreciate the charges and their seriousness;
 - (2) an ability to understand and realistically appraise the likely outcomes;
 - (3) a reliable episodic memory so that he can accurately and reliably relate a sequence of events;
 - (4) an ability to extend thinking into the future;
 - (5) an ability to consider the impact of his actions on others;
 - (6) verbal articulation abilities or the ability to express himself in a reasonable and coherent manner; and

(7) logical decision-making abilities, particularly multi-factored problem solving or the ability to take several factors into consideration in making a decision. **Ark. Code Ann. §9-27-502(b)(7)(C)(ix)(b)(i) (Supp. 2007).**

(8) Whether developmentally, he/she has:

(a) an ability to understand the charges;

(b) an ability to understand the roles of participants in the trial process, i.e., judge, defense attorney, prosecutor, witnesses, and jury and understand the adversarial nature of the process;

(c) an ability to adequately trust and work collaboratively with his attorney and provide a reliable recounting of events;

(d) an ability to reason about available options by weighing their consequences, including, but not limited to, weighing pleas, waivers, and strategies;

(e) an ability to disclose to an attorney a reasonably coherent description of facts pertaining to the charges, as perceived by the juvenile; and

(f) an ability to articulate his/her motives. **Ark. Code Ann. §9-27-502(b)(7)(C)(ix)(b)(2) (Supp. 2007).**

f. In reaching an opinion as to whether at the time the juvenile engaged in the conduct charged, as a result of immaturity or mental disease or defect, the juvenile lacked capacity, the examiner shall consider and make written findings regarding the following whether the juvenile:

(1) was able to form the necessary intent;

(2) knew which actions were wrong;

(3) had reasonably accurate expectations of the consequences of his/her actions;

(4) was able to act of his/her own volition;

(5) had the capacity to behave intentionally;

(6) had the capacity to engage in logical decision-making;

(7) had the capacity to foresee the consequences of his/her actions; and

- (8) had the capacity to exert control over his/her impulses and to resist peer pressure. **Ark. Code Ann. §9-27-502(b)(7)(C)(x)(b) (Supp. 2007).**
- g. In assessing the juvenile's competency, the examiner shall:
- (1) obtain and review all records pertaining to the juvenile, including but not limited to all the records listed above;
 - (2) consider the social, developmental, and legal history of the juvenile, as related by the juvenile and a parent or guardian, and any other relevant source;
 - (3) consider the current alleged offense;
 - (4) conduct a competence abilities interview of the juvenile;
 - (5) conduct an age-appropriate mental status exam using tests designed for juveniles;
 - (6) conduct an age-appropriate psychological evaluation, using tests designed for juveniles; and
 - (7) consider any other relevant test or information. **Ark. Code Ann. §9-27-502(b)(6) (Supp. 2007).**
- h. Evaluations shall be filed with the court and distributed to the parties within 90 days from the date of the order requesting such evaluation. **Ark. Code Ann. §9-27-502(b)(7)(A) (Supp. 2007).**
- i. All such reports shall be filed under seal with the court and shall not be subject to the Freedom of Information Act at Ark. Code Ann. § 25-19-101 et seq. **Ark. Code Ann. §9-27-502(b)(7)(B) (Supp. 2007).**
- j. The evaluation report shall include, but not be limited to, the following:
- (1) identification of the juvenile and the charges;
 - (2) listing of assessment methods used;
 - (3) description of what the juvenile was told about the purpose of the evaluation;
 - (4) social, clinical, and developmental history and the sources from which this information was obtained;
 - (5) mental status data, including any psychological testing conducted and results;

- (6) comprehensive intelligence testing;
- (7) competence data assessing the competence-to-stand-trial abilities;
- (8) interpretation of the data, including clinical or developmental explanations for any serious deficits in competence abilities;
- (9) an opinion as to the juvenile's fitness to proceed; and
- (10) an opinion as to whether at the time the juvenile engaged in the conduct charged, as a result of immaturity or mental disease or defect, the juvenile lacked capacity to:
 - (a) possess the necessary mental state required for the offense charged;
 - (b) conform his/her conduct to the requirements of the law; and
 - (c) appreciate the criminality of his/her conduct. **Ark. Code Ann. §9-27-502(b)(7)(C) (Supp. 2007).**

k. Time Constraints

- (1) Evaluations shall be filed with the court and distributed to the parties within ninety (90) days from the date of the order requesting such evaluation. **Ark. Code Ann. §9-27-502(b)(7)(A) (Supp. 2007).**
- (2) Within thirty (30) days of the receipt of the evaluation report, the court shall first determine whether the juvenile is fit to proceed. **Ark. Code Ann. §9-27-502(b)(8)(A) (Supp. 2007).**

D. Competency: Fitness to Proceed & Capacity Proceedings

- 1. A hearing shall be conducted unless the parties stipulate to the findings and conclusions of the evaluation report and the court enters an order with respect to fitness based thereon. **Ark. Code Ann. §9-27-502(b)(8)(B)(i-ii) (Supp. 2007).**
- 2. In order for the court to find a juvenile fit to proceed at the hearing, the prosecution all be required to prove by a preponderance of the evidence the following:
 - a. The juvenile understands the charges and potential consequences;
 - b. The juvenile understands the trial process and proceedings against him/her; and

- c. The juvenile has the capacity to effectively participate with and assist his/her attorney in a defense to prosecution. **Ark. Code Ann. §9-27-502(b)(8)(B)(ii)(a) (Repl. 2002).**
3. The court shall issue written findings as to whether the prosecution has met its burden with respect to such issues and whether the juvenile is fit or unfit to proceed. **Ark. Code Ann. §9-27-502(b)(8)(B)(ii)(b) (Repl. 2002).**
4. If the juvenile is found unfit to proceed:
 - a. The court shall commit the juvenile to the DHHS or a residential treatment facility for a period not to exceed nine months, and the facility responsible for the juvenile shall be required to report to the court and the parties at least every 30 days on the juvenile's progress. **Ark. Code Ann. §9-27-502(b)(9)(A-B) (Supp. 2007).**
 - b. If fitness to proceed is not restored within nine months, the court shall convert the delinquency petition to a family in need of services petition. **Ark. Code Ann. §9-27-502(b)(9)(C) (Supp. 2007).**
5. If the juvenile is found fit to proceed, the court shall conduct a hearing wherein the state shall be required to prove by a preponderance of the evidence that at the time the juvenile engaged in the conduct charged he had the capacity to:
 - a. Possess the necessary mental state required for the offense charged;
 - b. Conform his conduct to the requirements of the law; and
 - c. Appreciate the criminality of his conduct. **Ark. Code Ann. §9-27-502(b)(10)(A) (Supp. 2007).**
6. In making such determination, the court shall consider the written findings of the examiner and any other relevant evidence and shall issue a written order with respect to such hearing. **Ark. Code Ann. §9-27-502(b)(10)(B) (Supp. 2007).**
7. If the court finds that the state did not meet its burden with regard to the capacity of the charged offense, but the juvenile had the capacity for a lesser included offense, the court shall convert the EJJ petition to a delinquency petition. **Ark. Code Ann. §9-27-502(b)(10)(B)(ii) (Supp. 2007).**
8. If the court finds the state did not meet its burden with regard to the capacity of the charged offense or a lesser included offense, the court shall convert the delinquency petition into a family in need of services (FINS) petition. **Ark. Code Ann. §9-27-502(b)(10)(B)(iii) (Supp. 2007).**

9. If the court finds that the state met its burden with regard to the capacity, the court shall:
 - a. Schedule a designation hearing as described in Ark. Code Ann. §9-27-503. **Ark. Code Ann. §9-27-502(b)(10)(B)(iv)(a) (Supp. 2007).**
 - b. Such a finding by the court that the state has met its burden as to capacity, does not prevent the juvenile from raising the affirmative defense of lack of capacity at a subsequent adjudication hearing. **Ark. Code Ann. §9-27-502(b)(10)(B)(iv)(b) (Supp. 2007).**

EJJ DESIGNATION HEARING CHECKLIST

A.C.A. §9-27-503

Petitioners:

- Any party may request an EJJ designation.

Purpose of Adjudication & Disposition:

- To determine whether the juvenile should be charged as an EJJ offender.

Time Constraints:

- 🕒 If juvenile is in detention, the EJJ designation hearing shall be held within 30 days and no longer than 90 days from the date of the petition or motion requesting the EJJ designation.
- 🕒 These time frames shall be tolled during the pendency of any competency issues.

Present at Hearing:

- ✓ Judge
- ✓ Prosecuting Attorney
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Juvenile
- ✓ Relevant Witnesses
- ✓ Court Reporter

Burden of Proof:

- ✓ Party requesting has the burden of proof by a preponderance of the evidence.

Transfer Factors:

The court shall consider all of the following factors:

- Seriousness of alleged offense and whether the protection of society requires prosecution as an EJJ offender;
- Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
- Whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;

- The culpability of the juvenile, including the level of planning and participation in the alleged offense;
- The previous history of the juvenile, including whether the juvenile had been adjudicated a juvenile offender and, if so, whether the offenses were against persons or property, and any other previous history of antisocial behavior or patterns of physical violence;
- The sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- Whether there are facilities or programs available to the judge of the juvenile division of circuit court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction;
- Whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- Written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
- Any other factors deemed relevant by the court.

Designation Order

- Upon finding that the juvenile shall be treated as an EJJ offender, the court shall enter its written findings and inform the juvenile of his/her right to a jury trial and set a date for the adjudication.
- If the court denies the EJJ designation, the court shall enter its written findings and proceed with the case as a delinquency proceeding.
- A designation order is a final order and subject to an interlocutory appeal.

E. Designation Hearing

1. Time Constraints

- a. When a party requests an extended juvenile jurisdiction designation, the court shall hold a designation hearing within 30 days, if the juvenile is detained, and no longer than ninety 90 days following the petition or motion requesting such designation.
- b. These time limitations shall be tolled during the pendency of any competency issues. **Ark. Code Ann. §9-27-503(a) (Repl. 2002).**

2. Burden of Proof

The party requesting the extended juvenile jurisdiction designation has the burden to prove by a preponderance of the evidence that such designation is warranted. **Ark. Code Ann. §9-27-503(b) (Repl. 2002).**

3. Designation Factors

- a. The court shall make written findings considering all of the following factors in making its determination to designate a juvenile as an extended juvenile jurisdiction offender:
 - (1) the seriousness of the alleged offense and whether the protection of society requires prosecution as an extended juvenile jurisdiction offender;
 - (2) whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
 - (3) whether the offense was against a person or property, with greater weight being given to offenses against persons, especially if personal injury resulted;
 - (4) the culpability of the juvenile, including the level of planning and participation in the alleged offense;
 - (5) the previous history of the juvenile, including whether the juvenile had been adjudicated delinquent and, if so, whether the offenses were against persons or property and any other previous history of antisocial behavior or patterns of physical violence;

- (6) the sophistication and maturity of the juvenile, as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living, or desire to be treated as an adult;
- (7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction;
- (8) whether the juvenile acted alone or was part of a group in the commission of the alleged offense;
- (9) written reports and other materials relating to the juvenile's mental, physical, educational, and social history; and
- (10) any other factors deemed relevant by the court. **Ark. Code Ann. §9-27-503(c) (Repl. 2002).**

4. Court's Findings

- a. Upon finding that the juvenile shall be treated as an extended juvenile jurisdiction offender, the court shall:
 - (1) enter its written findings;
 - (2) inform the juvenile of his right to a jury trial; and
 - (3) set a date for the adjudication. **Ark. Code Ann. §9-27-503(d) (Repl. 2002).**
- b. If the court denies the request for extended juvenile jurisdiction, the court shall enter its written findings and proceed with the case as a delinquency proceeding. **Ark. Code Ann. §9-27-503(e) (Repl. 2002).**

5. Appeal

For purposes of appeal, a designation order is a final appealable order and shall be subject to an interlocutory appeal. **Ark. Code Ann. §9-27-503(f) (Repl. 2002).**

EJJ ADJUDICATION, DISPOSITION & REVIEW HEARING CHECKLIST

A.C.A. §9-27-505, -506 and -507

Purpose of Adjudication & Disposition:

- To determine whether the juvenile should be charged as an EJJ offender

Time Constraints:

- ⌚ Adjudication shall be held within time frame prescribed by the speedy trial provisions of Rule 28 of the Arkansas Rules of Criminal Procedure.
- ⌚ The state may petition for review at any time requesting to impose an adult sentence if the juvenile:
 - ❶ has violated a juvenile disposition order;
 - ❷ has been adjudicated delinquent or found guilty of committing a new offense; or
 - ❸ is not amenable to rehabilitation in the juvenile system.
- ⌚ The juvenile may petition to review and modify the disposition at any time. If the juvenile's petition is denied, the juvenile must wait one year to file new petition.
- ⌚ If no review hearing has been conducted, the court shall conduct a hearing six months prior to the juvenile's 18th birthday or six months prior to the juvenile's 21st birthday if the juvenile was 16-17 when the EJJ petition was filed.

Present at Hearing:

- ✓ Judge
- ✓ Prosecuting Attorney
- ✓ Juvenile's Attorney
- ✓ Parents/Guardians/Custodians
- ✓ Juvenile
- ✓ Relevant Witnesses
- ✓ Court Reporter

Burden of Proof:

- ✓ State bears the burden of proof beyond a reasonable doubt at adjudication
- ✓ State bears the burden of proof by a preponderance of the evidence if it seeks imposition of an adult sentence at review

Adjudication & Disposition:

- An EJJ offender has the right to a jury trial at adjudication.
- The right to a jury trial may be waived by a

juvenile only after being advised of his/her rights and after consultation with his/her attorney.

- The waiver shall be in writing and signed by the juvenile, the juvenile's attorney, and the juvenile's parent or guardian and the court shall inquire on the record to ensure that the waiver was made in a knowing, intelligent, and voluntary manner.
- If adjudicated as an EJJ offender, the court shall:
 - ❶ order any of the delinquency dispositions authorized by A.C.A. §9-27-331, and
 - ❷ suspend imposition of an adult sentence pending court review.
- If adjudicated for an offense that would not have subjected the juvenile to EJJ jurisdiction, the court shall enter any delinquency dispositions authorized by A.C.A. §9-27-331

Review Hearing:

- If the court finds by a preponderance of the evidence that the juvenile has violated a juvenile disposition order, is delinquent or guilty of committing a new offense, or is not amenable to rehabilitation in the juvenile system, the court may:
 - ❶ amend or add any delinquency dispositions authorized by A.C.A. §9-27-331, or
 - ❷ impose full range of adult sentencing including probation, suspended imposition of sentence or imprisonment.
- If no hearing has been conducted 6 months prior to the juvenile's eighteenth birthday, the court shall conduct a hearing and consider the following to determine whether to release the juvenile, amend or add any juvenile disposition, or impose an adult sentence:
 - ❶ the experience and character of the juvenile before and after the juvenile disposition, including compliance with the court's orders;
 - ❷ the nature of the offense or offenses and the manner in which the offense or offenses were committed;
 - ❸ the recommendations of the professionals who have worked with the juvenile;
 - ❹ the protection of public safety;

EJJ ADJUDICATION, DISPOSITION & REVIEW HEARING CHECKLIST

- ⑤ opportunities provided to the juvenile for rehabilitation and the juvenile's efforts toward rehabilitation; and
- ⑥ victim impact evidence admitted pursuant to A.C.A. §16-97-103.

Review Hearing:

- Following the review hearing the court may:
 - ① Release the juvenile;
 - ② amend or add any delinquency dispositions authorized by A.C.A. §9-27-331, or
 - ③ impose full range of adult sentencing including, probation, suspended imposition of sentence or imprisonment.

Sentencing Limitations:

- A sentence of imprisonment shall not exceed 40 years, except for juveniles adjudicated for capital murder or murder in the first degree who may be sentenced for any term up to and including life.
- Statutory provisions prohibiting or limiting probation or suspended imposition of sentence or parole for offenses when committed by an adult shall not apply to juveniles sentenced as extended juvenile jurisdiction offenders.
- A court may not order an absolute release of an extended juvenile jurisdiction offender who has been adjudicated delinquent for capital murder or murder in the first degree.
- If release is ordered, the court shall impose a period of probation for not less than 3 years.

F. Extended Juvenile Jurisdiction (EJJ) Adjudication & Disposition Hearings

1. Jury Trial

- a. An extended juvenile jurisdiction offender and the state shall have the right to a jury trial at the adjudication hearing. **Ark. Code Ann. §9-27-505(a) (Supp. 2007).**
- b. The juvenile shall be advised of the right to a jury trial by the court following a determination that the juvenile will be tried as an extended juvenile jurisdiction offender. **Ark. Code Ann. §9-27-505(b) (Supp. 2007).**
- c. The right to a jury trial may be waived by a juvenile only after being advised of his rights and consultation with the juvenile's attorney. **Ark. Code Ann. §9-27-505(c)(1) (Supp. 2007).**
- d. The waiver shall be in writing and signed by the juvenile, the juvenile's attorney, and the juvenile's parent or guardian and the court shall inquire on the record to ensure that the waiver was made in a knowing, intelligent, and voluntary manner. **Ark. Code Ann. §9-27-505(c)(2) (Supp. 2007).**
- e. All provisions of the Arkansas Code of 1987 Annotated and the Arkansas Rules of Criminal Procedure, not in conflict with this subchapter, that regulate criminal jury trials in circuit court shall apply to jury trials for juveniles subject to extended juvenile jurisdiction proceedings. **Ark. Code Ann. §9-27-505(d) (Supp. 2007).**

2. Time Constraints

The adjudication shall be held within the time prescribed by the speedy trial provisions of Rule 28 of the Arkansas Rules of Criminal Procedure. **Ark. Code Ann. §9-27-505(e) (Supp. 2007).**

3. Burden of Proof

The state bears the burden to prove the charges in the petition beyond a reasonable doubt. **Ark. Code Ann. §9-27-505(f) (Supp. 2007).**

4. EJJ Adjudication

- a. If a juvenile is adjudicated delinquent as an extended juvenile jurisdiction offender, the juvenile court shall:
 - (1) order any of the juvenile dispositions authorized by Ark. Code Ann. §9-27-330; and

(2) suspend the imposition of adult sentence pending juvenile court review. **Ark. Code Ann. §9-27-505(g)(1) (Supp. 2007); Ark. Code Ann. § 9-27-506 (Supp. 2007).**

b. If the juvenile is adjudicated delinquent for an offense that would not have subjected him to extended juvenile jurisdiction, the court shall enter any of the delinquency dispositions available at Ark. Code Ann. § 9-27-330. **Ark. Code Ann. §9-27-505(g)(2) (Supp. 2007).**

G. Extended Juvenile Jurisdiction Court Review Hearing

1. Adult Sentence Petition

- a. The state may petition the juvenile court at any time to impose an adult sentence if the juvenile:
- (1) has violated a juvenile disposition order;
 - (2) has been adjudicated delinquent or found guilty of committing a new offense; or
 - (3) is not amenable to rehabilitation in the juvenile system. **Ark. Code Ann. §9-27-507(a) (Supp. 2007).**

2. Court Disposition

If the court finds by a preponderance of the evidence that the juvenile has violated a juvenile disposition order, is delinquent or guilty of committing a new offense, or is not amenable to rehabilitation in the juvenile system, the court may:

- (1) amend or add any juvenile disposition authorized by § 9-27-330; or
- (2) exercise its discretion to impose the full range of sentencing available in the criminal division of circuit court, including probation, suspended imposition of sentence, and imprisonment. **Ark. Code Ann. §9-27-507(b) (Supp. 2007).**
 - (a) A sentence of imprisonment shall not exceed 40 years, except for juveniles adjudicated for capital murder and murder in the first degree who may be sentenced for any term, up to and including life. **Ark. Code Ann. §9-27-507(b)(2)(A)(ii) (Supp. 2007).**
 - (b) Statutory provisions prohibiting or limiting probation or suspended imposition of sentence or parole for offenses when committed by an adult shall not apply to juveniles sentenced as extended juvenile jurisdiction offenders. **Ark. Code Ann. §9-27-507(b)(2)(B) (Supp. 2007).**
 - (c) A juvenile shall receive credit for time served in a juvenile detention or any juvenile facility. **Ark. Code Ann. §9-27-507(b)(2)(C) (Supp. 2007).**

3. **Review and Modification of EJJ Disposition**

- a. The juvenile may petition the court to review and modify the disposition at any time. **Ark. Code Ann. §9-27-507(c)(1) (Supp. 2007).**
- b. If the juvenile's initial petition is denied, the juvenile must wait one year from the date of the denial to file a new petition for modification. **Ark. Code Ann. §9-27-507(c)(2) (Supp. 2007).**
- c. If the state or the juvenile files a petition to modify the juvenile court's disposition order before six months prior to the juvenile's eighteenth birthday, the filing party bears the burden of proof. If the juvenile is 16 or 17 when the EJJ petition is filed, then the state or juvenile may petition the court six month's prior to the juvenile's 21st birthday. **Ark. Code Ann. §9-27-507(d) (Supp. 2007).**
- d. If no hearing has been conducted six months prior to the juvenile's eighteenth birthday or six months prior the juvenile's 21st birthday, if the juvenile was 16 or 17 when the EJJ petition was filed, the court shall conduct a hearing and consider the following to determine whether to release the juvenile, amend or add any juvenile disposition, or impose an adult sentence:
 - (1) the experience and character of the juvenile before and after the juvenile disposition, including compliance with the court's orders;
 - (2) the nature of the offense or offenses and the manner in which the offense or offenses were committed;
 - (3) the recommendations of the professionals who have worked with the juvenile;
 - (4) the protection of public safety;
 - (5) opportunities provided to the juvenile for rehabilitation and the juvenile's efforts toward rehabilitation; and
 - (6) victim impact evidence admitted pursuant to Ark. Code Ann. §16-97-103. **Ark. Code Ann. §9-27-507(e)(1-2) (Supp. 2007).**
- e. If the state seeks to impose an adult sentence, the state must prove by a preponderance of the evidence that the imposition of an adult sentence is appropriate and that public safety requires imposition. **Ark. Code Ann. §9-27-507(e)(3) (Supp. 2007).**

- f. Following a hearing, the court may enter any of the following dispositions:
- (1) release the juvenile;
 - (2) amend or add any juvenile disposition; or
 - (3) exercise its discretion to impose the full range of sentencing available in criminal division of circuit court, including probation, suspended imposition of sentence, and imprisonment. **Ark. Code Ann. §9-27-507(e)(4)(A) (Supp. 2007).**
 - (a) A sentence of imprisonment shall not exceed 40 years, except for juveniles adjudicated for capital murder or murder in the first degree who may be sentenced for any term up to and including life. **Ark. Code Ann. §9-27-507(e)(4)(A)(iii)(b) (Supp. 2007).**
 - (b) Statutory provisions prohibiting or limiting probation or suspended imposition of sentence or parole for offenses when committed by an adult shall not apply to juveniles sentenced as extended juvenile jurisdiction offenders. **Ark. Code Ann. §9-27-507(e)(4)(B) (Supp. 2007).**
 - (c) A juvenile shall receive credit for time served in a juvenile detention or any juvenile facility. **Ark. Code Ann. §9-27-507(e)(4)(C) (Supp. 2007).**

4. Release

- a. A court may not order an absolute release of an extended juvenile jurisdiction offender who has been adjudicated delinquent for capital murder or murder in the first degree. **Ark. Code Ann. §9-27-507(b)(2)(D)(i) (Supp. 2007); Ark. Code Ann. §9-27-507(e)(4)(D)(i) (Supp. 2007).**
- b. If release is ordered, the court shall impose a period of probation for not less than 3 years. **Ark. Code Ann. §9-27-507(b)(2)(D)(ii) (Supp. 2007); Ark. Code Ann. §9-27-507(e)(4)(D)(ii) (Supp. 2007).**

H. Extended Juvenile Jurisdiction (EJJ) Records

1. Records of juveniles who are designated as extended juvenile jurisdiction offenders shall be kept for:
 - a. Ten years after the last adjudication of delinquency, date of plea of guilty or nolo contendere, or finding of guilt as an adult, or until the juvenile's twenty-first birthday, whichever is longer. **Ark. Code Ann. §9-27-508(a) (Repl. 2002).**
 - b. If an adult sentence is imposed upon an extended juvenile jurisdiction offender, the records of that case shall be considered adult criminal records.
 - (1) The juvenile court shall enter an order transferring the juvenile records to the clerk who is the custodian of adult criminal records.
 - (2) The clerk shall assign a criminal division of circuit court docket number and shall maintain the file as if the case had originated in the criminal division of the circuit court. **Ark. Code Ann. §9-27-508(b) (Repl. 2002).**

XVI. FAMILIES IN NEED OF SERVICES (FINS) PROCEEDINGS

Note: Most FINS cases do not come to court by way of an emergency removal; however, there are some rare cases that do result in emergency removals and as a result a Probable Cause Hearing is necessary. Common examples include cases that should have been filed as dependency-neglect and juveniles who have acute hospitalization needs resulting from drugs, alcohol or mental illness.

A. Probable Cause Hearings

1. Purpose

To determine if probable cause to issue an emergency ex parte order continues to exist. **Ark. Code Ann. §9-27-315(a)(1)(A) (Supp. 2007).**

- a. Court shall issue an ex parte order to remove the juvenile from the custody of the parent, guardian, or custodian when probable cause exists that immediate emergency custody is necessary to:
 - (1) protect the juvenile's health or physical well-being from immediate danger; or
 - (2) prevent juvenile's removal from state; **Ark. Code Ann. §9-27-314(a)(1) (Supp. 2007).**
- b. To provide specific appropriate safeguards to protect the juvenile when there is probable cause to believe an emergency order is necessary to protect the juvenile from severe maltreatment, if the alleged offender:
 - (1) has a legal right to custody or visitation with the juvenile,
 - (2) has a property right allowing access to the home where the juvenile resides, or
 - (3) is a juvenile. **A.C.A. §9-27-314(a)(2) (Supp. 2007).**

Severe maltreatment means:

- sexual abuse,
- sexual exploitation,
- acts or omissions which may result in death,

- abuse involving the use of a deadly weapon,
- bone fracture,
- internal injuries,
- burns,
- immersions,
- suffocation,
- abandonment,
- medical diagnosis of failure to thrive, or
- causing a substantial and observable change in behavior or demeanor of the child; or **A.C.A. §12-15-503(16) (Supp. 2007).**

c. When there is probable cause to believe that a juvenile is dependent, the court shall issue an ex parte order for emergency custody to DHS. **A.C.A. §9-27-314(a)(2) (Supp. 2007).**

Dependent juvenile means:

- a child of a parent in DHHS custody;
- a child whose parent or guardian is incarcerated and has no appropriate relative or friend willing or able to provide care for the child;
- a child whose parent or guardian is incapacitated so they cannot care for the juvenile and they have no appropriate relative or friend to care for the child;
- a child whose custodial parent dies and no stand-by guardian exists;
- a child who is an infant relinquished to the custody of DHS for the sole purpose of adoption;
- a safe-haven baby; or

➤a child who has disrupted his/her adoption and the adoptive parents have exhausted resources available to them. **A.C.A. § 9-27-503(17) (Supp. 2007).**

2. Notice

- a. The emergency ex parte order shall include notice to that parent, custodian, or guardian of the right to:
- (1) a hearing and procedure for obtaining Probable Cause Hearing within five business days of issuance of ex parte order;
 - (2) representation by counsel; and
 - (3) to appointed counsel if indigent and procedure for obtaining appointed counsel. **Ark. Code Ann. §9-27-314(b)(1-3) (Supp. 2007).**

The court may appoint counsel for the parent or guardian for whom custody was removed in the emergency ex parte order. **Ark. Code Ann. §9-27-316(h)(1)(B) (Supp. 2007).**

***Note:** Best practice is to appoint counsel for the parent or guardian when a child is first removed so they can appear at the first hearing prepared with counsel to provide the court valuable information concerning the needs of the child, family and possible relative placements*

The state only pays for parent counsel for parents or guardians from whom custody is removed and/or prior to a termination of parental rights hearing if the parent is indigent and requests counsel. If the court appoints counsel in the emergency ex parte order, the court shall determine the request for counsel and indigency at the Probable Cause Hearing based on indigency affidavit and filed with the court. **Ark. Code Ann. §9-27-316(h) (Supp. 2007); §9-27-401 (Supp. 2007).**

- b. Location and telephone number of court. **Ark. Code Ann. §9-27-314(b) (Supp. 2007).**

- c. Immediate notice of order shall be given to juvenile's parents, guardians, or custodian by petitioner or court. **Ark. Code Ann. §9-27-314(c)(1) (Supp. 2007).**
- d. All defendants shall be served according to ARCP or as otherwise provided by court. **Ark. Code Ann. §9-27-314(c)(2) (Supp. 2007)**

3. Time Constraints

- a. Court shall conduct a Probable Cause Hearing within five business days of issuance of the emergency ex parte order. **Ark. Code Ann. §9-27-315(a)(1)(A) (Supp. 2007); Ark. Code Ann. §9-27-314(b)(I) (Supp. 2007).**
- b. A written order shall be filed by the court or by a party or party's attorney as designated by the court within 30 days of the date of the Probable Cause Hearing, or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-315(d)(3) (Supp. 2007).**
- c. The court shall set the date and time for the Adjudication Hearing at Probable Cause Hearing. The Adjudication Hearing shall be held within 30 days of the Probable Cause Hearing and may be continued for no more than 30 days for good cause shown. **Ark. Code Ann. §9-27-315(d)(Supp. 2007); Ark. Code Ann. §9-27-327(a)(1) (Supp. 2007)**

4. Hearing Limitations

- a. The hearing shall be limited to determining whether there was probable cause to protect the juvenile and whether probable cause warrants continued protection. **Ark. Code Ann. §9-27-315(a)(1)(B)(I) (Supp. 2007).**
- b. All other issues, with the exception of custody and services, shall be reserved by the court until the adjudication hearing. **Ark. Code Ann. §9-27-315(a)(2)(A) (Supp. 2007).**
- c. All probable cause hearings are miscellaneous hearings. The Arkansas Rules of Evidence do not apply. **Ark. Code Ann. §9-27-315(e) (Supp. 2007); Ark. R. Evid., Rule1101(b)(3).**

5. Burden of Proof

Petitioner has burden of proof by a preponderance of the evidence that probable cause exists for continuation of emergency order. **Ark. Code Ann. §9-27-315(b) (Supp. 2007).**

6. Juvenile's Right to Counsel

- a. The juvenile and his/her parent or guardian shall be advised by the intake officer during the intake interview and by the court at the juvenile's first appearance of the right to be represented by counsel at all stages of the proceeding. **Ark. Code Ann. §9-27-316(a) (Supp. 2007).**

Ark. Code Ann. § 9-27-316 makes it clear that in both delinquency and FINS cases a juvenile has a right to counsel and that an attorney ad litem may be appointed who represents the best interests of the juvenile, but that this is not intended to be the same person. Because the juvenile was denied counsel, the trial court exceeded its authority and the order was thus invalid. The petitioner's writ of habeas corpus was granted. Since the writ of habeas is granted the writ of certiorari is moot. Arkansas Dep't of Human Servs. v. Mainard, et. al., 358 Ark. 204, 358 S.W.3d 204 (2004).

- b. Waiver of counsel shall be accepted upon a finding by the court from clear and convincing evidence that after questioning the juvenile that:
- (1) the juvenile fully understands the full implications of the right to counsel;
 - (2) the juvenile freely, voluntarily, and intelligently wishes to waive the right to counsel; and
 - (3) the parent, guardian, or custodian for the juvenile have agreed with the juvenile's decision to waive counsel; however this agreement may only be accepted if the court finds that:
 - (a) the person freely, voluntarily, and intelligently made the decision to agree with the juvenile's waiver;
 - (b) the person has no adverse interest to the juvenile; and
 - (c) the person consulted with the juvenile in the juvenile's decision to waive counsel. **Ark. Code Ann. §9-27-316(a) (Supp. 2007).**

- c. No waiver of counsel shall be accepted for a juvenile in any of the following cases:
- (1) the parent or guardian has filed, initiated, or requested the removal of the juvenile from the home; **Ark. Code Ann. §9-27-316(d) (Supp. 2007).**
 - (2) counsel was appointed due to the likelihood of the juvenile's commitment to an institution; or **Ark. Code Ann. §9-27-316(e) (Supp. 2007).**

7. Court Findings

- a. The court shall order that probable cause continues to exist and the juvenile cannot return safely home or order the juvenile to return home pending adjudication if it determines that the juvenile can safely return and it is in the juvenile's best interest. **Ark. Code Ann. §9-27-315(a)(1)(B) (Supp. 2007); Ark. Code Ann. §9-27-315(c) (Supp. 2007).**

Circuit Court affirmed for placing the custody of a child with his paternal grandparent's who lived in another state at the probable cause hearing and closing the case. DHHS appealed on five grounds. The case arose when the police were contacted when a two year-old was left locked in a car at the mall. The mother appeared and DHHS took a 72 hold and filed an emergency petition for custody. Prior to the probable cause hearing the child's father filed a paternity petition to establish paternity and to request the child to be placed in the custody of his parents.

At the probable cause hearing, both parents and the maternal and paternal grandmother testified they all lived in Sallisaw, Oklahoma. They also testified that the child had lived with the paternal grandparents since April 2005 and they all wanted custody to remain with the paternal grandparents. The paternal grandmother testified that the child was covered on their health insurance policy. Evidence also included an approved home study from a licensed social worker for the Arkansas without objection, a background check, testimony that the grandparents had provided excellent care for the child, and several letters from community members stating that the paternal grandparents were qualified and financially able to care for the child.

The circuit court found that probable cause existed at the time of removal; the father was the legal father; an approved home study was performed

and custody should be placed with the grandparents. Since no further services were found to be necessary, the court closed the case.

DHS argued that the court could not close the case prior to adjudication. The Court held that the statute does not require the court to hold adjudication. Second, DHS argued that the home study was not preformed by a licensed "certified" social worker; however, DHS did not object to the social worker's qualification or the home study at the hearing. DHS' third argument was that DHS' third argument was that a court may not grant permanent custody at a probable cause hearing. Ark. Code. Ann. §9-27-315(a)(1)(B) specifically provides that the courts may enter orders as to "issues to custody and delivery of services" at probable cause hearings. Arkansas Dep't of Human Servs. v. Jones., 97 Ark. App. 267, ___ S.W. 3d. ___ (2007).

Emergency hearing orders are not final and appealable orders. Dover v. Arkansas Dep't. of Human Servs., 62 Ark. App. 37, 968 S.W.2d 635 (1998); Johnston v. Arkansas Dep't. of Human Servs., 55 Ark. 392, 935 S.W.2d 589 (1997).

b. Federal IV-E Adoption Safe Families Act (ASFA) Initial Removal Finding

- (1) In the initial order of removal the court must find:
 - (a) Whether it is contrary to the welfare of the juvenile to remain at home;
 - (b) Whether removal and the reasons for removal are necessary to protect the health and safety of the juvenile; and
 - (c) Whether removal is in the best interest of the juvenile. **Ark. Code Ann. §9-27-328(b) (Supp. 2007).**

Where the state agency's first contact with the family has occurred during an emergency in which the juvenile could not safely remain at home, even with reasonable services provided, the agency is deemed to have made reasonable efforts to prevent or eliminate the need for removal. **Ark. Code Ann. §9-27-328(c) (Supp. 2007).**

Appellant strangled his 12-year-old blind daughter in November of 1994. The stepmother took custody of child and went to a women's

shelter. The appellant began divorce proceedings and asked for the custody of his daughter. The chancellor ordered the daughter to be returned to the father on January 25, 1995. That same day the prosecutor filed a FINS petition in juvenile court requesting an emergency hearing. At this hearing testimony was given that the daughter would either run away or kill herself if returned to her father. The judge placed the daughter in foster care.

Appellant filed a petition for habeas corpus claiming that the court was required by Ark. Code Ann. 9-27-328 to make specific findings prior to removing a child from a parent's custody and that in the absence of such findings, his daughter should be returned to him. The court found that reasonable efforts are deemed to have been made where the state agency's first contact with the family occurred during an emergency in which the juvenile could not safely remain at home.

*Appellant argued the agency's first contact was when DHS began its investigation shortly after the incident in November and that it was not an emergency. The court found that even if the investigation was the first contact by the agency, that it occurred as the result of an emergency situation and that the first affirmative action taken by the state was on January 25, the day that it appeared the child would be returned to the appellant. Such a return constituted an emergency. **Gullick v. Arkansas Dep't. of Human Servs., 326 Ark. 475, 931 S.W.2d 786 (1996).***

B. FINS Adjudication Hearings

1. Purpose

- a. To determine whether the allegations in petition are substantiated by proof. **Ark. Code Ann. §9-27-303(4) (Supp. 2007.); Ark. Code Ann. §9-27-327(a) (Supp. 2007).**
- b. FINS means any family with a juvenile who exhibits behavior that includes, but is not limited to being a truant, a runaway, or one habitually disobedient to the reasonable and lawful commands of his parents. **Ark. Code Ann. §9-27-303(24) (Supp. 2007).**

2. Juvenile's Right to Counsel

- a. The juvenile and his/her parent or guardian shall be advised by the intake officer during the intake interview and by the court at the juvenile's first appearance of the right to be represented by counsel at all stages of the proceeding. **Ark. Code Ann. §9-27-316(a) (Supp. 2007).**

In this FINS case the juvenile was denied the right to counsel in a contempt proceeding. Ark. Code Ann. § 9-27-316 makes it clear that in both delinquency and FINS cases a juvenile has a right to counsel and an attorney ad litem may be appointed who represents the best interests of the juvenile, but that this is not intended to be the same person. Because the juvenile was denied counsel, the trial court exceeded its authority and the order was thus invalid. The petitioner's writ of habeas corpus was granted. Since the writ of habeas is granted the writ of certiorari is moot. Arkansas Dep't of Human Servs. v. Mainard, et. al., 358 Ark. 204, __ S.W.3d __ (2004).

- b. Waiver of counsel shall be accepted upon a finding by the court based on clear and convincing evidence that after questioning the juvenile that:
 - (1) the juvenile fully understands the full implications of the right to counsel;
 - (2) the juvenile freely, voluntarily, and intelligently wishes to

waive the right to counsel; and

- (3) the parent, guardian, or custodian for the juvenile have agreed with the juvenile's decision to waive counsel; however this agreement may only be accepted if the court finds that:
 - (a) the person freely, voluntarily, and intelligently made the decision to agree with the juvenile's waiver;
 - (b) the person has no adverse interest to the juvenile; and
 - (c) the person consulted with the juvenile in the juvenile's decision to waive counsel. **Ark. Code Ann. §9-27-316(a) (Supp. 2007).**

c. No waiver of counsel shall be accepted for a juvenile in any of the following cases:

- (1) the parent or guardian has filed, initiated, or requested the removal of the juvenile from the home; **Ark. Code Ann. §9-27-316(d) (Supp. 2007).**
- (2) counsel was appointed due to the likelihood of the juvenile's commitment to an institution; or **Ark. Code Ann. §9-27-316(e) (Supp. 2007).**

3. Studies & Reports

- a. The court may order studies, evaluations, or predisposition reports, if needed that bear on the disposition, following adjudication. **Ark. Code Ann. §9-27-327(d) (Supp. 2007).**
- b. Reports shall be written and be provided to all parties at least two days prior to a disposition hearing. **Ark. Code Ann. §9-27-327(e)(1) (Supp. 2007).**
- c. All parties shall be given a fair opportunity to controvert any part of reports. **Ark. Code Ann. §9-27-327(e)(2) (Supp. 2007).**

C. FINS Disposition Hearings

1. Purpose

- a. To determine what action will be taken following an adjudication to enter orders consistent with the disposition alternatives. **Ark. Code Ann. §9-27-303(22) (Supp. 2007); Ark. Code Ann. §9-27-329(a) (Supp. 2007).**
- b. The court shall consider the disposition alternatives with preference for the least restrictive disposition consistent with the best interest and welfare of the juvenile and society. **Ark. Code Ann. §9-27-329(d) (Supp. 2007).**

2. Evidence

The court may admit into evidence any studies or reports which have been ordered, even if not admissible at adjudication hearing. **Ark. Code Ann. §9-27-329(f) (Supp. 2007).**

D. FINS Disposition Alternatives

If a family is adjudicated a FINS, the court may enter any of the following dispositions:

1. Family Services - Ark. Code Ann. §9-27-332(a)(1)(A) (Supp. 2007).

a. To rehabilitate the juvenile and his or her family:

(1) If DHHS is the provider of family services, the services shall be limited to the community based provider contractors and those services for which the family applies for and is determined eligible. **Ark. Code Ann. §9-27-332(a)(1)(B)(i)(Supp. 2007).**

b. To prevent removal:

(1) When DHHS is provider of family services, the court shall make written findings outlining how the each service is intended to prevent removal. **Ark. Code Ann. §9-27-332(a)(1)(B)(ii) (Supp. 2007).**

(2) Family services means relevant service provided to the juvenile and his or her family, included but not be limited to:

(a) child care,

(b) homemaker services,

(c) crisis counseling,

(d) cash assistance,

Short term financial assistance, and does not include long-term financial assistance that is the equivalent of a board payment or adoption subsidy. **Ark. Code Ann. §9-27-303(10) (Supp 2005).**

(e) transportation,

(f) family therapy,

(g) physical, psychiatric or psychological evaluation,

(h) counseling, and

- (i) treatment. **A.C.A. §9-27-303(25)(A) (Supp. 2007).**

Prior to the court placing a juvenile in a residential placement the court shall comply with the mental health assessments required by Act 1959 of 2005. **Ark. Code Ann. §9-27-602 (Supp. 2007); Ark. Code Ann. §9-27-603 (Supp. 2007);**

Note: For detailed information on the mental health assessments required see XIX. MISCELLANEOUS D. Mental Health Assessments.

The trial court was upheld in ordering DHS to pay the Brown School \$48,000. DHS is obligated by statute to provide services, including treatment in a residential facility if the court determines it is necessary.

The General Assembly has waived sovereign immunity as to DHS when a court orders DHS to provide family services to prevent a juvenile from being removed from a parent. DHS' policy not to provide financial assistance for out-of-state treatment is not binding on the court's order. There was not a violation of the separation of powers doctrine because the court simply ordered the juvenile to be placed in a residential treatment facility. The placement was made to Brown and the court subsequently ordered that the juvenile remain there. DHS recommended that the juvenile remain at Brown in a report to the court dated after Medicaid benefits had been denied.

*Compliance with A.C.A. §20-46-106 (regarding out-of-state placements) is DHS' responsibility and the fact that the court was eager to get treatment in no way absolved DHS from its responsibility under this section. The Court also noted that the purpose of the section is to ensure whenever possible that juveniles receive treatment in state; however, this was not the case as no facilities were available at that time in Arkansas. **Arkansas Dep't of Human Servs. v T.B., 347 Ark. 593, 67 S,W, 3d 539 (2002).***

*The court ordered DHS to provide adequate housing, including electric and water utilities and held DHS and Sandi Doherty in willful contempt for failing to abide by its order. DHS argued that the trial court lacked the statutory authority to order family services. **Ark. Code Ann. §9-27-307(17) defines family services***

as relevant services, including... cash assistance... to prevent a juvenile from being removed from a parent... The trial court did not exceed the statutory criteria for family services. At the September 30 hearing, the court unequivocally stated that it was ordering services to prevent R.P. from being removed from her mother.

The trial court's order of family services was not defective because it failed to make specific written findings. Ark. Code Ann. § 9-27-328 requires specific findings only when the court orders removal from a custodial parent. DHS' contention that the court's order did not comply with its policy is without merit. The juvenile court's orders do not have to comply with DHS policy. Further, the record does not show that DHS could not have paid the bills and in fact funds were available.

*DHS argued that it could not be made a defendant without waiving sovereign immunity and that the court's order coerced DHS into bearing a financial burden which is barred. There is a waiver of sovereign immunity where an act by the legislature has created a specific waiver of immunity. The Juvenile Code expressly empowers the court to order family services in FINS cases (Ark. Code Ann. §9-27-330) and family services includes cash assistance Ark. Code Ann. §9-27-303(17). Pursuant to Ark. Code Ann. §9-27-328(a), a court is required to order family services appropriate to prevent removal. Therefore, the General Assembly has specifically waived sovereign immunity as to DHS in such cases. Finally, DHS argued that the court's order violated separation of powers, but this theory was not raised or developed below with respect to setting aside the court's September 30 order. **Arkansas Dep't of Human Servs. v. R.P., 333 Ark. 516, 970 S.W. 2d 235 (1998).***

- (3) Family services are provided to:
 - (a) prevent a juvenile from being removed from a parent, guardian, or custodian;
 - (b) reunite a juvenile with a parent, guardian, or custodian from whom he/she was removed; or
 - (c) implement a permanent plan of adoption, guardianship, or rehabilitation of the juvenile. **A.C.A. §9-27-303(25(B)(i-iii) (Supp. 2007).**

- c. At least five working days prior to ordering DHHS to provide or pay for services, excluding community-based providers the court shall:
 - (1) fax written notice of intent to order services to the DHHS Director and the local OCC attorney; and
 - (2) provide DHHS an opportunity to be heard at any hearing at which DHHS is ordered to provide family services. **Ark. Code Ann. § 9-27-333(a-b) (Supp. 2007).**
- d. Failure to provide DHHS five days notice renders any part of the order pertaining to the department void. **Ark. Code Ann. § 9-27-333(c) (Supp. 2007).**
- e. In all cases in which family services are ordered, the court shall determine the parent's, guardian's, or custodian's ability to pay, in whole or in part, for said services **Ark. Code Ann. §9-27-333(e)(1) (Supp. 2007).**
 - (1) The court's finding and supporting evidence shall be made in writing in the order requiring family services **Ark. Code Ann. §9-27-333(e)(2) (Supp. 2007).**
 - (2) If the court determines that the parent, guardian, or custodian is able to pay, in whole or part, for said services, the court shall enter a written order setting forth the amounts the parent, guardian, or custodian can pay for the family service(s) ordered, and ordering the parent, guardian, or custodian to pay such amount periodically to the provider from whom family services are received.
 - (a) "Periodically" is deemed to be a period of time no greater than once per month.
 - (b) Parent, guardian, and custodian refers to the individual or individuals from whom custody was removed. **Ark. Code Ann. §9-27-333(e)(3-4) (Supp. 2007).**
 - (3) In making its determination, the court shall consider the following factors:
 - (a) the financial ability of the parent, both parents, the guardian(s), or custodian(s) to pay for such services;

- (b) the past efforts of the parent, or both parents, the guardian(s), or the custodian(s) to correct the conditions which resulted in the need for family services; and
 - (c) any other factors which the court deems relevant. **Ark. Code Ann. §9-27-333(e)(5) (Supp. 2007).**
- f. The court shall not specify a particular provider for placement or family services when DHHS is the payor or provider. **Ark. Code Ann. §9-27-333(d) (Supp. 2007).**

*In a FINS case where the child was put into DHS custody, the trial court was upheld in ordering DHS to pay the Brown School \$48,000. The trial court did not err because it ordered placement in a “residential treatment facility” and did not order a specific named placement facility. DHS is obligated by statute to provide services, including treatment in a residential facility if the court determines it is necessary. **Arkansas Dept. of Human Servs. v T.B., 347 Ark. 593, 67 S.W.3d 539 (2002).***

*An order directing DHS to pay appellee a foster care board payment for a six-month period was reversed because the court lacked the statutory authority to order DHS to pay. Appellee was not a certified foster parent and was not entitled to board payments between June and November pursuant to DHS policy which mirrors 42 U.S.C.S. §672(c)(1) which defines a foster family home as one “licensed by the State in which it is situated or has been approved by the agency of such State having responsibility for licensing homes of this type, as meeting the standards established for such licensing.” **Arkansas Department of Human Services v. Southerland, 65 Ark. App. 97, 985 S.W.2d 336 (1999).***

*The Arkansas Supreme Court upheld a juvenile judge's award of specific services, funds for a mother's medication and bus tokens or bus credits for mother and children to attend counseling sessions. **Arkansas Dep't. of Human Servs. v. Clark, 304 Ark. 403, 802 S.W.2d 461 (1991).***

The court affirmed the juvenile court's finding DHS in contempt for failure to provide the services as ordered and imposition of a

\$250 fine. Arkansas Dep't. of Human Servs. v. Clark, 305 Ark. 561, 810 S.W.2d 331 (1991).

2. Requirements Prior to Removing a Juvenile from Home

- a. Prior to ordering a juvenile to be removed from his/her parent, guardian, or custodian and placed with DHHS, another licensed agency responsible for the care of a juvenile, relative, or other individual, the court shall order family services to prevent removal, unless the health and safety of the juvenile warrant immediate removal for the juvenile's safety. **Ark. Code Ann. §9-27-328(a) (Supp. 2007).**
- b. When the court orders such removal, the court shall make the following specific findings:
 - (1) The initial order shall provide:
 - (a) whether it is contrary to the welfare of the juvenile to remain at home;
 - (b) whether removal and the reasons for removal are necessary to protect the health and safety of the juvenile; and
 - (c) whether removal is in the best interest of the juvenile.
 - (2) Within 60 days of removal the court must find:
 - (a) which family services were made available to family prior to removal;
 - (b) what efforts were made to provide family services relevant to the needs of the family prior to removal, taking into consideration whether or not the juvenile could remain safely at home with services;
 - (c) why efforts made to provide family services described did not prevent removal; and
- (d) whether efforts made to prevent removal of juvenile were reasonable based upon the family's and juvenile's needs. **Ark. Code Ann. §9-27-328(b) (Supp. 2007).**
- (e) The department is deemed to have made reasonable

efforts to prevent or eliminate the need for removal when its first contact with family occurred during an emergency in which the juvenile could not remain at home safely, even if reasonable services were provided. **Ark. Code Ann. §9-27-328(c) (Supp. 2007).**

DHS sought to challenge a judge's placement with the agency claiming she failed to comply with Ark. Code Ann. §9-27-328(a)(2) by not making specific findings of fact that family services were made available before the child was removed from the grandmother's home. The issue is moot because at a later disposition hearing and prior to the agency filing a notice of appeal, the judge placed custody with the child's mother in another county. The Court does not issue advisory opinions nor review matters when the complaining litigant received the relief it requested. Arkansas Dep't. of Human Servs. v. State, 318 Ark. 294, 885 S.W.2d 14 (1994).

- c. Upon the court's finding that the department's preventative and reunification efforts have not been reasonable, but further efforts could not permit juvenile to remain safely in home, the court may authorize or continue removal. **Ark. Code Ann. §9-27-328(d) (Supp. 2007).**
- d. Custody can be transferred only after determining that reasonable efforts have been made by DHHS to deliver family services designed to prevent the need for an out-of-home placement and that the need for an out-of-home placement exists.
- e. In all instances of removal of a juvenile from the home of his/her parent, guardian, or custodian, the court shall set forth in a written order:
 - (1) evidence supporting decision to remove,
 - (2) facts regarding the need for removal, and
 - (3) findings required by this section. **Ark. Code Ann. §9-27-328(e)(1) (Supp. 2007).**
- f. The written findings and the order shall be filed by the court or a party, or party's attorney, as designated by the court within 30 days of the date of the hearing at which removal is ordered or prior to next hearing, whichever is sooner. **Ark. Code Ann. §9-27-328(e)(2) (Supp. 2007).**

The trial court's order of family services was not defective because it failed to make specific written findings. The statute

requires specific findings only when the court orders removal from a custodial parent. Arkansas Dep't of Human Servs. v. R.P., 333 Ark. 516, 970 S.W. 2d 235 (1998).

3. Transfer Custody

- a. If in the best interest of the juvenile, transfer custody to DHHS or another licensed agency responsible for care of juveniles, to relatives, or to other individuals **Ark. Code Ann. §9-27-332(a)(2)(A) (Supp. 2007).**

In all custody cases, the primary consideration is the welfare and best interest of the children involved; all other considerations are secondary; the chancellor must utilize to the fullest extent all powers of perception in evaluating witnesses, their testimony, and the best interest of the children; in no other kind of case does the superior position, ability, and opportunity of the chancellor to observe the parties carry as much weight as in those cases involving minor children; juvenile courts are a division of chancery, and therefore the same standards of review apply.

Where, among other things, the juvenile court credited a clinical psychologist's testimony that he did not believe that appellant had the ability to care for all three of her sons for an extended period of time, and the juvenile court determined that the evidence showed that the appellee fathers provided safe, nurturing environments and that they were the more stable custodians for the boys, the appellate court concluded that a review of the entire record demonstrated that the trial judge's refusal to restore custody to appellant was not clearly erroneous. Lowell v. Lowell, 55 Ark. App. 211, 934 S.W.2d 540 (1996).

- (1) Custody can only be transferred to a relative or other individual after a home study is conducted by DHHS or a licensed certified social worker and submitted to the court in writing, and the court determines that the placement is in the juvenile's best interest. **Ark. Code Ann. §9-27-333(f) (Supp. 2007).**
- (2) Transfer of custody to DHHS (foster care) is limited to a finding that it is in the juvenile's best interest and because of acts or omissions by the parent, guardian or custodian that removal is necessary to protect the juvenile's health and safety. **Ark. Code Ann. §9-27-332(a)(1)(B) (Supp. 2007).**
- (a) If the court transfers custody to DHHS the court shall issue orders regarding educational issues of the juvenile including:

- (i) determining if the parent or guardian shall have access to the juvenile's school records
 - (ii) determining if the parent or guardian who has access to school records is entitled to information on the child's placement (name and address of foster parent or provider), and
 - (iii) determining if the parent or guardian may participate in school conferences or similar activities. **Ark. Code Ann. §9-27-103(B)(6)(A) (Supp. 2007).**
- (b) If custody is transferred to DHHS the circuit court may appoint a person to consent to an initial evaluation and serve as a surrogate parent pursuant to the Individuals with Disabilities Education Act (IDEA). **Ark. Code Ann. §9-27-103(B)(6)(B) (Supp. 2007).**
- (c) If the court grants custody of a juvenile to a relative or other person the juvenile shall not:
- (i) be placed in the custody of DHS while remaining in the relatives home, and
 - (ii) the juvenile shall not be removed from the custody of the relative or other person, placed in the custody of DHS and then remain or return to the home of the relative or other person while remaining in the custody of DHS. **Ark. Code Ann. §9-27-355(b)(1)(A) (Supp. 2007).**
- (d) The court shall not specify a particular provider for placement of any foster child. **Ark. Code Ann. §9-27-333(d) (Supp. 2007).**

The trial court was upheld in ordering DHS to pay the Brown School \$48,000. The trial court did not err because it ordered placement in a "residential treatment facility" and did not order a specific named placement facility. DHS is obligated by statute to provide services, including treatment in a residential facility if the court determines it is necessary. Arkansas Dept. of Human Servs. v T.B., 347 Ark. 593, 67 S.W.3d 539 (2002).

- (e) Custody of a juvenile **shall not** be transferred to DHHS when a delinquency petition or case is converted to a FINS petition or case. **Ark. Code Ann. §9-27-333(g) (Supp. 2007).**

- (3) Prior to the court placing a juvenile in a residential placement the court shall comply with the mental health assessments required by Act 1959 of 2005. **Ark. Code Ann. §9-27-602 (Supp. 2007); Ark. Code Ann. §9-27-603 (Supp. 2007);**

Note: *For detailed information on the mental health assessments required see XIX. MISCELLANEOUS D. Mental Health Assessments.*

- (4) The court shall order parents to pay a reasonable sum for support, maintenance or education of juvenile to any person, agency, or institution to whom custody is awarded if it appears that the parents or other person named in petition are required by law to support juvenile and able to contribute to support of the juvenile. **Ark. Code Ann. §9-27-346(a) (Supp. 2007).**

The court shall order such person to pay a reasonable sum pursuant to the Guidelines for Child Support and the Family Support Chart. **Ark. Code Ann. §9-27-346(a) (Supp. 2007); Administrative Order Number 10.**

4. Permanent Custody

- a. The court may grant custody upon proof that the parent or guardian from whom the juvenile has been removed has not complied with the orders of the court; or
- b. Upon finding that no further services or periodic reviews are required to reunite the juvenile with the parent(s). **Ark. Code Ann. §9-27-332(a)(3) (Supp. 2007).**

*In a FINS case, the mom appealed a permanent custody order placing her child with the paternal grandparents. The Court of Appeals reversed the trial court and held that the findings required by Ark. Code Ann. § 9-27-328(b) were not made and could not be supported by the record. **Robbins v. State, 80 Ark. App. 204, 92 S.W. 3d 707 (2002).***

5. Parent Training

- a. The court may order the parent(s) or the guardian of the juvenile to attend a court-ordered parental responsibility training program, if available.
- b. The court may make reasonable orders requiring proof of completion of such training program within a certain time period and payment of a fee covering the cost of the training program.
- c. The court may provide that any violation of such orders shall subject the parent, both parents, or the guardian to contempt sanctions of the court **Ark. Code Ann. §9-27-332(a)(4) (Supp. 2007).**

6. Electronic Monitoring - Residential Detention

Place the juvenile on residential detention with electronic monitoring in the juvenile's home. **Ark. Code Ann. §9-27-332(a)(5) (Supp. 2007).**

7. Community Service

- a. Order the juvenile, his/her parent(s), or guardian to perform court-approved volunteer community service.

- b. Community service shall be designed to contribute to the rehabilitation of the juvenile or the ability of the parent or guardian to provide proper parental care and supervision of the juvenile.
- c. Community service shall not exceed 160 hours. **Ark. Code Ann. §9-27-332(a)(6) (Supp. 2007).**

8. Supervision Terms

- a. The supervision terms may include, but are not limited to:
 - (1) requiring the juvenile to attend school or make satisfactory progress toward a general education development certificate;
 - (2) requiring the juvenile to observe a curfew; and
 - (3) prohibiting the juvenile from possessing or using any alcohol or illegal drugs.
- b. Supervision terms shall be in writing.
- c. Supervision terms shall be given to the juvenile and explained to him/her and to his/her parent, guardian, or custodian by the juvenile intake or probation officer in a conference immediately following the disposition hearing. **Ark. Code Ann. §9-27-332(a)(7) (Supp. 2007).**

9. Fine

- a. Fine not to exceed five hundred dollars (\$500) to be paid by the juvenile, parent(s), guardian(s), or custodian(s) when said juvenile exceeds the number of unexcused absences provided for in the district's or the State Board of Vocational Education's student attendance policy.
 - (1) The purpose of the penalty is to impress upon the parents, guardians, or persons in loco parentis the importance of school or adult education attendance, and is not to be used primarily as a source of revenue.
 - (2) In all cases in which a fine is ordered, the court shall determine the parent's, guardian's, or custodian's ability to pay

for said fine, considering the following factors:

- (a) the financial ability of the parent, both parents, the guardian or custodian to pay for such services;
 - (b) the past efforts of the parent, or both parents, the guardian or the custodian to correct the conditions which resulted in the need for family services; and
 - (c) any other factors which the court deems relevant.
- b. When practicable and appropriate, the court may utilize mandatory attendance to such programs as well as community service requirements in lieu of a fine. **Ark. Code Ann. §9-27-332(a)(8) (Supp. 2007).**

10. Assess Court Cost

Not to exceed \$35.00 to be paid by the juvenile, his/her parent(s), guardian(s), or custodian(s). **Ark. Code Ann. §9-27-332(a)(9) (Supp. 2007).**

11. Order Juvenile Service Fee

Not to exceed \$20.00 a month to be paid by the juvenile, his/her parent(s), guardian(s), or custodian(s). **Ark. Code Ann. §9-27-332(a)(10) (Supp. 2007).**

12. Contempt Sanctions

- a. The court may provide that any violation of its orders shall subject the parent, both parents, custodian, guardian, or the juvenile to contempt sanctions. **Ark. Code Ann. §9-27-332(b) (Supp. 2007).**

In this FINS case the juvenile was denied the right to counsel in a contempt proceeding. Ark. Code Ann. § 9-27-316 makes it clear that in both delinquency and FINS cases a juvenile has a right to counsel and that an attorney ad litem may be appointed who represents the best interests of the juvenile, but that this is not

E. Six-Month Review Hearings

1. Purpose

- a. To review a dependent-neglected or FINS case at least every six months when a juvenile is placed out of his/her home until there is a permanent order of custody, guardianship or other permanent placement or the juvenile is returned to his/her parent, guardian or custodian and the court has not discontinued orders for family services. **Ark. Code Ann. §9-27-337(a)(1) (Supp. 2007).**
- b. To review the case and determine the future status based on the juvenile's best interest. **Ark. Code Ann. §9-27-337(e)(1)(A) (Supp. 2007).**

2. Time Constraints

- a. The Review Hearing shall be held within six months after the original out-of-home placement and every six months thereafter until permanency is achieved. **Ark. Code Ann. §9-27-337(a)(2)(B) (Supp. 2007)**
 - (1) The court may require review prior to six month review date and the court shall announce the date, time, and place of the hearing. **Ark. Code Ann. §9-27-337(b)(1)(A) (Supp. 2007).**
 - (2) In all other cases it is the duty of petitioner to request court to set review hearing at least 60 days prior to the date of the required six month review and to provide all parties with reasonable notice and service in accordance with ARCP. **Ark. Code Ann. §9-27-337(b)(2)(B) (Supp. 2007).**
 - (3) Any party may request the court to review case at any time during pendency of a dependency-neglect or FINS case in which an out-of-home placement has occurred. **Ark. Code Ann. §9-27-337(c) (Supp. 2007).**
- b. Seven business days prior to a scheduled dependency-neglect review hearing DHS and the CASA, if appointed, shall file a review report including certificate of service that the report has been distributed to all parties or their attorneys and the CASA, if appointed. **Ark. Code Ann. § 9-27-361(a)(1) (Supp. 2007).**
- d. A written order shall be filed and distributed by the court, or by a party or party's attorney to the parties within 30 days of the date of

the hearing or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-337(e)(2) (Supp. 2007).**

3. Court Reports

- a. The DHS court report shall include a summary of the parties' compliance with the court orders and case plan, including a description of services and assistance the department has provided, and recommendations to the court. **Ark. Code Ann. § 9-27-361(a)(2)(A) (Supp. 2007).**
- b. If the child has been returned home, the DHS report shall include a description of any services or requirements of the parents, including, but not limited to a safety plan to ensure the health and safety of the juvenile in the home. **Ark. Code Ann. § 9-27-361(a)(2)(B) (Supp. 2007).**
- c. The CASA report shall include but not be limited to:
 - (1) any independent factual information that he/she feels is relevant to the case;
 - (2) a summary of the parties' compliance with the court orders; and
 - (3) recommendations to the court. **Ark. Code Ann. § 9-27-361(a)(2)(B)(3) (Supp. 2007).**
- d. At the review hearing the court shall determine on the record whether the previously filed reports and addendum reports shall be admitted into evidence based on any evidentiary objections made by the parties. The court shall not consider as evidence any report, part of a report, or addendum that was not admitted into evidence. **Ark. Code Ann. § 9-27-361(a)(4)(A-B) (Supp. 2007); Ark. Code Ann. § 9-27-361(c) (Supp. 2007).**

4. Court Review Findings

- a. The court shall determine and include in its order whether:
 - (1) the case plan, services and placement meet the special needs and best interest of the juvenile, with the juvenile's health, safety, and educational needs specifically addressed;

- (2) the state has made reasonable efforts to provide family services;
 - (3) the case plan is moving towards an appropriate permanency plan pursuant to Ark. Code Ann. §9-27-338; and
 - (4) the visitation plan is appropriate for the children and parents and siblings, if separated. **Ark. Code Ann. §9-27-337(e)(1)(B) (Supp. 2007).**
- b. The court's determination must be based on a full and deliberate consideration of the following:
- (1) the extent of compliance with the case plan including, but not limited to, a review of DHS' care for the health, safety, and education of the juvenile while in an out-of-home placement;
 - (2) the extent of progress which has been made toward alleviating or mitigating the causes of the out-of-home placement;
 - (3) whether the juvenile should be returned to the parent(s) and whether or not the juvenile's health and safety can be protected by the parent(s) if returned home;
 - (4) whether the juvenile should be continued in an out-of-home placement for a specified period of time; and
 - (5) whether there is an appropriate permanency plan for the juvenile pursuant to Ark. Code Ann. §9-27-338, including concurrent planning. **Ark. Code Ann. §9-27-337(e)(1)(C) (Supp. 2007).**

F. Permanency Planning Hearing

1. Purpose

To finalize a permanency plan for the juvenile. **Ark. Code Ann. §9-27-338(a)(1) (Supp. 2007).**

2. Time Constraints

a. The Permanency Planning Hearing (PPH) shall be held:

- (1) no later than 12 months after date juvenile enters an out-of-home placement;
- (2) after a juvenile has been in an out-of-home placement for 15 of the previous 22 months, excluding trial placements with parents and time on runaway status; or
- (3) no later than 30 days after the No Reunification Hearing. **Ark. Code Ann. §9-27-338(a)(1)(A-B) (Supp. 2007).**

Appellants objection to the Permanency Hearing being held on the same day as the dependency-neglect adjudication was effectively waived when appellant agreed to having both hearings on the same day on the record. Harwell-Williams v. Arkansas Dep't of Human Servs., 36 Ark. 183, S.W. 3d __ (2006).

- b. If a juvenile remains in an out-of-home placement after the initial PPH an annual PPH shall be held to reassess the permanency plan for the juvenile. **Ark. Code Ann. §9-27-338(a)(2) (Supp. 2007); Ark. Code Ann. §9-27-328(f) (Supp. 2007).**
- c. If the court finds that DHS failed to provide services, the court should continue the PPH for no longer than six months. **Ark. Code Ann. §9-27-338(c)(2)(C)(ii) (Supp. 2007).**
- d. Seven business days prior to a scheduled dependency-neglect PPH, DHS and the CASA volunteer, if appointed, shall file a Permanency Planning Court Report with the court stating that it has been distributed to all parties and the CASA, if appointed. **Ark. Code Ann. § 9-27-361(b)(1) (Supp. 2007).**

- e. A written order shall be filed and distributed to the parties by the court, or by a party or party's attorney as designated by the court within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-338(e) (Supp. 2007).**
- f. Upon the courts determination that the new permanency goal is TPR, DHS shall file a TPR petition within 30 days of the PPH hearing to establish TPR as the goal. **Ark. Code Ann. §9-27-338(f) (Supp. 2007).**
- g. Nothing shall prevent the state or the AAL from filing a petition for termination, guardianship, or permanent custody prior to the PPH. **Ark. Code Ann. §9-27-338(b)(1) (Supp. 2007).**

3. Court Reports

- a. The DHS Permanency Planning Court Report shall include but not be limited to the following:
 - (1) a summary of the parties' compliance with the case plan, including the description of the services and assistance the department has provided
 - (2) a list of all the placements the juvenile has been in;
 - (3) a recommendation and discussion regarding the permanency plan including the appropriateness of the plan, a time line, and the steps and services necessary to achieve the plan including the persons responsible; and
 - (4) the location of any siblings, and if separated, a statement for the reasons for separation and any efforts if appropriate to reunite or maintain contact if appropriate and in their best interest. **Ark. Code Ann. § 9-27-361(b)(2) (Supp. 2007).**
- b. The CASA Report shall include, but is not limited to:
 - (1) any independent factual information that he or she feels is relevant to the case;

- (2) a summary of the parties' compliance with the court orders; and
 - (3) recommendations to the court. **Ark. Code Ann. § 9-27-361(b)(3)(Supp. 2007).**
- c. At the PPH the court shall determine on the record whether the reports or addendum reports shall be admitted into evidence based on any evidentiary objections made by the parties. The court shall not consider as evidence any report, part of a report, or addendum report that was not admitted into evidence on the record. **Ark. Code Ann. § 9-27-361(b)(4)(A-B) (Supp. 2007); Ark. Code Ann. § 9-27-361(c)(1) (Supp. 2007).**

4. Permanency Plans

- a. At the PPH, based upon the facts of the case, the court shall enter one of the following permanency goals, listed in order of preference, in accordance with the best interest of the juvenile. **Ark. Code Ann. §9-27-338(c) (Supp. 2007).**
- (1) **Return juvenile to parent, guardian or custodian** at the Permanency Planning Hearing if it is in the best interests of the juvenile and the juvenile's health and safety can be adequately safeguarded if returned home; **Ark. Code Ann. §9-27-338[©](1) (Supp. 2007).**
 - (2) **Authorize plan for termination of parent-child relationship** so that the juvenile is available to be adopted unless the:
 - (a) Juvenile is being cared for by a relative (including a minor foster child caring for his/her child in foster care) and termination of parental rights is not in the best interest of the juvenile;
 - (b) DHS has documented in the case plan a compelling reason why TPR is not in the

juvenile's best interest and the court approves the compelling reason as documented in the case plan; or

- (c) DHS has not provided services to the family of the juvenile consistent with the time period in the case plan, such services as the department deemed necessary for the safe return of the juvenile to his/her home if reunification services were required to be made to the family. **Ark. Code Ann. §9-27-338(c)(2) (Supp. 2007).**

If DHS fails to provide services in such case, the court shall continue the PPH for no more than six months. **Ark. Code Ann. §9-27-338(c)(2)(ii) (Supp. 2007).**

- (3) Authorize a plan to obtain a **guardian** for the juvenile; **Ark. Code Ann. §9-27-338(c)(3) (Supp. 2007).**
- (4) Authorize a plan for a **permanent custodian**, including relatives; **Ark. Code Ann. §9-27-338(c)(4) (Supp. 2007).**

Circuit Court affirmed for placing child with father at permanency planning hearing. At the permanency planning hearing the court determined that it was in the juvenile's best interest for the goal to be changed and he authorized plan for permanent placement with the juvenile's father. The court further made specific findings as to the permanency plan alternatives and why this plan was in the child's best interest. Appellant failed to demonstrate that the court erred.

Appellant argued that the trial court erred because the father failed to show a material change of circumstances to warrant the change in custody. Had this been a domestic relations case the burden would be on the father to show

such a change; however, it is a FINS case and the dispositions are governed solely by the juvenile code.

*Finally, appellant argues that it was not in the juvenile's best interest to be placed with his father and that her mental evaluation was faulty and there were variations of opinion about alleged sexual abuse. Due deference to assess creditably of the witness is left the trial judge and the Court found that it was not left with a distinct and firm conviction that a mistake had been made. The trial court was affirmed on all points. **Judkins r. Arkansas Dep't of Human Servs., 97Ark. App. 260, ___ S.W. 3d __ (2007).***

- (5) Continue the goal of **reunification** only when:
 - (a) the parent is complying with the case plan and court orders;
 - (b) the parent is making significant measurable progress towards achieving the goals in the plan and diligently working toward reunification;
 - (c) the parent can demonstrate genuine sustainable investment in completing the requirements in the case plan and following the orders of the court in order to retain reunification as the permanency goal; and
 - (d) reunification can occur within a time frame consistent with the child's developmental needs. **Ark. Code Ann. §9-27-338(c)(5)(A-C)**

- (6) Authorize a plan for **another permanent planned living arrangement (APPLA)** which shall include a permanent planned living arrangement and addresses the quality of services, including but not limited to independent living services, if

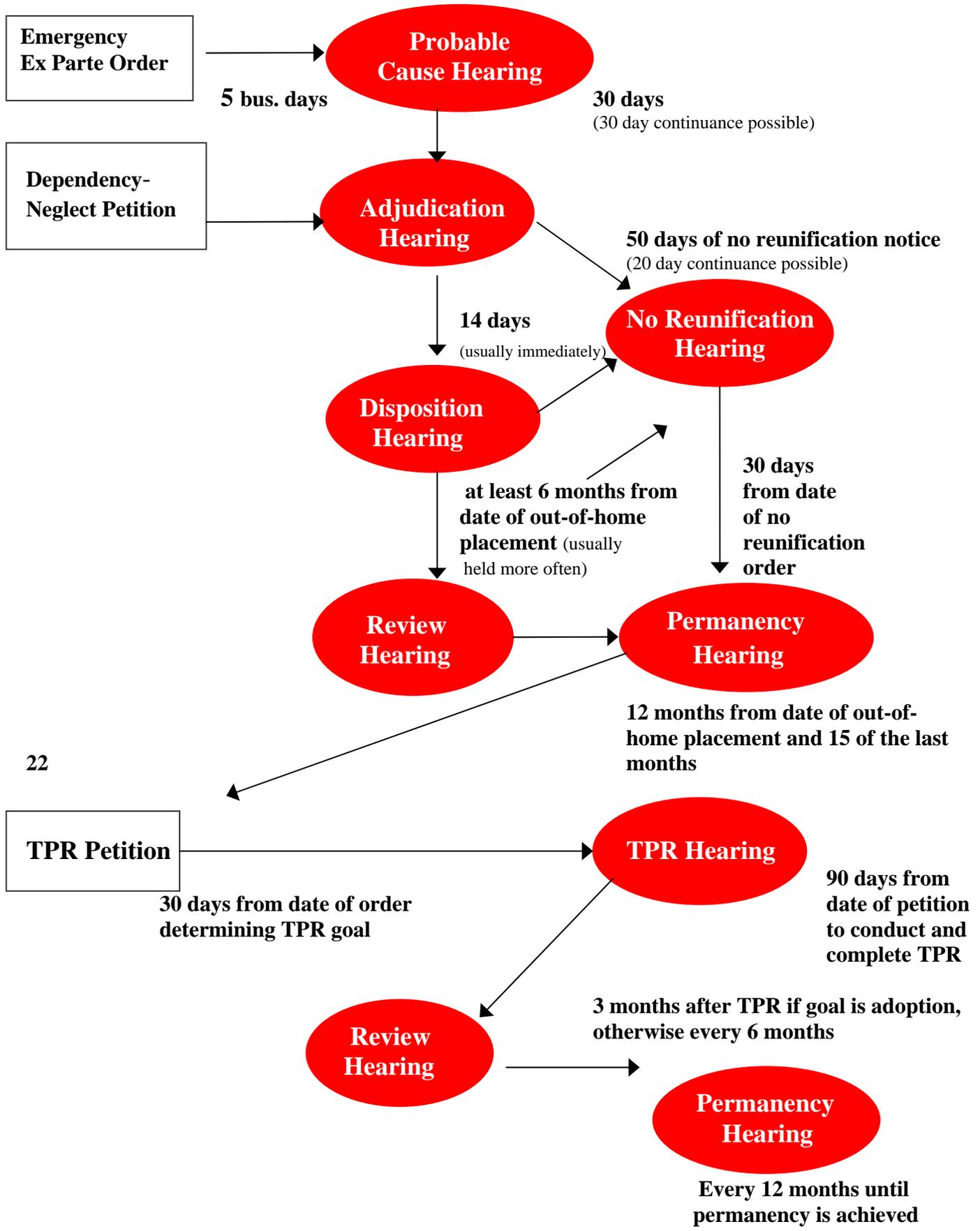
age appropriate and a plan for the supervision and nurturing the juvenile will receive. APPLA shall be selected only if:

- (a) the juvenile cannot be reunited with his/her family;
- (b) another permanent plan is not available; and either
 - (i) a compelling reason exists why TPR is not in the juvenile's best interest, or
 - (ii) the juvenile is being care for by a relative and TPR is not in the juvenile's best interest. **Ark. Code Ann. § 9-27-338(c)(6) (Supp. 2007).**

5. Required Reasonable Efforts - Adoption Safe Families Act (ASFA) Findings

- a. The court shall make a finding on whether DHS has made reasonable efforts and shall describe the efforts to finalize the permanency plan for the juvenile. **Ark. Code Ann. § 9-27-338(d) (Supp. 2007); Ark. Code Ann. §9-27-328(f) (Supp. 2007).**
- b. If a reasonable efforts to finalize the permanency plan is not made within the 12 months of the date the child comes into care, the child becomes ineligible for IV-E funding from the end of the 12th month following the date the child is considered to have entered foster care, or the end of the month of the most recent judicial determination to finalize permanency was made and remains ineligible until such a determination is made. **45 CFR Sec. 1356.21(b)(2)(i).**

Dependency-Neglect Proceedings



22

PROBABLE CAUSE HEARING CHECKLIST

A.C.A. §9-27-315, 9-27-327

Purpose:

To determine if probable cause to issue an ex parte emergency order existed at the time of its issuance and whether probable cause to protect the juvenile continues to exist.

Time constraints:

- ☉ The Probable Cause Hearing shall be held within 5 business days of the issuance of the ex parte order.
- ☉ The Adjudication Hearing shall be held within 30 days of the Probable Cause Hearing and may be continued for no more than 30 days.
- ☉ A written order shall be filed by the court or by a party or party's attorney as designated by the court within 30 days of the date of the Probable Cause Hearing, or prior to the next hearing, which ever is sooner.
- ☉ The court shall set the time and date for the adjudication hearing

Burden of Proof

Proof by a preponderance of the evidence that probable cause exists for continuation of the emergency order

Present At Hearing:

- ✓ Judge
- ✓ Child (if appropriate)
- ✓
- ✓ Attorney Ad Litem for the Child
- ✓ CASA, if appointed
- ✓ Parents, including putative fathers
- ✓ Attorney for parents
- ✓ Relatives with legal standing or other custodial adults
- ✓ Assigned investigator and/or caseworker
- ✓ Agency attorney
- ✓ Court Reporter

Issues:

- ✓ Have all parties been identified?
- ✓ Probable cause
 - Did it exist to protect the child?
 - Does it continue to exist?
- ✓ Is it in the child's best interest and can the child be returned home safely?
- ✓ If the child cannot be returned home what visitation and services should be ordered pending adjudication?
- ✓ Did DHS make reasonable efforts?
- ✓ Have all relatives been identified?

Note: Ark. R. Evid. do not apply at Probable Cause Hearings.

Court Findings:

- If the court finds that it is in the juvenile's best interest and he/she can safely be returned home pending adjudication the court shall so order.

XVI. DEPENDENCY-NEGLECT PROCEEDINGS

A. Probable Cause Hearings

1. Purpose

To determine if probable cause to issue an emergency ex parte order continues to exist. **Ark. Code Ann. §9-27-315(a)(1)(A) (Supp. 2007).**

a. Court shall issue an ex parte order to remove the juvenile from the custody of the parent, guardian, or custodian when probable cause exists that immediate emergency custody is necessary to:

- (1) protect the juvenile's health or physical well-being from immediate danger; or
- (2) prevent juvenile's removal from state; **Ark. Code Ann. §9-27-314(a)(1) (Supp. 2007).**

b. To provide specific appropriate safeguards to protect the juvenile when there is probable cause to believe an emergency order is necessary to protect the juvenile from severe maltreatment, if the alleged offender:

- (1) has a legal right to custody or visitation with the juvenile,
- (2) has a property right allowing access to the home where the juvenile resides, or
- (3) is a juvenile. **A.C.A. §9-27-314(a)(2) (Supp. 2007).**

Severe maltreatment means:

- sexual abuse,
- sexual exploitation,
- acts or omissions which may result in death,
- abuse involving the use of a deadly weapon,
- bone fracture,
 - internal injuries,

- burns,
- immersions,
- suffocation,
- abandonment,
- medical diagnosis of failure to thrive, or
- causing a substantial and observable change in behavior or demeanor of the child; or **A.C.A. §12-15-503(16) (Supp. 2007)**.

c. When there is probable cause to believe that a juvenile is dependent, the court shall issue an ex parte order for emergency custody to DHS. **A.C.A. §9-27-314(a)(2) (Supp. 2007)**.

Dependent juvenile means:

- a child of a parent in DHHS custody;
- a child whose parent or guardian is incarcerated and has no appropriate relative or friend willing or able to provide care for the child;
- a child whose parent or guardian is incapacitated so they cannot care for the juvenile and they have no appropriate relative or friend to care for the child;
- a child whose custodial parent dies and no stand-by guardian exists;
- a child who is an infant relinquished to the custody of DHS for the sole purpose of adoption;
- a safe-haven baby; or
- a child who has disrupted his/her adoption and the adoptive parents have exhausted resources available to them. **A.C.A. § 9-27-503(17) (Supp. 2007)**.

2. Notice

- a. The emergency ex parte order shall include notice to that parent, custodian, or guardian of the right to:
 - (1) a hearing and procedure for obtaining Probable Cause Hearing within five business days of issuance of ex parte order;
 - (2) representation by counsel; and
 - (3) to appointed counsel if indigent and procedure for obtaining appointed counsel. **Ark. Code Ann. §9-27-314(b)(1-3) (Supp. 2007).**

The court may appoint counsel for the parent or guardian for whom custody was removed in the emergency ex parte order. **Ark. Code Ann. §9-27-316(h)(1)(B) (Supp. 2007).**

Note: Best practice is to appoint counsel for the parent or guardian when a child is first removed so they can appear at the first hearing prepared with counsel to provide the court valuable information concerning the needs of the child, family and possible relative placements

The state only pays for parent counsel for parents or guardians from whom custody is removed and/or prior to a termination of parental rights hearing if the parent is indigent and requests counsel. If the court appoints counsel in the emergency ex parte order, the court shall determine the request for counsel and indigency at the Probable Cause Hearing based on indigency affidavit and filed with the court. **Ark. Code Ann. §9-27-316(h) (Supp. 2007); §9-27-401 (Supp. 2007).**

- b. Appointment of the attorney ad litem for the child. **Ark. Code Ann. §9-27-316(f)(1) (Supp. 2007).**
- c. Location and telephone number of court. **Ark. Code Ann. §9-27-314(b) (Supp. 2007).**
- d. Immediate notice of order shall be given to juvenile's parents, guardians, or custodian by petitioner or court. **Ark. Code Ann. §9-27-314(c)(1) (Supp. 2007).**
- e. All defendants shall be served according to ARCP or as otherwise provided

by court. **Ark. Code Ann. §9-27-314(c)(2) (Supp. 2007)**

3. Time Constraints

- a. Court shall conduct a Probable Cause Hearing within five business days of issuance of the emergency ex parte order. **Ark. Code Ann. §9-27-315(a)(1)(A) (Supp. 2007); Ark. Code Ann. §9-27-314(b)(I) (Supp. 2007).**
- b. A written order shall be filed by the court or by a party or party's attorney as designated by the court within 30 days of the date of the Probable Cause Hearing, or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-315(d)(3) (Supp. 2007).**
- c. The court shall set the date and time for the Adjudication Hearing at Probable Cause Hearing. The Adjudication Hearing shall be held within 30 days of the Probable Cause Hearing and may be continued for no more than 30 days for good cause shown. **Ark. Code Ann. §9-27-315(d)(Supp. 2007); Ark. Code Ann. §9-27-327(a)(1) (Supp. 2007)**

4. Hearing Limitations

- a. The hearing shall be limited to determining whether there was probable cause to protect the juvenile and whether probable cause warrants continued protection. **Ark. Code Ann. §9-27-315(a)(1)(B)(I) (Supp. 2007).**
- b. All other issues, with the exception of custody and services, shall be reserved by the court until the adjudication hearing. **Ark. Code Ann. §9-27-315(a)(2)(A) (Supp. 2007).**
- c. All probable cause hearings are miscellaneous hearings. The Arkansas Rules of Evidence do not apply. **Ark. Code Ann. §9-27-315(e) (Supp. 2007); Ark. R. Evid., Rule1101(b)(3).**

5. Burden of Proof

Petitioner has burden of proof by a preponderance of the evidence that probable cause exists for continuation of emergency order. **Ark. Code Ann. §9-27-315(b) (Supp. 2007).**

6. Court Findings

- a. The court shall order that probable cause continues to exist and the juvenile

cannot return safely home or order the juvenile to return home pending adjudication if it determines that the juvenile can safely return and it is in the juvenile's best interest. **Ark. Code Ann. §9-27-315(a)(1)(B) (Supp. 2007); Ark. Code Ann. §9-27-315(c) (Supp. 2007).**

Circuit Court affirmed for placing the custody of a child with his paternal grandparent's who lived in another state at the probable cause hearing and closing the case. DHHS appealed on five grounds. The case arose when the police were contacted when a two year-old was left locked in a car at the mall. The mother appeared and DHHS took a 72 hold and filed an emergency petition for custody. Prior to the probable cause hearing the child's father filed a paternity petition to establish paternity and to request the child to be placed in the custody of his parents.

At the probable cause hearing, both parents and the maternal and paternal grandmother testified they all lived in Sallisaw, Oklahoma. They also testified that the child had lived with the paternal grandparents since April 2005 and they all wanted custody to remain with the paternal grandparents. The paternal grandmother testified that the child was covered on their health insurance policy. Evidence also included an approved home study from a licensed social worker for the Arkansas without objection, a background check, testimony that the grandparents had provided excellent care for the child, and several letters from community members stating that the paternal grandparents were qualified and financially able to care for the child.

The circuit court found that probable cause existed at the time of removal; the father was the legal father; an approved home study was performed and custody should be placed with the grandparents. Since no further services were found to be necessary, the court closed the case.

*DHS argued that the court could not close the case prior to adjudication. The Court held that the statute does not require the court to hold adjudication. Second, DHS argued that the home study was not preformed by a licensed "certified" social worker; however, DHS did not object to the social worker's qualification or the home study at the hearing. DHS' third argument was that a court may not grant permanent custody at a probable cause hearing. Ark. Code. Ann. §9-27-315(a)(1)(B) specifically provides that the courts may enter orders as to "issues to custody and delivery of services" at probable cause hearings. **Arkansas Dep't of Human Servs. v. Jones., 97 Ark. App. 267, ___ S.W. 3d. ___ (2007).***

*Emergency hearing orders are not final and appealable orders. **Dover v.***

Arkansas Dep't. of Human Servs., 62 Ark. App. 37, 968 S.W.2d 635 (1998);
Johnston v. Arkansas Dep't. of Human Servs., 55 Ark. 392, 935 S.W.2d 589
(1997).

b. **Federal IV-E Adoption Safe Families Act (ASFA) Initial Removal Finding**

- (1) In the initial order of removal the court must find:
 - (a) Whether it is contrary to the welfare of the juvenile to remain at home;
 - (b) Whether removal and the reasons for removal are necessary to protect the health and safety of the juvenile; and
 - (c) Whether removal is in the best interest of the juvenile. **Ark. Code Ann. §9-27-328(b) (Supp. 2007).**
 - (d) Where the state agency's first contact with the family has occurred during an emergency in which the juvenile could not safely remain at home, even with reasonable services provided, the agency is deemed to have made reasonable efforts to prevent or eliminate the need for removal. **Ark. Code Ann. §9-27-328(c) (Supp. 2007).**

D-N ADJUDICATION & DISPOSITION HEARING CHECKLIST

A.C.A. §9-27-327; -329; -334; -335

Petitioners:

- ✓ Any adult and any juvenile in the home age 10 years or older
- ✓ Only law enforcement, prosecuting attorney or DHS or its designee can file d-n petition seeking ex parte relief

Purpose of Adjudication:

- To determine whether allegations in the petition are substantiated by the evidence.

Purpose of Disposition:

- To enter orders consistent with the goals of the case as determined by the court.

Time Constraints:

- ⌚ A written adjudication order shall be filed by the court, or by a party or party's attorney as designated by the court, within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner.
- ⌚ Any predisposition reports shall be provided in writing to all parties and counsel at least 2 days prior to the disposition hearing.
- ⌚ The Disposition Hearing may be held immediately following or concurrent with the Adjudication Hearing, but shall be held not more than 14 days following the Adjudication Hearing.
- ⌚ A written disposition order shall be filed by the court, or by a party or party's attorney as designated by the court, within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner.

Present at Hearing:

- ✓ Judge
- ✓ Attorney Ad Litem & CASA volunteer
- ✓ Parents/Guardians/Custodians & attorney(s)
- ✓ Case workers and agency attorney
- ✓ Court Reporter

Burden of Proof:

Preponderance of the evidence

Issues:

- Have all the parties been identified?
- Have the allegations in petition been substantiated by the proof?
- Is child d-n as defined at A.C.A. §9-27-303?
- Is case plan sufficient and appropriate to meet child's needs and is the goal appropriate?
- If the child can not remain or return home, what is the best placement option?
- Is there an appropriate relative placement?
- What services should be provided to the child and to the family to remedy the condition that led to the d-n adjudication and removal?
- How often should the child visit family members and siblings if not placed in the same home?
- Did DHS provide reasonable efforts?

Disposition Options:

- ① Order family services defined at A.C.A. 9-27-303(23)
- ② If in child's best interest - Transfer custody to DHS, licensed agency responsible for care of juveniles, relative or other individual
- ③ Grant Permanent Custody
- ④ Order parent/guardian/custodian to attend parental responsibility training

Disposition Limitations:

- ① The court shall not specify a particular provider for placement or family services.
- ② Custody can be transferred only after full investigation of placement is conducted by DHS and submitted to court in writing and court determines placement in child's best interest.
- ③ Prior to placing a child in DHS custody court must find that reasonable efforts were made to prevent need for removal. Reasonable efforts are deemed if emergency.
- ④ If court finds that RE could have been made with the juvenile remaining safely at home, but that DHS failed to do so the court may dismiss the petition, order services or transfer custody to protect child's health and safety or prevent removal from court's jurisdiction.

B. Dependency-Neglect Adjudication Hearings

1. Purpose

To determine whether the allegations in petition are substantiated by proof. **Ark. Code Ann. §9-27-303(4) (Supp. 2007); Ark. Code Ann. §9-27-327(a) (Supp. 2007).**

*Dependency adjudication dismissal affirmed because DHS failed to meet its burden of proof. DHS failed to call any witness or present any evidence and rested solely on its pleadings that the father was a convicted sex offender and that the mother had failed to properly supervise the children by allowing him unsupervised custody. The appellant testified that she believed her children were safe and had complied with the DHS safety plan in order to keep her children. The caseworker testified that the appellants were complying with the safety plan and she believed that the mother would protect the children. **Arkansas Dep't of Human Servs. v. Mitchell,** __ Ark. App, __ (No. 07-427, September 26, 2007).*

*Dependency adjudication reversed where parent was arrested and there were appropriate relatives to care for the child. Ark. Code Ann. §9-27-303(17)(B) provides that a child is dependent when a parent is incarcerated and there is no appropriate relative or friend to care for the child. In this case when the father was arrested his father and an aunt and uncle were available to take custody of his child. Parent counsel also presented evidence at the adjudication that DCFS had reviewed their respective homes and found them appropriate. No evidence was presented at the hearing that the relatives were inappropriate to care for the child. **Moiser v. Arkansas Dep't of Human Servs.,** 95 Ark. 32, __ S.W. 3d __ (2006).*

*Infant was found dependent-neglected as a result of multiple broken bones of varying ages. At the time of the adjudication all bone tests were normal, but one test on brittle bone disease was not completed in time for the adjudication hearing. On March 24, 2004, the date set for the adjudication hearing, appellant's attorney objected and requested a continuance, claiming that the statute mandating that the adjudication hearing be held within 60 days of the probable-cause hearing was unconstitutional and violated his client's procedural and due process rights because the definitive test on brittle bone disease had not yet been completed. In **Hathcock v. Arkansas Dep't of Human Servs.,** 347 Ark.*

819, 69 S.W.3d 6 (2002), the Supreme Court ruled that time constraints in the juvenile code controlled instead of those in the Arkansas Rules of Civil Procedure because the juvenile code serves the specific purpose of expediting hearings involving children in out-of-home placements.

The trial court went on to adjudicate the child dependent-neglected finding that the injuries were not accidental; that one or both parents were the likely cause of the injuries; and despite the parents' denial, the X-rays indicated that the fractures were from varying ages and they were of the type consistent with child abuse, and the radiologist findings were suspicious of trauma. While noting that the results of the test for brittle bone disease had not yet been received, the trial court found that the observation of medical personnel did not reveal symptoms of brittle bone disease. The adjudication order was not appealed. At the disposition hearing on April 7, the trial court held that the goal should be adoption. On May 13, the court entered a no-reunification order finding that the child had been subjected to extreme and repeated cruelty, that the injuries were not accidental, that one or both parents caused the injuries, and that when received, the brittle bone test showed no abnormal findings. At this hearing the trial court denied appellant's motion to call an expert witness to testify as to alternative theories for the infants injuries. The court ruled that *res judicata* applied and that expert testimony was not relevant at this stage of the proceedings. Appellants' filed a notice of appeal after the no-reunification order and the TPR order handed down on November 16, 2004.

The appellate court noted that the time for appellant to present that testimony was prior to the adjudication. The appellate court held that it was not necessary to address appellant's *res judicata* argument because appellant failed to appeal the adjudication order. The Supreme Court made clear in the *Jefferson and Lewis* cases that the appellate court will not re-litigate the adjudication hearing at future hearings, including the termination of parental rights hearing. The appellant could have appealed the adjudication order, but failed to do so. ***Neves da Rocha v. Arkansas Dep't of Human Servs.*, 93 Ark. App. 366, 219 S.W.3d 660 (2005).**

Change of custody consolidated in dependency-neglect action upheld. Appellant's children were removed due to severe physical abuse of her five-week old child. The father of one of the children (A.J.) filed a notice with the court of a motion for change of custody. The trial court found the children to be dependent-neglected and ordered temporary custody of A.J. with her father with the goal of reunification with appellant. Several

review hearings were held and the court continued custody with the father and then entered an order to change custody based on a material change of circumstances.

*A court may consolidate all actions involving a common question of law or fact pending before the court. In cases involving children, the primary consideration is the child's best interest and welfare, regardless of the goals of the parties or the particular type of proceeding. Having found that appellant had not complied with the case plan, the court properly made the custody determination based on the change of custody petition and found a material change in circumstances. **Miller v. Arkansas Dep't of Human Servs.**, 86 Ark. App. 172, 167 S.W.3d 153 (2004).*

*The Court of Appeals dismissed as moot appellant's appeal of her dependency-neglect adjudication based on parental unfitness because her child was returned to her custody. Despite briefs requesting review by DHS and appellant, the Court stated that the case was moot because there was no practical legal effect on an existing legal controversy. **Richardson v. Arkansas Dep't of Human Servs.**, 86 Ark. App. 142, 165 S.W. 3d 127 (2004).*

*The juvenile code defines a juvenile as an individual from birth to the age of 18. An unborn fetus does not fall within this definition. A writ of certiorari was granted because the judge exceeded her statutory authority by declaring the fetus to be dependent-neglected, placing the fetus in DHS custody and ordering prenatal care. **Arkansas Dep't of Human Servs. v. Collier**, 351 Ark. 380, 92 S.W. 3d 683 (2003).*

There was sufficient evidence to find the child dependent-neglected where there was evidence that the injury was not consistent with the explanation given. In addition, there was evidence that the appellant sent her seven-year-old son unsupervised into a bathroom to bathe without determining the temperature of water, resulting in the child suffering second-degree burns.

Appellant argued that the court erred in admitting the medical records over her hearsay objection. The Hospital Records Act is an exception to

the hearsay rule and the trial court did not abuse discretion in admitting it. While other objections may have sufficed to exclude certain portions of the medical records, such objections were not made.

*The appellant argued that the trial court erred in allowing the doctor to give her medical opinion without being qualified as an expert witness at the adjudication hearing. If scientific, technical or other specialized knowledge would will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness may testify thereto in the form of an opinion or otherwise. R. Evid. 702 (2002). The "rational connection" test of Ark. R. Evid. 701 requires that the opinion or inference is one that a normal person would form on the basis of the observed facts. The trial court did not abuse its discretion in permitting the treating physician to testify without first being qualified as an expert witness. The physician's opinion that someone would have more extensive burns if they fell into a bathtub of scalding water is an opinion that a normal person could form on the basis of the observed facts. The trial court did not abuse its discretion in permitting the doctor to provide opinion testimony regarding "friction burns" because she had knowledge of the treatment and diagnosis of burns from her medical training. **Hopkins v. Arkansas Dept. Of Human Servs., 79 Ark. App. 1, 83 S.W. 3d 418 (2002).***

*The trial court was reversed for failure to adjudicate the siblings of a child who was found dependent-neglected. Evidence included a severe whipping, pouring salt into the wounds, keeping the child in the same pair of underwear for two days while bleeding and oozing caused his underwear to stick to his rear, and failure to seek medical care. The child abuse of one child demonstrated parental unfitness that put the other siblings at substantial risk of harm. **Arkansas Dep't of Human Servs. v. Jorden, 80 Ark. App. 104, 91 S.W.3d, 536 (2002).***

*Appellant's children had been adjudicated dependent-neglected and subsequently returned to the custody of the mother. Some months later DHS filed a motion for ex parte emergency change of custody and the children were taken back into DHS custody. The Court affirmed the trial court's ruling that it was unnecessary to hold a second adjudication hearing at this point because the children were already adjudicated dependent-neglected. **Walters v. Arkansas Dept. of Human Servs., 77 Ark. App 191, 72 S.W. 3d 533 (2002).***

*A dependent-neglected child is one who is at risk of serious harm from an unfit parent and such unfitness is not necessarily predicated upon the parent actually causing some direct injury to the child in question. Further, the juvenile court is a court of competent jurisdiction to determine that a parent committed a serious felony assault that results in serious bodily injury. **Brewer v. Arkansas Dep't. Of Human Servs., 71 Ark. App. 364, 32 S.W.3d 22 (2001)(substituted opinion on grant of rehearing delivered April 25, 2001).***

On April 18, 1995, DHS filed a petition with the juvenile court seeking an emergency removal of the appellant's daughter. On April 24, 1995, the court held an emergency (probable cause) hearing and determined that there was probable cause to believe that emergency conditions existed which necessitated the child's removal and that those conditions continued to exist. The court ordered the child to remain in DHS' custody pending the adjudication hearing. The court's adjudication order, entered on July 26, 1995, found that the child was dependent-neglected and that it was in the child's best interest to remain in foster care.

*A dependent-neglected child is a child at substantial risk of serious harm as a result of abandonment, abuse, sexual abuse, sexual exploitation, neglect or parental unfitness. Neglect is defined as an act or omission by a parent that constitutes the failure or irremediable inability to provide for the essential and necessary physical, mental or emotional needs of a juvenile. At the adjudication hearing the court was presented with conflicting testimony concerning appellant's ability to provide for her child. The chancellor's findings of fact will be reviewed de novo and will not be set aside unless they are clearly erroneous, giving due regard to the trial court's opportunity to judge the credibility of witnesses. **Johnston v. Arkansas Dep't. of Human Servs., 55 Ark. App. 392, 935 S.W.2d 509 (1996).***

*The juvenile division of chancery court, having found a child to be dependent or neglected, has the authority to make an award of custody of the child between competing parents. Appellant alleged that the definition of "neglect" in the Juvenile Code was not met despite evidence that she would not let her daughter remain at a psychiatric facility for the duration of her treatment; the Court said neglect could be found despite appellant's lack of intent to harm her child. **Nance v. Arkansas Dept. of Human Servs., 316 Ark. 43, 870 S.W.2d 721 (1994).***

*During an action to determine whether appellants' children were dependent-neglected minors, both children were examined by a physician and X-rays were taken. Subsequently, the appellants were ordered, without hearing or notice, to pay the costs of the physical examinations. The Court held that parents of children found to be dependent-neglected minors could not be required to pay such investigative expenses. **Bates v. Reynolds, 299 Ark. 280, 771 S.W.2d 774 (1989).***

Note: Court now required to assess parent's ability to pay for family services. The court shall order financial able parents to pay in whole or part for services. See Ark. Code Ann. §9-27-335(c)(Supp. 2007).

2. Time Constraints

- a. A dependency-neglect adjudication hearing shall be held within 30 days of the probable cause hearing, but upon a motion of the court or parties for good cause shown may be continued for no more than 30 days following the first 30 days **Ark. Code Ann. §9-27-327(a)(1)(B) (Supp. 2007).**

***Note:** Statutory changes made since *Hathcock*, yet no effect on the court's holding. The time frame has been extended for a continuance for no more 30 days (added 10 days) and the statutory site has changed.*

Appellant argued that the trial court erred in denying his motion for a continuance because he was subject to a criminal proceeding. As a result, he would exercise his 5th Amendment rights and not be able to testify at the adjudication hearing. The trial court denied the continuance based on the statutory requirement at A.C.A. §9-27-315(d)(2) that requires an adjudication hearing to be held within 30 days of an emergency hearing and that it may not be continued for more than 20 days.

The Court held A.C.A. §9-27-315(d)(2) controls because it expedites hearings involving children in out-of-home placements and serves a specific purpose not in conflict with Rule 40(b). The Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings,

but a court has discretion to stay civil proceedings where the intent of justice requires a stay. Delays in D-N proceedings would run counter to the public interest of protecting children and providing them permanency. Hathcock v. Arkansas Dept. of Human Servs., 347 Ark. 819, 69 S.W.3d 6 (2002).

- b. In dependency-neglect cases, a written adjudication order shall be filed by the court or by a party or party's attorney as designated by the court within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-327(f) (Supp. 2007).**

3. Burden of Proof

Preponderance of the evidence. **Ark. Code Ann. §9-27-325(h)(2)(B) (Supp. 2007).**

4. Hearing Limitations

- a. In medical neglect cases involving a child's receiving treatment through prayer alone in accordance with a religious method of healing in lieu of medical care, the adjudication order shall be limited to:
 - (1) preventing or remedying serious harm to the child; or
 - (2) preventing the withholding of medically indicated treatment from the child with a life-threatening condition. **Ark. Code Ann. §9-27-325(f) (Supp. 2007).**

5. Studies & Reports

- a. Court may order studies, evaluations, or predisposition reports, if needed and bear on the disposition, following adjudication. **Ark. Code Ann. §9-27-327(d) (Supp. 2007).**
- b. Reports shall be written; and be provided to all parties and counsel at least two days prior to disposition hearing. **Ark. Code Ann. §9-27-327(e)(Supp. 2007).**
- c. All parties shall be given a fair opportunity to controvert any part of reports. **Ark. Code Ann. § 9-27-327(e)(2) (Supp. 2007).**

C. Dependency-Neglect Disposition Hearings

1. Purpose

- a. To determine what action will be taken following adjudication to enter orders consistent with the disposition alternatives. **Ark. Code Ann. §9-27-303(22) (Supp. 2007); Ark. Code Ann. §9-27-329(a) (Supp. 2007).**
- b. The court shall consider the disposition alternatives with preference for the least restrictive disposition consistent with best interest and welfare of the juvenile and the public. **Ark. Code Ann. §9-27-329(d) (Supp. 2007).**

2. Time Constraints

- b. The disposition hearing may be held immediately following or concurrent with the adjudication hearing, but in any event shall be held no more than 14 days following the adjudication hearing. **Ark. Code Ann. §9-27-329©)(1) (Supp. 2007).**
- b. A written disposition order shall be filed by a party or party's attorney as designated by the court within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-329(e) (Supp. 2007).**

3. Evidence

The court may admit into evidence any studies or reports which have been ordered, even if not admissible at adjudication hearing. **Ark. Code Ann. §9-27-329(f) (Supp. 2007).**

4. Required Reasonable Efforts - Adoption Safe Families Act (ASFA) - 60 Day Findings

Within 60 days of removal the court must find:

- (a) which family services were made available to family prior to

removal;

- (b) what efforts were made to provide family services relevant to the needs of the family prior to removal, taking into consideration whether or not the juvenile could remain safely at home with services;
- (c) why efforts made to provide family services described did not prevent removal; and
- (d) whether efforts made to prevent removal of juvenile were reasonable based upon the family's and juvenile's needs. **Ark. Code Ann. §9-27-328(b) (Supp. 2007).**
- (e) The department is deemed to have made reasonable efforts to prevent or eliminate the need for removal when its first contact with family occurred during an emergency in which the juvenile could not remain at home safely, even if reasonable services were provided. **Ark. Code Ann. §9-27-3289(c) (Supp. 2007).**

D. Dependency-Neglect Disposition Alternatives

If the juvenile is found dependent-neglected the circuit court may enter any of the following dispositions:

1. Family Services - Ark. Code Ann. §9-27-334(a)(1) (Supp. 2007).

a. Family services means relevant services provided to the juvenile or his/her family, including but not limited to:

- (1) child care,
- (2) homemaker services,
- (3) crisis counseling,
- (4) cash assistance,

Short term financial assistance, and does not include long-term financial assistance that is the equivalent of a board payment or adoption subsidy. **Ark. Code Ann. §9-27-303(10) (Supp. 2007).**

- (5) transportation,
- (6) family therapy,
- (7) physical, psychiatric or psychological evaluation,
- (8) counseling, or
- (9) treatment. **Ark. Code Ann. §9-27-303(24)(A) (Supp. 2007).**

Prior to the court placing a juvenile in a residential placement the court shall comply with the mental health assessments required by Act 1959 of 2005. **Ark. Code Ann. §9-27-602 (Supp. 2007); Ark. Code Ann. §9-27-603 (Supp. 2007);** *For detailed information on the mental health assessments required go to XIX. MISCELLANEOUS D. Mental Health Assessments.*

The trial court was upheld in ordering DHS to pay the Brown School \$48,000. The trial court did not err because it ordered placement in a “residential treatment facility” and did not order a specific named placement facility. DHS is obligated by statute to provide services, including treatment in a residential facility if the court determines it is necessary. Arkansas Dep’t of Human Servs. v T.B., 347 Ark. 593, 67 S,W, 3d 539 (2002).

The court ordered DHS to provide adequate housing, including electric and water utilities and held DHS and Sandi Doherty in willful contempt for failing to abide by its order. DHS argued that the trial court lacked the statutory authority to order family services. Ark. Code Ann. §9-27-307(17) defines family services as relevant services, including... cash assistance... to prevent a juvenile from being removed from a parent... The trial court did not exceed the statutory criteria for family services. At the September 30 hearing, the court unequivocally stated that it was ordering services to prevent R.P. from being removed from her mother.

The trial court's order of family services was not defective because it failed to make specific written findings. Ark. Code Ann. § 9-27-328 requires specific findings only when the court orders removal from a custodial parent. DHS' contention that the court's order did not comply with its policy is without merit. The juvenile court's orders do not have to comply with DHS policy. Further, the record does not show that DHS could not have paid the bills and in fact funds were available.

*DHS argued that it could not be made a defendant without waiving sovereign immunity and that the court's order coerced DHS into bearing a financial burden which is barred. There is a waiver of sovereign immunity where an act by the legislature has created a specific waiver of immunity. The Juvenile Code expressly empowers the court to order family services in FINS cases (Ark. Code Ann. §9-27-330) and family services includes cash assistance Ark. Code Ann. §9-27-303(17). Pursuant to Ark. Code Ann. §9-27-328(a), a court is required to order family services appropriate to prevent removal. Therefore, the General Assembly has specifically waived sovereign immunity as to DHS in such cases. Finally, DHS argued that the court's order violated separation of powers, but this theory was not raised or developed below with respect to setting aside the court's September 30 order. **Arkansas Dep't of Human Servs. v. R.P., 333 Ark. 516, 970 S.W. 2d 235 (1998).***

*The court affirmed the juvenile court's finding that DHS was in contempt for failure to provide the services as ordered and imposition of a \$250 fine. **Arkansas Dep't. of Human Servs. v. Clark, 305 Ark. 561, 810 S.W.2d 331 (1991).***

An order directing DHS to pay appellee a foster care board payment for a six-month period was reversed because the court lacked authority to order DHS to pay. Appellee was not a certified foster parent and was not entitled to board payments between June and November pursuant to DHS policy which mirrors the federal law definition of a foster family at 42 U.S.C.S. §672(c)(1). Arkansas Dept. of Human Servs. v. Southerland, 65 Ark. App. 97, 985 S.W.2d 336 (1999).

The Arkansas Supreme Court upheld a juvenile judge's award of specific services, funds for a mother's medication and bus tokens or bus credits for mother and children to attend counseling sessions. Further, the juvenile court is not required to fashion orders within DHS policy guidelines; juvenile court has the authority under the Juvenile Code to review action of DHS and the evidence supported the finding that the mother was in need of assistance and transportation. Arkansas Dep't. of Human Servs. v. Clark, 304 Ark. 403, 802 S.W.2d 461 (1991).

- b. Family services are provided to:
 - (1) Prevent a juvenile from being removed from a parent, guardian or custodian;
 - (2) Reunite a juvenile with a parent, guardian, or custodian from whom he/she was removed; or
 - (3) Implement a permanent plan of adoption, guardianship or rehabilitation of the juvenile. **Ark. Code Ann. §9-27-303(25)(B)(i-iii)(Supp. 2007).**

- c. At least five working days prior to ordering DHS to provide or pay for services, excluding community-based providers, in any case in which DHS is not a party, the court shall:
 - (1) fax written notice of intent to order services to the DHS Director and the local OCC attorney; and
 - (2) provide DHS an opportunity to be heard. **Ark. Code Ann. § 9-27-335(a)(1-2) (Supp. 2007).**

- d. Failure to provide five working days notice to DHS renders any part of the order pertaining to DHS void. **Ark. Code Ann. § 9-27-335(a)(3) (Supp. 2007).**

- e. In all cases in which family services are ordered, the court shall determine the parent's, guardian's, or custodian's ability to pay, in whole or in part, for said services. **Ark. Code Ann. §9-27-335(c)(1) (Supp. 2007).**
- f. The court's finding and supporting evidence shall be made in writing in the order requiring family services. **Ark. Code Ann. §9-27-335(c)(2) (Supp. 2007).**
- g. If the court determines that the parent, guardian or custodian is able to pay, in whole or part, for said services, the court shall enter a written order setting forth the amounts the parent, guardian, or custodian can pay for the family service(s) ordered, and ordering the parent, guardian or custodian to pay such amount periodically to the provider from whom family services are received. **Ark. Code Ann. §9-27-335(c)(3) (Supp. 2007).**
- h. The court shall not specify a particular provider for placement or family services when DHS is the payor or provider. **Ark. Code Ann. §9-27-335(b) (Supp. 2007).**

The trial court was upheld in ordering DHS to pay the Brown School \$48,000. The trial court did not err because it ordered placement in a "residential treatment facility" and did not order a specific named placement facility. DHS is obligated by statute to provide services, including treatment in a residential facility if the court determines it is necessary.

The General Assembly has waived sovereign immunity as to DHS when a court orders DHS to provide family services to prevent a juvenile from being removed from a parent. DHS' policy not to provide financial assistance for out-of-state treatment is not binding on the court's order. There was not a violation of the separation of powers doctrine because the court simply ordered the juvenile to be placed in a residential treatment facility. (The placement was made to Brown and the court subsequently ordered that the juvenile remain there. DHS recommended that the juvenile remain at Brown in a report to the court dated after Medicaid benefits had been denied.)

*Compliance with A.C.A. §20-46-106 (regarding out-of-state placements) is DHS' responsibility and the fact that the court was eager to get treatment did not absolve DHS from its responsibility under this section. The Court also noted that the purpose of the section is to ensure whenever possible that juveniles receive treatment in state; however, this was not the case as no facilities were available at that time in Arkansas. **Arkansas Dep't of Human Servs. v T.B., 347 Ark. 593, 67 S.W. 3d 539 (2002).***

2. Requirements Prior to Removing a Juvenile from Home

a. Prior to ordering a juvenile to be removed from his/her parent, guardian, or custodian and placed with DHS, another licensed agency responsible for the care of a juvenile, relative or other individual, the court shall order family services to prevent removal unless the health and safety of the juvenile warrant immediate removal for the juvenile's safety. **Ark. Code Ann. §9-27-328(a) (Supp. 2007).**

b. When the court orders such removal, the court shall make the following specific findings:

(1) The initial order shall provide:

(a) whether it is contrary to the welfare of the juvenile to remain at home;

(b) whether removal and the reasons for removal are necessary to protect the health and safety of the juvenile; and

(c) whether removal is in the best interest of the juvenile.

DHS sought to challenge a judge's placement with the agency claiming she failed to comply with Ark. Code Ann. §9-27-328(a)(2) by not making specific findings of fact that family services were made available before the child was removed from the grandmother's home. The issue is moot because at a later disposition hearing and prior to the agency filing a notice of appeal, the judge placed custody with the child's mother in another county. The Court does not issue advisory opinions nor review matters when the complaining litigant received the relief it requested. Arkansas Dep't. of Human Servs. v. State, 318 Ark. 294, 885 S.W.2d 14 (1994).

c. Upon the court's finding that the department's preventative and reunification efforts have not been reasonable, but further efforts could not permit juvenile to remain safely in home, the court may:

(1) Order family services reasonably calculated to prevent the need for out-of-home placement; **Ark. Code Ann. §9-27-335(e)(2) Supp. 2007).**

(2) Authorize or continue removal; **Ark. Code Ann. §9-27-328(d) (Supp. 2007).**

(a) The court may transfer custody of the juvenile despite the

lack of reasonable efforts by the department to prevent the need for out-of-home placement, if such a transfer of custody is necessary:

- (i) to protect the juvenile's health and safety; or
 - (ii) to prevent the juvenile from being removed from the jurisdiction of the court. **Ark. Code Ann. §9-27-335(e)(2) Supp. 2007).**
- (3) Shall note in the record the department's failure to deliver services, or **Ark. Code Ann. §9-27-328(d) (Supp. 2007).**
- (4) Dismiss the petition; **Ark. Code Ann. §9-27-335(e)(2) Supp. 2007).**
- d. Custody can be transferred only after determining that reasonable efforts have been made by DHS to deliver family services designed to prevent the need for out-of-home placement and that the need for out-of-home placement exists.
- (1) The juvenile's health and safety shall be the paramount concern for the court in determining whether or not DHS could have provided reasonable efforts to prevent the juvenile's removal. **Ark. Code Ann. §9-27-335(e)(2) Supp. 2007).**
- e. In all instances of removal of a juvenile from the home of his/her parent, guardian, or custodian, the court shall set forth in a written order:
- (1) evidence supporting decision to remove
 - (2) facts regarding the need for removal, and
 - (3) findings required by this section. **Ark. Code Ann. §9-27-328(e)(1) (Supp. 2007).**
- f. The written findings and the order shall be filed:
- (1) by the court or a party or party's attorney, as designated by the court, and
 - (2) within 30 days of the date of the hearing at which removal is ordered or prior to next hearing, whichever is sooner. **Ark. Code Ann. §9-27-328(e)(2) (Supp. 2007).**

The trial court's order of family services was not defective because it failed to make specific written findings. The statute requires specific findings only when the court orders removal from a custodial parent. Arkansas Dep't of Human Servs. v. R.P., 333 Ark. 516, 970 S.W. 2d 235 (1998).

3. **Transfer Custody**

a. If in the best interest of the juvenile, transfer custody to DHS or another licensed agency responsible for care of juveniles, to relatives or to other individuals **Ark. Code Ann. §9-27-334(a)(2)(A) (Supp. 2007)**.

(1) Prior to the court placing a juvenile in a residential placement the court shall comply with the mental health assessments required by Act 1959 of 2005. **Ark. Code Ann. §9-27-602 (Supp. 2007); Ark. Code Ann. §9-27-603 (Supp. 2007);**

Note: For detailed information on the mental health assessments required go to XIX. MISCELLANEOUS D. Mental Health Assessments.

(2) Custody can only be transferred to a relative or other individual after a home study is conducted by DHS or a licensed certified social worker and submitted to the court in writing and the court determines that the placement is in the juvenile's best interest. **Ark. Code Ann. §9-27-335(d) (Supp. 2007)**.

(3) The court shall order parents to pay a reasonable sum for support, maintenance or education of juvenile to any person, agency or institution to whom custody is awarded if it appears at adjudication or disposition hearing that the parents or other person named in petition are required by law to support juvenile and able to contribute to support of juvenile. **Ark. Code Ann. §9-27-346(a) (Supp. 2007)**.

The court shall order such person to pay a reasonable sum pursuant to the Guidelines for Child Support and the Family Support Chart. **Ark. Code Ann. §9-27-346(a) (Supp. 2007); Administrative Order Number 10.**

(4) If the court grants custody to DHS, the juvenile shall be placed in a licensed or approved foster home, shelter or facility or exempt child welfare agency as defined by 9-28-402(12). **Ark. Code Ann. §9-27-334(a)(2)(B) (Supp. 2007); Ark. Code Ann. §9-27-355(b)(1)(A) (Supp. 2007)**.

- (5) If the court grants custody of a juvenile to a relative or other person the juvenile shall not:
- (a) be placed in the custody of DHS while remaining in the relatives home, and
 - (b) the juvenile shall not be removed from the custody of the relative or other person, placed in the custody of DHS and then remain or return to the home of the relative or other person while remaining in the custody of DHS. **Ark. Code Ann. §9-27-355(b)(1)(A) (Supp. 2007).**
- (6) If the court transfers custody to DHS the court shall issue orders regarding educational issues of the juvenile including determining if the parent or guardian :
- (a) shall have access to the juvenile's school records
 - (b) has access to school records is entitled to information on the child's placement (name and address of foster parent or provider), and
 - (c) may participate in school conferences or similar activities. **Ark. Code Ann. §9-27-103(b)(6)(A) (Supp. 2007).**
- (7) If custody transferred to DHS the circuit court may appoint a person to consent to an initial evaluation and serve as a surrogate parent pursuant to the Individuals with Disabilities Education Act (IDEA). **Ark. Code Ann. §9-27-103(b)(6)(B) (Supp. 2007).**

In all custody cases, the primary consideration is the welfare and best interest of the children involved; all other considerations are secondary; the chancellor must utilize to the fullest extent all powers of perception in evaluating witnesses, their testimony, and the best interest of the children; in no other kind of case does the superior position, ability, and opportunity of the chancellor to observe the parties carry as much weight as in those cases involving minor children; juvenile courts are a division of chancery, and therefore the same standards of review apply.

*Where, among other things, the juvenile court credited a clinical psychologist's testimony that he did not believe that appellant had the ability to care for all three of her sons for an extended period of time, and the juvenile court determined that the evidence showed that the appellee fathers provided safe, nurturing environments and that they were the more stable custodians for the boys, the appellate court concluded that a review of the entire record demonstrated that the trial judge's refusal to restore custody to appellant was not clearly erroneous. **Lowell v. Lowell, 55 Ark. App. 211, 934 S.W.2d 540 (1996).***

*The juvenile division of chancery court, having found a child to be dependent or neglected, has the authority to make an award of custody of the child between competing parents. **Nance v. Arkansas Dep't. of Human Servs., 316 Ark. 43, 870 S.W.2d 721 (1994).***

*Appellants alleged error by trial court in failing to return children to parents at conclusion of initial dependency-neglect hearing. The Court held the issue was rendered moot on appeal by the return of the children after the hearing was continued at appellants' suggestion, and the action was dismissed. **Peeks v. Arkansas Dept. of Human Servs., 304 Ark. 172, 800 S.W.2d 428 (1990).***

4. Parent Training

- a. Order that the parent(s) or guardian(s) of the juvenile attend a parental responsibility training program, if available.
- b. The court may make reasonable orders requiring proof of completion of such training program within a certain time period and payment of a fee covering the cost of the training program.

5. Contempt Sanctions

- a. The court may provide that any violation of its orders shall subject the parent, both parents, custodian, guardian or the juvenile to contempt sanctions. **Ark. Code Ann. §9-27-334 ©) (Supp. 2007).**

- b. No court may commit a juvenile to DYS solely for criminal contempt. **Ark. Code Ann. §9-27-335 (g) (Supp. 2007); Ark. Code Ann. §9-28-208(a)(2) (Supp. 2007).**

JUDGES' NO REUNIFICATION HEARING CHECKLIST

A.C.A. §9-27-327; -329; -303; -337

Purpose:

To determine whether DHS should provide reunification services to the parent. This hearing is also referred to as “fast track” to accelerate permanency for a child that does not include reunification home with the parents.

Time Constraints:

☉ DHS, the attorney ad litem, or the court can make a “no reunification services” recommendation at any time following a d-n adjudication. **A.C.A. §9-27-327(a)(2)(A)(i), -327(2)(C-D); A.C.A. §9-27-329(c)(2)(A), -329(c)(4); §9-27-337(d)**

☉ DHS, the attorney ad litem, or the court shall provide written notice to the defendants of a recommendation of no reunification services at least 14 calendar days before the hearing. **A.C.A. §9-27-327(a)(2)(A)(ii); -329(c)(2)(B)**

☉ Court shall conduct and complete the hearing within 50 days of the date of written notice; however, the court upon good cause shown may continue the hearing an additional 20 days **A.C.A. §9-27-327(a)(2)(E)(i); -329(c)(5)(A)**

☉ Upon a no reunification finding, the court shall hold a Permanency Planning Hearing within 30 days of the determination. **A.C.A. §9-27-327(a)(2)(E)(i)(b)(ii); -329(c)(5)(C)**

☉ Nothing shall prevent the state from filing a petition for termination, guardianship, or permanent custody prior to any hearing. **A.C.A. §9-27-338(b)(1)**

Notice:

Shall identify, in sufficient detail to put the family on notice of the grounds for no reunification services and shall be provided at least 14 days prior to hearing. **A.C.A. §9-27-327(a)(2)(A)(ii-iii); -329(c)(2)(B-C)**

Best Practice: Judge should review motion to see if it is in sufficient detail, and, if proven, would result in a finding of no-reunification services for the parents. If the motion is sufficient, the judge may schedule a pre-trial conference with attorneys to ensure all parties entitled to counsel have counsel, share witness list, ensure that exhibits have been shared with all parties, and determine how much time is needed to schedule hearing.

At the hearing, explain the purpose of the No Reunification Hearing. Don't allow attorneys to re-adjudicate the dependency-neglect case; make them prove the grounds for no-reunification. Ensure that all parties are identified and have counsel or that counsel is properly waived. Ensure that all witnesses are sworn on the record. Judge should ensure that foster parents, relative caregivers and pre-adoptive parents have opportunity to be heard if not called as a witness

Present at Hearing:

- ✓ Judge
- ✓ Parties, including children, unless excused for good cause by court
- ✓ Attorneys for all parties and CASA if appointed
- ✓ CASA volunteer, if appointed
- ✓ Foster parents, relative caregivers, and pre-adoptive parents if identified
- ✓ Investigator, case worker, and relevant witnesses
- ✓ Court Reporter

No Reunification Grounds:

The parent has:

- ① subjected the child to aggravated circumstances as defined in 9-27-303(6) including:
 - ▶ abandonment;
 - ▶ chronic abuse;
 - ▶ subjected to extreme or repeat cruelty;
 - ▶ sexual abuse; or
 - ▶ judicial determination that there is little likelihood that services will result in successful reunification;

JUDGES' NO REUNIFICATION HEARING CHECKLIST

The parent has:

- ❶ subjected the child to aggravated circumstances as defined in 9-27-303(6) including:
 - ▶ child who has been removed from the custody of the parent and placed in foster care or custody of another person 3 times in the last 15 months.
- ❷ committed murder or voluntary manslaughter of any child;
- ❸ aided, abetted, conspired or solicited such a murder or voluntary manslaughter;
- ❹ committed felony battery or assault resulting in serious bodily injury to any child;
- ❺ had parental rights involuntarily terminated as to a sibling of the child; or.
- ❻ abandoned an infant as defined in 9-27-303(1) A.C.A. §9-27-303(46)(C)

Burden of Proof:

The burden is on the party requesting a no reunification finding is clear and convincing evidence A.C.A. §9-27-303(46)(C); A.C.A. §9-27-327(a)(2)(B)(ii); - §329(c)(5)(B)

Court Findings:

- Court should enter findings as to the child's best interest; and
- Court should enter findings of fact and conclusions of law based on the statutory grounds as to whether or not DHS should be relieved of providing reunification services to the parents.

Best Practice: The court should make specific findings of fact and conclusions of law based on the statutory grounds.

If the court grants the no reunification motion, the court shall hold a Permanency Planning Hearing within 30 days and explain to the parties the purpose of the next hearing.

E. No Reunification Efforts Hearings

1. Purpose

To determine whether or not DHS should provide reunification services to reunite a child with his/her family. **Ark. Code Ann. §9-27-327(a)(2)(A)(I)(Supp. 2007); Ark. Code Ann. §9-27-329(2)(B)(i) (Supp. 2007); Ark. Code Ann. §9-27-337(d) (Supp. 2007).**

2. Time Constraints

- a. DHS, attorney ad litem, or court may make a “no reunification efforts” recommendation at any time following the adjudication. **Ark. Code Ann. §9-27-327(a)(2)(A)(i) and (2)(D) (Supp. 2007); Ark. Code Ann. §9-27-329(c)(2)(A) (Supp. 2007); Ark. Code Ann. §9-27-337(d) (Supp. 2007).**
- b. The court shall determine whether the “no reunification” request shall be heard immediately after the adjudication hearing or in a separate disposition hearing. **Ark. Code Ann. §9-27-327(a)(2)(c) (Supp. 2007); Ark. Code Ann. §9-27-329(c)(3) (Supp. 2007).**
- c. The court shall conduct and complete a hearing on a “no reunification efforts” request within 50 days of the date of written notice to the defendants and shall enter an order determining whether or not reunification services shall be provided. **Ark. Code Ann. §9-27-327(a)(2)(E)(i)(a) (Supp. 2007); Ark. Code Ann. §9-27-329(c)(2)(C)(5)(Supp. 2007).**
- d. Upon good cause shown, the hearing may be continued for an additional 20 days. **Ark. Code Ann. §9-27-327(a)(2)(E)(i)(b) (Supp. 2007).**
- e. Upon determination that no reunification efforts shall be provided, the court shall hold a permanency planning hearing within 30 days after the determination. **Ark. Code Ann. §9-27-327(a)(2)(E)(ii) (Supp. 2007); Ark. Code Ann. §9-27-329(c)(5)(c) (Supp. 2007).**

3. Notice

Party or court recommending “no reunification efforts” shall provide notice to the defendants. **Ark. Code Ann. §9-27-327(a)(2)(A)(i-ii) (Supp. 2007); Ark. Code Ann. §9-27-329(c)(2)(B) (Supp. 2007).**

The notice shall:

- a. be provided to the parties at least 14 calendar days before the hearing, and
- b. identify, in sufficient detail to put the family on notice, the grounds for recommending “no reunification services.” **Ark. Code Ann. §9-27-327(a)(2)(A)(ii-iii) (Supp. 2007); Ark. Code Ann. §9-27-329(c)(2)(B-C) (Supp. 2007).**

4. Burden of Proof

The burden is on the moving party and is based on clear and convincing evidence. **Ark. Code Ann. §9-27-303(46)(c) (Supp. 2007); Ark. Code Ann. §9-27-325(h)(2)(c) (Supp. 2007); §9-27-327(a)(2)(B)(ii) (Supp. 2007); §9-27-329(c)(5)(c) (Supp. 2007).**

5. Court Finding

- a. The court shall enter an order determining whether or not reunification services should be provided.
- b. Reunification efforts shall not be required if court of competent jurisdiction, including the juvenile division of circuit court, has determined by clear and convincing evidence that the parent has:
 - (1) Subjected the child to aggravated circumstances which include:
 - (a) a child being abandoned;
 - (b) a child being chronically abused;
 - (c) a child being subjected to extreme or repeated cruelty or sexual abuse;

Infant was found dependent-neglected as a result of multiple broken bones of varying ages. The trial court found that the injuries were not accidental; that one or both parents were the likely cause of the injuries; and despite the parents' denial, the X-rays indicated that the fractures were from varying ages and they were of the type consistent with child abuse, and the radiologist findings were suspicious of trauma. While noting that the results of the test for brittle bone disease had not yet been received, the trial court found that the observation of medical personnel did not reveal symptoms of brittle bone disease.

The adjudication order was not appealed. At the disposition hearing on April 7, the trial court held that the goal should be adoption.

On May 13, the court entered a no-reunification order finding that the child had been subjected to extreme and repeated cruelty, that the injuries were not accidental, that one or both parents caused the injuries, and that when received, the brittle bone test showed no abnormal findings. At this hearing the trial court denied appellant's motion to call an expert witness to testify as to alternative theories for the infant's injuries. The court ruled that res judicata applied and that expert testimony was not relevant at this stage of the proceedings. Appellants' filed a notice of appeal after the no-reunification order and the TPR order handed down on November 16, 2004.

All of appellants' issues on appeal related to the trial court's denial of expert testimony at the no-reunification hearing to refute its previous finding of child abuse by the parents. The appellate court noted that the time for appellant to present that testimony was prior to the adjudication. The appellate court held that it was not necessary to address appellant's res judicata argument because appellant failed to appeal the adjudication order. The Supreme Court made clear in the Jefferson and Lewis cases that the appellate court will not re-litigate the adjudication hearing at future hearings. The appellant could have appealed the adjudication order, but failed to do so.

*The denial to allow the expert to examine the infant only to refute the injuries of the finding of the adjudication are not permitted under Jefferson. **Neves da Rocha v. Arkansas Dep't of Human Servs., 93Ark. App. 366, 219 S.W.3d 616 (2005).***

- (d) a determination by a judge that there is little likelihood that services to the family will result in successful reunification; or
- (e) a child has been removed from the custody of the parent or guardian and placed in foster care or the custody of another person three or more times in the last fifteen months. **Ark. Code Ann. §9-27-303(46)(C)(i) (Supp. 2007); Ark. Code Ann. §9-**

27-303(6)(Supp. 2007).

- (2) Committed murder of any child; **Ark. Code Ann. §9-27-303(46)(C)(ii) (Supp. 2007).**
- (3) Committed voluntary manslaughter of any child; **Ark. Code Ann. §9-27-303(46)(C)(iii) (Supp. 2007).**
- (4) Aided, abetted, attempted, conspired or solicited to commit such murder or voluntary manslaughter; **Ark. Code Ann. §9-27-303(46)(C)(iv) (Supp. 2007).**
- (5) Committed a felony battery or assault that results in serious bodily injury to any child; **Ark. Code Ann. § 9-27-303(46)(C)(v) (Supp. 2007).**

The juvenile court is a court of competent jurisdiction to determine that a parent committed a felony assault that results in serious bodily injury to the child. The court reasoned that a criminal conviction is not required.
Brewer v. Ark. Dep't. Of Human Servs., 71 Ark. App. 364, 32 S.W.3d 22 (2001) (substituted opinion on grant of rehearing delivered April 25, 2001).

- (6) Had parental rights involuntarily terminated as to a sibling of the child; or **Ark. Code Ann. §9-27-303(46)(C)(vi) (Supp. 2007).**
- (7) Abandoned an infant. **Ark. Code Ann. §9-27-303(46)(C)(vii) (Supp. 2007).**

Abandoned infant means a juvenile less than nine months of age whose parent, guardian or custodian left the child alone or in the possession of another person without identifying information or with an expression of intent by words, actions, or omissions not to return for the infant.
Ark. Code Ann. §9-27-303(1) (Supp. 2007).

F. Six-Month Review Hearings

1. Purpose

- a. To review a dependent-neglected or FINS case at least every six months when a juvenile is placed out of his/her home until there is a permanent order of custody, guardianship or other permanent placement or the juvenile is returned to his/her parent, guardian or custodian and the court has not discontinued orders for family services. **Ark. Code Ann. §9-27-337(a)(1) (Supp. 2007).**
- b. To review the case and determine the future status based on the juvenile's best interest. **Ark. Code Ann. §9-27-337(e)(1)(A) (Supp. 2007).**

2. Time Constraints

- a. The Review Hearing shall be held within six months after the original out-of-home placement and every six months thereafter until permanency is achieved. **Ark. Code Ann. §9-27-337(a)(2)(B) (Supp. 2007)**
 - (1) The court may require review prior to six month review date and the court shall announce the date, time, and place of the hearing. **Ark. Code Ann. §9-27-337(b)(1)(A) (Supp. 2007).**
 - (2) In all other cases it is the duty of petitioner to request court to set review hearing at least 60 days prior to the date of the required six month review and to provide all parties with reasonable notice and service in accordance with ARCP. **Ark. Code Ann. §9-27-337(b)(2)(B) (Supp. 2007).**
 - (3) Any party may request the court to review case at any time during pendency of a dependency-neglect or FINS case in which an out-of-home placement has occurred. **Ark. Code Ann. §9-27-337(c) (Supp. 2007).**
- b. Seven business days prior to a scheduled dependency-neglect review hearing DHS and the CASA, if appointed, shall file a review report including certificate of service that the report has been distributed to all parties or their attorneys and the CASA, if appointed. **Ark. Code Ann. § 9-27-361(a)(1) (Supp. 2007).**
- d. A written order shall be filed and distributed by the court, or by a party or party's attorney to the parties within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-337(e)(2) (Supp. 2007).**

3. Court Reports

- a. The DHS court report shall include a summary of the parties' compliance with the court orders and case plan, including a description of services and assistance the department has provided, and recommendations to the court. **Ark. Code Ann. § 9-27-361(a)(2)(A) (Supp. 2007).**
- b. If the child has been returned home, the DHS report shall include a description of any services or requirements of the parents, including, but not limited to a safety plan to ensure the health and safety of the juvenile in the home. **Ark. Code Ann. § 9-27-361(a)(2)(B) (Supp. 2007).**
- c. The CASA report shall include but not be limited to:
 - (1) any independent factual information that he/she feels is relevant to the case;
 - (2) a summary of the parties' compliance with the court orders; and
 - (3) recommendations to the court. **Ark. Code Ann. § 9-27-361(a)(2)(B)(3) (Supp. 2007).**
- d. At the review hearing the court shall determine on the record whether the previously filed reports and addendum reports shall be admitted into evidence based on any evidentiary objections made by the parties. The court shall not consider as evidence any report, part of a report, or addendum that was not admitted into evidence. **Ark. Code Ann. § 9-27-361(a)(4)(A-B) (Supp. 2007); Ark. Code Ann. § 9-27-361(c) (Supp. 2007).**

4. Court Review Findings

- a. The court shall determine and include in its order whether:
 - (1) the case plan, services and placement meet the special needs and best interest of the juvenile, with the juvenile's health, safety, and educational needs specifically addressed;
 - (2) the state has made reasonable efforts to provide family services;
 - (3) the case plan is moving towards an appropriate permanency plan pursuant to Ark. Code Ann. §9-27-338; and

- (4) the visitation plan is appropriate for the children and parents and siblings, if separated. **Ark. Code Ann. §9-27-337(e)(1)(B) (Supp. 2007).**
- b. The court's determination must be based on a full and deliberate consideration of the following:
- (1) the extent of compliance with the case plan including, but not limited to, a review of DHS' care for the health, safety, and education of the juvenile while in an out-of-home placement;
 - (2) the extent of progress which has been made toward alleviating or mitigating the causes of the out-of-home placement;
 - (3) whether the juvenile should be returned to the parent(s) and whether or not the juvenile's health and safety can be protected by the parent(s) if returned home;
 - (4) whether the juvenile should be continued in an out-of-home placement for a specified period of time; and
 - (5) whether there is an appropriate permanency plan for the juvenile pursuant to Ark. Code Ann. §9-27-338, including concurrent planning. **Ark. Code Ann. §9-27-337(e)(1)(C) (Supp. 2007).**

PERMANENCY PLANNING HEARING CHECKLIST

A.C.A. §9-27-338

Purpose:

Court shall determine a permanency goal in accordance with the child's best interest.

Time constraints:

☉ Shall be held:

- not later than 12 months after the date the child enters an out-of-home placement, or
- not later than 30 days after the court files a no reunification services order, or
- after a juvenile has been in care for 15 of the last 22 months.

☉ DHS shall provide the CASA, parties and counsel with a copy of the permanency planning report no later than 7 business days prior to the hearing.

☉ A written order shall be filed by the court, or by a party or party's attorney as designated by the court, within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner.

☉ Upon the court's determination that the goal is termination of the parental rights, DHS shall file a TPR petition within 30 days of the order.

☉ Nothing shall prevent the state from filing a petition for termination, guardianship or permanent custody prior to any hearing.

☉ If the court finds the child should remain in an out-of-home placement, either long-term or otherwise, the child's care shall be reviewed every 6 months with an annual permanency hearing.

☉ If DHS failed to provide services, court shall continue the hearing no longer than 6 months.

Present at Hearing

- ✓ Judge
- ✓ Attorney Ad Litem & CASA volunteer
- ✓ Child
- ✓ Parents/Guardians/Custodians & attorney(s)
- ✓ Case workers and agency attorney
- ✓ Court Reporter

Issues:

- ✓ Parties' compliance with case plan and court orders
- ✓ Which permanency plan is in the child's best interest?
- ✓ What specific steps need to be taken to achieve permanency for child?
- ✓ What plan can be achieved in a time frame consistent with the child's developmental needs?
- ✓ Order clarification or modification needed
- ✓ Finalize steps for permanency plan goal
- ✓ Custody, support and placement
- ✓ Visitation - parents' compliance/effect on the child
- ✓ Services - are the child's needs being met? Is family availing themselves of DHS services? Are services for the family alleviating the reason the child was removed from home?
- ✓ Did DHS make reasonable efforts to provide services to reunify the family or provide a permanent placement for the child?

Permanency Options (order of preference):

- ① **Return Home** if child's health and safety can be adequately protected;
- ② **TPR** unless:
 - Relative placement and not in child's best interest, or
 - Compelling reason, or
 - DHS failed to provide services.
- ③ **Guardianship**
- ④ **Permanent Custodian**
- ⑤ **Continue Reunification** only if:
 - parent is complying with case plan and court orders and making significant measurable progress toward reunification, and
 - reunification can occur within time frame consistent with child's developmental needs
- ⑥ **Independence** only if:
 - child cannot be reunited with family;
 - another permanent plan is not available; &
 - compelling reason not to TPR, or
 - child is being cared for by relative

G. Permanency Planning Hearing

1. Purpose

To finalize a permanency plan for the juvenile. **Ark. Code Ann. §9-27-338(a)(1) (Supp. 2007).**

2. Time Constraints

- a. The Permanency Planning Hearing (PPH) shall be held:
 - (1) no later than 12 months after date juvenile enters an out-of-home placement;
 - (2) after a juvenile has been in an out-of-home placement for 15 of the previous 22 months, excluding trial placements with parents and time on runaway status; or
 - (3) no later than 30 days after the No Reunification Hearing. **Ark. Code Ann. §9-27-338(a)(1)(A-B) (Supp. 2007).**

Appellants objection to the Permanency Hearing being held on the same day as the dependency-neglect adjudication was effectively waived when appellant agreed to having both hearings on the same day on the record. Harwell-Williams v. Arkansas Dep't of Human Servs., 36 Ark. 183, S.W. 3d __ (2006).

- b. If a juvenile remains in an out-of-home placement after the initial PPH an annual PPH shall be held to reassess the permanency plan for the juvenile. **Ark. Code Ann. §9-27-338(a)(2) (Supp. 2007); Ark. Code Ann. §9-27-328(f) (Supp. 2007).**
- c. If the court finds that DHS failed to provide services, the court should continue the PPH for no longer than six months. **Ark. Code Ann. §9-27-338(c)(2)(C)(ii) (Supp. 2007).**
- d. Seven business days prior to a scheduled dependency-neglect PPH, DHS and the CASA volunteer, if appointed, shall file a Permanency Planning Court Report with the court stating that it has been distributed to all parties and the CASA, if appointed. **Ark. Code Ann. § 9-27-361(b)(1) (Supp. 2007).**
- e. A written order shall be filed and distributed to the parties by the court, or by a party or party's attorney as designated by the court within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-338(e) (Supp. 2007).**

- f. Upon the courts determination that the new permanency goal is TPR, DHS shall file a TPR petition within 30 days of the PPH hearing to establish TPR as the goal. **Ark. Code Ann. §9-27-338(f) (Supp. 2007).**
- g. Nothing shall prevent the state or the AAL from filing a petition for termination, guardianship, or permanent custody prior to the PPH. **Ark. Code Ann. §9-27-338(b)(1) (Supp. 2007).**

3. Court Reports

- a. The DHS Permanency Planning Court Report shall include but not be limited to the following:
 - (1) a summary of the parties' compliance with the case plan, including the description of the services and assistance the department has provided
 - (2) a list of all the placements the juvenile has been in;
 - (3) a recommendation and discussion regarding the permanency plan including the appropriateness of the plan, a time line, and the steps and services necessary to achieve the plan including the persons responsible; and
 - (4) the location of any siblings, and if separated, a statement for the reasons for separation and any efforts if appropriate to reunite or maintain contact if appropriate and in their best interest. **Ark. Code Ann. § 9-27-361(b)(2) (Supp. 2007).**
- b. The CASA Report shall include, but is not limited to:
 - (1) any independent factual information that he or she feels is relevant to the case;
 - (2) a summary of the parties' compliance with the court orders; and
 - (3) recommendations to the court. **Ark. Code Ann. § 9-27-361(b)(3)(Supp. 2007).**
- c. At the PPH the court shall determine on the record whether the reports or addendum reports shall be admitted into evidence based on any evidentiary objections made by the parties. The court shall not consider as evidence any report, part of a report, or addendum report that was not admitted into evidence on the record. **Ark. Code Ann. § 9-27-361(b)(4)(A-B) (Supp. 2007); Ark. Code Ann. § 9-27-361(c)(1) (Supp. 2007).**

4. Permanency Plans

a. At the PPH, based upon the facts of the case, the court shall enter one of the following permanency goals, listed in order of preference, in accordance with the best interest of the juvenile. **Ark. Code Ann. §9-27-338(c) (Supp. 2007).**

(1) **Return juvenile to parent, guardian or custodian** at the Permanency Planning Hearing if it is in the best interests of the juvenile and the juvenile's health and safety can be adequately safeguarded if returned home; **Ark. Code Ann. §9-27-338(c)(1) (Supp. 2007).**

(2) **Authorize plan for termination of parent-child relationship** so that the juvenile is available to be adopted unless the:

(a) Juvenile is being cared for by a relative (including a minor foster child caring for his/her child in foster care) and termination of parental rights is not in the best interest of the juvenile;

(b) DHS has documented in the case plan a compelling reason why TPR is not in the juvenile's best interest and the court approves the compelling reason as documented in the case plan; or

(c) DHS has not provided services to the family of the juvenile consistent with the time period in the case plan, such services as the department deemed necessary for the safe return of the juvenile to his/her home if reunification services were required to be made to the family. **Ark. Code Ann. §9-27-338(c)(2) (Supp. 2007).**

If DHS fails to provide services in such case, the court shall continue the PPH for no more than six months. **Ark. Code Ann. §9-27-338(c)(2)(ii) (Supp. 2007).**

(3) Authorize a plan to obtain a **guardian** for the juvenile; **Ark. Code Ann. §9-27-338(c)(3) (Supp. 2007).**

(4) Authorize a plan for a **permanent custodian**, including relatives; **Ark. Code Ann. §9-27-338(c)(4) (Supp. 2007).**

Circuit Court affirmed for placing child with father at permanency planning hearing. At the permanency planning hearing the court determined that it was in the juvenile's best interest for the goal to be changed and he authorized plan for permanent placement with the juvenile's father. The court further made specific findings as to the permanency plan alternatives and why this plan was in the child's best interest. Appellant failed to demonstrate that the court erred.

Appellant argued that the trial court erred because the father failed to show a material change of circumstances to warrant the change in custody. Had this been a domestic relations case the burden would be on the father to show such a change; however, it is a FINS case and the dispositions are governed solely by the juvenile code.

*Finally, appellant argues that it was not in the juvenile's best interest to be placed with his father and that her mental evaluation was faulty and there were variations of opinion about alleged sexual abuse. Due deference to assess creditably of the witness is left the trial judge and the Court found that it was not left with a distinct and firm conviction that a mistake had been made. The trial court was affirmed on all points. **Judkins v. Arkansas Dep't of Human Servs.**, 97Ark. App. 260, ___ S.W. 3d ___ (2007).*

- (5) Continue the goal of **reunification** only when:
- (a) the parent is complying with the case plan and court orders;
 - (b) the parent is making significant measurable progress towards achieving the goals in the plan and diligently working toward reunification;
 - (c) the parent can demonstrate genuine sustainable investment in completing the requirements in the case plan and following the orders of the court in order to retain reunification as the permanency goal; and
 - (d) reunification can occur within a time frame consistent with the child's developmental needs. **Ark. Code Ann. §9-27-338(c)(5)(A-C) (Supp. 2007).**

with the case plan and court orders in the months or weeks immediately preceding the Permanency Hearing are insufficient grounds for retaining reunification as the permanency plan. **Ark. Code Ann. §9-27-338(c)(5)(D) (Supp. 2007).**

- (6) Authorize a plan for **another permanent planned living arrangement (APPLA)** which shall include a permanent planned living arrangement and addresses the quality of services, including but not limited to independent living services, if age appropriate and a plan for the supervision and nurturing the juvenile will receive.

APPLA shall be selected only if:

- (a) the juvenile cannot be reunited with his/her family;
- (b) another permanent plan is not available; and either
 - (i) a compelling reason exists why TPR is not in the juvenile's best interest, or
 - (ii) the juvenile is being care for by a relative and TPR is not in the juvenile's best interest. **Ark. Code Ann. § 9-27-338(c)(6) (Supp. 2007).**

5. Required Reasonable Efforts - Adoption Safe Families Act (ASFA) Findings

- a. The court shall make a finding on whether DHS has made reasonable efforts and shall describe the efforts to finalize the permanency plan for the juvenile. **Ark. Code Ann. § 9-27-338(d) (Supp. 2007); Ark. Code Ann. §9-27-328(f) (Supp. 2007).**
- b. If a reasonable efforts to finalize the permanency plan is not made within the 12 months of the date the child comes into care, the child becomes ineligible for IV-E funding from the end of the 12th month following the date the child is considered to have entered foster care, or the end of the month of the most recent judicial determination to finalize permanency was made and remains ineligible until such a determination is made. **45 CFR Sec. 1356.21(b)(2)(i).**

H. Fifteenth-Month Review Hearing

1. Purpose

To determine if DHS shall file a TPR petition if the juvenile has been out of the home for 15 continuous months, excluding trial placements or run-away status, previous 22 months, and the permanency planning hearing goal was either reunification or APPLA. **A.C.A. §9-27-359(a) (Supp. 2007)**

2. Time Constraints

- a. When the juvenile has been out of the home for 15 continuous months, excluding trial placements and time on run-away status out of the last 22 months, the court should conduct a Fifteen Month Review Hearing. **A.C.A. §9-27-338(a)(1) (Supp. 2007).**
- b. A written order shall be filed and distributed to the parties by the court, or by a party or party's attorney as designated by the court, within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner. **A.C.A. §9-27-359(e) (Supp. 2007).**
- c. If court approves permanency goal to terminate, DHS shall file TPR petition no later than the 15th month of the child's entry into foster care. **A.C.A. §9-27-359(c) (Supp. 2007).**
- d. If court determines that the child should remain in an out-of-home placement, the court shall review the case every six months with an annual permanency planning hearing until permanency is achieved. **A.C.A. § 9-27-359(d) (Supp. 2007).**

3. Court Findings

- a. The Court shall authorize DHS to file a TPR petition unless:
 - (1) The juvenile is being cared for by a relative and TPR is not in the juvenile's best interest;
 - (2) DHS has documented in the case plan a compelling reason why termination is not in the juvenile's best interest and the court approves the compelling reasons; or
 - (3) DHS has failed to provide the family services consistent with the time period in the case plan deemed necessary for the safe return of the juvenile if such services were required. **A.C.A. § 9-27-359(b) (Supp. 2007).**

TERMINATION OF PARENTAL RIGHTS HEARING CHECKLIST (1)

A.C.A. §9-27-338 and §9-27-341

Purpose:

- ❶ To provide permanency in a child's life where return home is contrary to the child's health, safety or welfare and cannot be accomplished in a reasonable period of time, as viewed from the child's perspective.
- ❷ To clear the child for permanent placement.

Time constraints:

- ⌚ Upon the court's determination that the goal is termination of the parental rights, DHS shall file a TPR petition within 30 days of the order.
- ⌚ If the Court determines the new permanency goal to be termination of parental rights, DHS shall file the TPR petition no later than the 15th month after the child's entry into foster care.
- ⌚ The court shall conduct and complete the TPR hearing within 90 days from the date the TPR petition is filed, unless continued for good cause as articulated in the written order of the court.
- ⌚ A written order shall be filed by the court or by a party or party's counsel as designated by the court within 30 days of the date of the termination hearing or before the next hearing, whichever is sooner.
- ⌚ After the TPR order is filed, the court shall review the case at least every 3 months when the goal is adoption and in other cases every 6 months until permanency is achieved for that child.

Petitioners:

- ✓ DHS
- ✓ Attorney Ad Litem

Notice:

The petitioner shall provide the parent(s) or putative parent actual or constructive notice.

Present at Hearing:

- ✓ Judge
- ✓ Child
- ✓ Attorney Ad Litem & CASA volunteer
- ✓ Parents/Guardians/Custodians & attorney(s)
- ✓ Case workers and agency attorney
- ✓ Court Reporter

Burden of Proof: Clear and convincing evidence

Effect of a TPR order:

A TPR order terminates the parent-child relationship and divests the parent and the child of all legal rights, powers and obligations between each other, including the right to withhold consent to adoption. A child has a right to inherit until the final adoption is entered.

Issues:

- ✓ Is TPR in the child's best interest and has one of the grounds been proven?
- ✓ Does an appropriate permanency plan exist?
- ✓ What specific steps are needed to finalize permanent placement?
- ✓ Visitation with relatives and siblings
- ✓ What efforts have been made to place the child in an adoptive home?
- ✓ Did DHS make reasonable efforts to provide services to reunify the family or provide a permanent placement for the child?

I. Termination of Parental Rights (TPR) Hearing

1. Purpose

- a. To be used only when DHS is attempting to clear a juvenile for permanent placement. **Ark. Code Ann. §9-27-341(a)(2) (Supp. 2007).**
- b. To provide permanency in a juvenile's life where a return home is contrary to the juvenile's health, safety or welfare and it appears from the evidence that the return home cannot be accomplished in a reasonable period of time, as viewed from the juvenile's perspective. **Ark. Code Ann. §9-27-341(a)(3) (Supp. 2007).**
- c. A parent's resumption of contact or overtures toward participating in the case plan or following the orders of the court following the PPH and preceding the TPR Hearing is an insufficient reason not to terminate. **Ark. Code Ann. §9-27-341(a)(4)(A) (Supp. 2007).**

The Supreme Court noted the following evidence supporting the trial court's decision to terminate appellant's parental rights. Her recent steps prior to the termination hearing to gain employment and housing did not negate her history of instability. When appellant did work it was with a temporary agency, and at the time of the termination hearing she was laid off. Appellant never provided documented evidence of support payments for the children despite the trial court's request. Appellant married a convicted sex offender, who as a condition of his parole could not have any unsupervised contact with minors, after her four minor children were placed in foster care. Appellant failed to maintain her counseling and medication management for depression.

*The Supreme Court stated the bottom line is that the evidence was clear that these children needed a permanent and stable environment. Although the appellant began to make some progress, the children had been out of the home for two years and "her compliance was at the eleventh hour. It was not an error for the trial court to disregard the progress she had made immediately before the termination hearing. This progress did not outweigh other evidence demonstrating a failure to comply and remedy the situation that caused the children to be removed. **Camarillo-Cox v. Arkansas Dep't of Human Servs., 360 Ark. 340, 201 S.W.3d 391 (2005).***

*Termination of parental rights was pursued because a return of the child to the appellant's home would have been contrary to the child's health, safety, or welfare and because it appeared that the return could not be accomplished within a reasonable period of time. **M.T. v. Arkansas Dep't. of Human Servs., 58 Ark. App. 302, 952 S.W.2d 177 (1997).***

The intent of the TPR statute is to provide permanency in a juvenile's life

where return is contrary to the juvenile's health, safety, or welfare, and it appears from the evidence that return to the family home cannot be accomplished within a reasonable time. **Crawford v. Arkansas Dep't. of Human Servs.**, 330 Ark. 152, 951 S.W. 2d 310 (1997); **Thompson v. Arkansas Dep't. of Human Servs.**, 59 Ark. App. 141, 954 S.W. 2d 292 (1997).

2. Time Constraints

- a. If the court determines that the permanency goal is TPR at the PPH, DHS shall file a TPR petition within 30 days of the PPH hearing. **Ark. Code Ann. §9-27-338(f) (Supp. 2007).**

Termination upheld where appellants argued that the court failed to have a permanency planning hearing within 30 days of the order of no reunification services. DHS provided notice and petitions of its intent to seek dependency-neglect adjudication, a no-reunification services order, and to terminate parental rights. DHS requested that it be allowed to set all the hearings on the same day. The trial court conducted all of these hearings on the same day, including a permanency planning hearing. Appellant was provided proper notice and due process. Phillips v. Arkansas Dep't of Human Servs., 85 Ark. App. 450, 158 S.W. 3d 691 (2004).

- b. If court approves permanency goal to TPR at the Fifteenth-Month Hearing, DHS shall file TPR petition no later than the 15th month of the child's entry into foster care. **A.C.A. §9-27-359(c) (Supp. 2007).**
- c. Court shall conduct and complete TPR hearing within 90 days from the date TPR petition is filed, unless continued for a good cause as articulated in the written order of the court. **Ark. Code Ann. §9-27-341(d)(1) (Supp. 2007).**

Continuances at the termination hearing are not permitted under Jefferson. Neves da Rocha v. Arkansas Dep't of Human Servs., 93 Ark. App. 366, 219 S.W. 3d 660 (2005).

The trial court's findings constituted more than clear and convincing evidence to terminate parental rights. The only other adverse ruling of the trial court was the denial of the motion for a continuance. The granting or denial of a continuance is in the sound discretion of the trial court and the court should consider the following factors:

1. *The diligence of the movant;*
2. *The probable effect of the testimony at trial;*
3. *The likelihood of procuring the witnesses' attendance in the event of the postponement;*
4. *The filing of an affidavit, stating not only what facts the*

witness would prove but what the appellant believes to be true; and

5. *The appellant must show prejudice from denial. Green v. State, 354 Ark. 210, 128 S.W.3d 563 (2003).*

The attorney requesting the continuance was not diligent because she did not request the continuance until the day of the trial and her client was not prejudiced because she was able to participate in the hearing via telephone. TPR affirmed and counsel's motion to withdraw granted. Smith v. Arkansas Dep't of Human Servs., 93 Ark. App. 395, ___ S.W.3d ___ (2005).

- d. A written order shall be filed by the court or by a party or party's counsel as designated by the court within 30 days of the date of the termination hearing or before the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-341(e) (Supp. 2007).**

Appellant argued that the trial court's termination was clearly erroneous; that the order should be vacated because it was not filed within 30 days. The court did not lose jurisdiction because the order was not filed within 30 days from the date of the hearing. Wade v. Arkansas Dep't of Human Servs., 337 Ark. 353, 990 S.W. 2d 509 (1999).

- e. After TPR order is filed, the court shall review the case at least every three months when the goal is adoption and in other cases every six months until permanency is achieved for that juvenile. **Ark. Code Ann. §9-27-341(f) (Supp. 2007).**
- f. A Permanency Planning Hearing is not a prerequisite to the filing of a TPR petition or for the court's consideration of a TPR petition. **Ark. Code Ann. §9-27-341(b)(1)(B) (Supp. 2007).**
- g. The court shall not transfer any case in which a TPR petition has been filed until the court takes final action on the petition. **Ark. Code Ann. §9-27-307(b)(2) (Supp. 2007).**

3. Notice

- a. The petitioner shall provide the parent(s) or putative parent actual or

constructive notice of hearing to terminate parental rights. **Ark. Code Ann. §9-27-341(b)(2)(A) (Supp. 2007).**

TPR affirmed. Appellant first argued that the trial court erred because the petitioner did not provide notice that a TPR hearing would be conducted at the adjudication hearing. However, the appellants did not preserve this issue for appeal because they did not appeal the adjudication order. Sowell v. Arkansas Dept. of Human Servs., 96 Ark. App. 325, ___ S.W. 3d__ (2006).

- b. In addition to constructive notice, the petitioner shall check the putative father registry if the name or whereabouts of the putative father are unknown. **Ark. Code Ann. §9-27-341(b)(2)(B) (Supp. 2007).**

4. TPR Petition

- a. TPR is a remedy available only to DHS or the attorney ad litem. **Ark. Code Ann. §9-27-341(a)(1)(A) (Supp. 2007).**

Termination of parental rights is a remedy available only to DHS (and to an attorney ad litem beginning in 1997 after case decided) and not to private litigants; therefore, the right of dismissal accrues to DHS as the petitioner, and not to a parent. M.T. v. Arkansas Dep't. of Human Servs., 58 Ark. App. 302, 952 S.W.2d 177 (1997).

- b. The court may consider a TPR petition if there is an appropriate permanency placement plan for the juvenile. **Ark. Code Ann. §9-27-341(b)(1)(A) (Supp. 2007).**

The termination statute does not require that termination of parental rights be a predicate to permanent placement, but only that DHS shall attempt to clear the juvenile for permanent placement when parental rights are terminated. M.T. v. Arkansas Dep't. of Human Servs., 58 Ark. App. 302, 952 S.W.2d 177 (1997).

5. Burden of Proof

A TPR order shall be based upon a finding by clear and convincing evidence. **Ark. Code Ann. §9-27-341(b)(3) (Supp. 2007); Ark. Code Ann. §9-27-**

325(h)(2)(c) (Supp. 2007).

*Appellant argued that DHS failed to meet the burden of proof required by the Indian Child Welfare Act (ICWA). The trial court correctly found that DHS met all the necessary elements of the case beyond a reasonable doubt as required by ICWA. **Burks v. Arkansas Dept. of Human Servs., 76 Ark. App. 71, 61 S.W.3d 184 (2001).***

*Grounds for termination of parental rights must be proven by clear and convincing evidence, and the question on appeal is whether the chancellor's finding that the disputed fact was proved was clearly erroneous. Due regard is given to the trial court's ability to judge the credibility of witnesses. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made based on the entire evidence. **Posey v. Arkansas Dept. Of Human Servs., ___ Ark. ___ (06-1274, September 12, 2007), App. 195, 85 S.W. 3d 558 (2002); Conn v. Arkansas Dept. Of Human Servs., 79 Ark. App. 195, 85 S.W. 3d 558 (2002); Moore v. Arkansas Dep't. of Human Servs., 333 Ark. 288, 969 S.W. 2d 186 (1998); Donna S. v. Arkansas Dep't. of Human Servs., 61 Ark. App. 235, 966 S.W. 2d 919 (1998); Crawford v. Arkansas Dep't. of Human Servs., 330 Ark. 152, 951 S.W. 2d 310 (1997); Thompson v. Arkansas Dep't. of Human Servs., 59 Ark. App. 141, 954 S.W. 2d 292 (1997); M.T. v. Arkansas Dep't. of Human Servs., 58 Ark. App. 302, 952 S.W. 2d 171 (1997).***

*The U.S. Supreme Court held that before a state may sever the rights of parents in their natural child, Due Process requires that the state support its allegations by at least clear and convincing evidence. **Santosky v. Kramer, 455 U.S. 745 (1982).***

6. TPR Evidence

*TPR affirmed. The appellant failed to appear for the termination hearing and later filed this appeal arguing, first, that the trial court erred in terminating his parental rights by default. Court found that the record revealed that, although the trial court granted a motion for default judgment, evidence was properly taken and reviewed at the hearing, and so a default judgment was not rendered. Court found that the decision to terminate did fully take into consideration the appellant's fundamental rights as a parent and did safeguard the appellant's constitutional protections, as well as to determine the children's best interest. **Osborne v. Arkansas Dep't of Human Servs., 98 Ark. App. 129, ___ S.W. 3d ___ (2007).***

*The trial court was upheld in denying an expert to examine the infant only to refute the injuries of the finding of the adjudication after the adjudication order, which was not appealed. This is not permitted under Jefferson. **Neves da Rocha v. Arkansas Dep't of Human Servs., 93 Ark. App.316, 219 S.W.3d 660 (2005).***

Under the rules of appellate procedure, specifically Ark. R. App. P. Civ. 2(c)(3), the review of the record for adverse rulings is limited to the termination hearing, because a party is entitled to appeal final orders from the adjudication, review, and permanency planning hearings.

However, a conscientious review of the record under Linker-Flores II requires the Court to examine all evidence from all hearings and proceedings in the case when the trial court takes judicial notice and incorporates by reference into the record at the termination hearing all pleadings and testimony in the case that occurred before the termination hearing.

*Under Ark. Sup. Ct. R. 4-3(j), no-merit briefs in termination of parental rights cases shall include an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. **Lewis v. Arkansas Dep't of Human Servs., 364 Ark. 243, 217 S.W.3d 788 (2005).***

*Termination upheld where appellants' argued that the trial court failed to have a permanency planning hearing within 30 days of the order of no reunification services. DHS provided notice and petitions of its intent to seek a dependency-neglect adjudication, a no-reunification services order, and to terminate parental rights. DHS requested that it be allowed to set all the hearings on the same day. The trial court conducted all of these hearings on the same day, including a permanency planning hearing. Appellant was provided proper notice and due process.. **Phillips v. Arkansas Dep't of Human Servs., 85 Ark. App. 450, 158 S.W. 3d 691 (2004).***

- a. **It is in the juvenile's best interest**, including but not limited to:
 - (1) the likelihood the juvenile will be adopted if the TPR petition is granted; and

*TPR upheld based on clear and convincing evidence where trial court found that termination was in the children's best interests and that the children were adoptable. Appellant argued that the court erred in finding that the children were likely to be adopted since they were 11 and 15 years old and had emotional problems. Appellant argued that there are documents that support her claim but they were not abstracted. The caseworker testified at the termination hearing that she believed that the children would be adopted and that there was a possibility for them to be adopted together. **Cobbs v. Arkansas Dep't of Human Servs.**, 87 Ark. App.188, __S.W. 3d __ (2004).*

*The trial court did not improperly consider the child's wishes to be adopted by her foster parents as a controlling factor in the decision to TPR. **Jefferson v. Arkansas Dep't of Human Servs.**, 356 Ark. 647, 158 S.W. 3d 129 (2004).*

- (2) the potential harm specifically addressing the effect of the health and safety of the juvenile caused by returning the child to the custody of the parents or the putative parent. **Ark. Code Ann. §9-27-341(b)(3)(A) (Supp. 2007).**

*Termination upheld where trial court found that each parent as either an offender or as an accomplice committed a felony battery against another child that resulted in the child's death. **Todd and Nelson v. Arkansas Dep't of Human Servs.**, 85 Ark. App. 174, 151 S.W. 3d 315 (2004).*

Appellants appealed the termination of parental rights arguing that the trial court erred in finding the termination in the children's best interest because there was not clear and convincing evidence of potential harm to the children if they continued contact with the parents.

***Note:** Act 1990 of 2005 changed potential harm of to continued contact to return home to parents.*

Risk of harm is a factor for the court to consider in its best interests analysis. There was sufficient evidence presented as to the child's best interest and evidence that demonstrated potential harm that might result if the parents had continuing contact including, unstable housing,

*failure to support the children, and continued drug use. In addition, there were at least three separate statutory grounds for termination in this case. **Carroll v. Arkansas Dep't of Human Servs., 85 Ark. App. 255, 148 S.W. 3d 780 (2004).***

*TPR reversed because parties stipulated to child's best interest and no evidence presented to the court. Ark. Code Ann. §9-27-341(b) requires that an order terminating parental rights must be based upon clear and convincing evidence that it is in the child's best interest and that one of the TPR grounds are proven. Although the trial court's order recited that it was contrary to the child's best interest to return home and that the TPR was in her best interest, there was no evidence presented that would support such a finding. The only evidence submitted at the hearing was a stipulation concerning an earlier termination of a sibling. Since only one of the two grounds of the statute was proven, the decision to terminate parental rights was clearly erroneous. **Conn v. Arkansas Dept. Of Human Servs., 79 Ark. App. 195, 85 S.W. 3d 558 (2002).***

*TPR upheld circuit court finding of best interest with strong evidence that the children would be adopted and that there was potential harm to the children if they remained in their father's custody. **Posey v. Arkansas Dept. Of Human Servs., __ Ark. __, __ S.W. ____(06-1274, September 12, 2007).***

*TPR upheld circuit court's finding where trial court made specific findings of fact of the child's best interest including that return home would be harmful, that the child was very adoptable, and he was stable and thriving in his foster home. The trial court also noted the six year history with this family and that the child, age 11, expressed his wishes to not be returned to or have any contact with his father. **Latham v. Arkansas Dept. Of Human Servs., 99 Ark. 25, __ S.W. 3d ____(2007).***

- (3) The court shall rely upon the record of the parent's compliance in the entire dependency-neglect case and evidence presented at the termination hearing in making its decision whether it is in the juvenile's best interest to terminate parental rights. **Ark. Code Ann. §9-27-341(b)(4)(B) (Supp. 2007).**

TPR upheld based on best interest and aggravated circumstances. Appellant argued that there was not enough evidence on the adoptability of the children and it was not in their best interest to terminate parental rights. The Court noted its previous holding that the trial court shall consider all the factors relating to best interest and evidence must be by clear and convincing evidence that termination is in the best interest of the child. McFarland v. Arkansas Dept. of Human Servs., 91 Ark. App. 323 (2005). There was no error in the trial court's determination that it was in the children's best interest to terminate parental rights. Davis v. v. Arkansas Dep't of Human Servs., 98 Ark. App. 275, __ S.W. 3d __ (2007).

Circuit Court reversed on termination that was fast tracked based on prior sibling termination based on parent's drug addiction. Parents of infant had lost prior child due to drug addiction and then a second child was born with drugs in the infant's system. Both parents failed to submit to hair follicle test ordered by the court. The AAL filed motion for no reunification services which ultimately led to TPR.

The Court of Appeals found that there was no evidence that drug treatment would not be successful. The Court relied on Conn v. Arkansas Dep't of Human Servs., 79 Ark. App. 195 (2002) holding that the trial court erred in finding that it was in the child's best interest to find that prior termination was a sufficient ground for TPR. Ivers v Arkansas Dep't of Human Servs., 98 Ark. App. 57, __S.W. 3d __ (2007).

Note: Under the Adoption Safe Families Act (ASFA)effective November 1997 an involuntary termination as to another sibling is a ground to fast track a case and a ground for termination of parental rights. This federal law has been adopted into state law as well. Factors of best interest are separate from TPR grounds. Best interest and a TPR ground must be proven by clear and convincing evidence to terminate best interest. In Conn, the trial court was reversed for allowing a stipulation as to the child's best interest. In Conn, the appellate court stated that the trial court must be presented evidence and make findings as to the best interest of the child in a termination hearing.

b. One or more of the following grounds:

- (1) The juvenile has been adjudicated dependent-neglected and has continued outside of the custody of the parent for 12 months, despite a meaningful effort by DHS to rehabilitate the home and correct conditions which caused removal, and those conditions have not been remedied by the parent. **Ark. Code Ann. §9-27-341(b)(3)(B)(i)(a) (Supp. 2007).**

It is not necessary that the 12-month period referenced in this subdivision immediately precede the filing of the petition for TPR, or that it be for 12 consecutive months. **Ark. Code Ann. §9-27-341(b)(3)(B)(i)(b) (Supp. 2007).**

TPR upheld. Circuit Court acknowledged that appellant had completed anger-management and substance abuse classes in prison, had filed for divorce, and was employed; however at the time of the TPR hearing appellant still did not have any means to care for his child despite six year case history with family. Latham v. Arkansas Dept. Of Human Servs., 99 Ark 25, ___ S.W. 3d ___ (2007).

TPR upheld based on finding that other factors arose that demonstrated that return home would be contrary to the child's health, safety, and welfare. Appellant was incapable of remedying the conditions that caused removal and had subjected the child to aggravated circumstances. The one-month old infant came into care as a result of a spiral fracture. DHHS provided intensive services for 14 months and the appellant could only care for the child for 2-3 hours with her mother. Appellant had limited intellectual and mental capacity and physical disabilities, which impaired her ability to care for her child. The trial court also found that it was in the child's best interest for termination of parental rights and that the child was likely to be adopted.

The Court found that the appellant was willing to be the parent her child need, but was unable to be the parent on her own. "Appellants' rights had to yield to the best interest of the child." Meriweather v. Arkansas Dep't of Human Servs., 98 Ark. App. 328, ___ S.W. 3d ___ (2007).

TPR affirmed. DHHS filed a petition to terminate parental rights based, in part, upon the child having been placed out of the home for an excess of 12 months. The appellant argued that termination was improper because the hearing was held 12 days less than 12 months after the child's removal. Court

found that the record revealed that the court recognized that the hearing was held sooner than 12 months and found clear and convincing evidence to terminate. The termination order was entered 27 days after the hearing, which was more than 12 months after the child was placed out of the home. Citing Ullom v. Ark. Dept of Human Servs., 340 Ark. 615, 12 S.W.3d 204 (2000), the court found that the child was out of the home for more than 12 months at the time the termination order was entered, which cured any error. Included in the termination order was a finding that the child had been subjected to aggravated circumstances; however, the appellant did not contest that finding. Riley v. Arkansas Dept of Human Servs., 98 Ark. App. 235, ___ S.W. 3d ___ (2007).

Court of Appeals reversed and Circuit Court affirmed on termination of parental rights. The Court found that the record revealed that the appellant failed to comply with the courts orders and did not provide the court with any evidence that she had remedied her drug problem that caused her children to be removed from her home. The evidence showed that she failed to address her drug problems, failed to provide meaningful proof of employment, or establish a stable living environment for her children. Long v. Arkansas Dept of Human Servs., 369 Ark. 74, ___ S.W. 3d ___ (2007).

TPR affirmed. The children had been in and out of foster care over the last two years and the record had abundant proof of environmental neglect and that despite intensive efforts made by DHHS no appreciable change had occurred. Sowell v. Arkansas Dept. of Human Servs., 96 Ark. App. 325, ___ S.W. 3d ___ (2006).

In Knight I the trial court was reversed for terminating appellant's parental rights. DHS sought review with the Supreme Court, which was denied and then later filed a second petition for TPR, which was affirmed. Appellant did not challenge the sufficiency of the evidence or that the TPR was in the child's best interest. Appellant only argued that the trial court erred by not following the Court of Appeal's order to provide reunification services which violated her due process rights.

The appellate court noted DHS' meager attempts at providing reunification services, but noted that the children had been out of the home for over three years and neither child has seen their mother in two years. At the advice of counsel appellant refused subsequent drug screens after she tested positive when she denied using drugs. As a result, she was denied visitation. Appellant

also did not maintain stable housing or employment. ***Knight v. Arkansas Dep't of Human Servs.*, 76 Ark. App. 400, ___ S.W.3d ___ (2006).**

The parent counsel's motion to withdraw was granted and the TPR was affirmed. Appellant failed to remedy the situation that caused her children to come into care despite DHS' meaningful efforts to rehabilitate the home and correct the conditions that caused removal. Appellant failed to maintain stable housing, blamed her children for DHS involvement, had numerous interruptions in therapy due to multiple incarcerations, and was incarcerated again at the time of the termination hearing. She failed to protect her children from abuse and when she eventually acknowledged their abuse, one doctor testified that she had no idea whatsoever of the magnitude of the abuse. Linker-Flores v. Arkansas Dep't of Human Servs., 359 Ark. 131, 194 S.W.3d 739 (2005) (Linker-Flores I); Linker-Flores v. Arkansas Dep't of Human Servs., 364 Ark. 224, 217 S.W.3d 107 (2005) (Linker-Flores II).

T PR affirmed and attorney's motion to withdraw was granted. There was clear and convincing evidence that the children had been correctly adjudicated dependent-neglected. The children continued out of the parents' home for 17 months despite DHS efforts to provide services to remedy the situation. The father failed to rehabilitate the condition that caused removal in a reasonable amount of time and manifested an incapacity and indifference to remedy the conditions that caused removal, including failing to maintain stable housing and employment, provide child support, or comply with the orders of the court. Lewis v. Arkansas Dep't of Human Servs., 158 Ark. 129, ___ S.W.3d ___ (2005).

DHS petitioned the Supreme Court for review from the Court of Appeals' reversal of the trial court's TPR order. The Court of Appeals found that none of the grounds were supported by clear and convincing evidence and that appellant had shown significant improvement and met nearly all of her case plan requirements.

The trial court terminated appellant's parental rights based on the facts that the children had remained out of the home for more than one year and despite meaningful efforts by DHS to rehabilitate the home and correct the conditions that caused the removal, the conditions had not been remedied. The trial court also found that appellant failed to provide meaningful contact or support with the children and manifested an incapacity or indifference to remedy the conditions that caused removal.

The Supreme Court noted the following evidence supporting the trial court's decision to terminate appellant's parental rights. Her recent steps prior to the termination hearing to gain employment and housing did not negate her history of instability. When appellant did work it was with a temporary agency, and at the time of the termination hearing she was laid off. Appellant never provided documented evidence of support payments for the children despite the trial court's request. Appellant married a convicted sex offender, who as a condition of his parole could not have any unsupervised contact with minors, after her four minor children were placed in foster care. Appellant failed to maintain her counseling and medication management for depression.

*The Supreme Court stated the bottom line is that the evidence was clear that these children needed a permanent and stable environment. Although the appellant began to make some progress, the children had been out of the home for two years and her compliance was at the eleventh hour. It was not an error for the trial court to disregard the progress she had made immediately before the termination hearing. This progress did not outweigh other evidence demonstrating a failure to comply and remedy the situation that caused the children to be removed. **Camarillo-Cox v. Arkansas Dep't of Human Servs., 360 Ark. 223, 201 S.W. 3d 391 (2005).***

After 2.5 years of services including placing appellant in a foster home with her three children to learn proper care of her children, counseling, parenting classes, adult education and GED classes, and housing assistance referrals, the trial court found that the appellant was still non-compliant with court order and still had no visible means to support the children. Further, the children would not be able to return to the appellant within a time frame consistent with the children's developmental needs.

*Appellant challenged the constitutionality of the statute requiring the permanency planning hearing to be held no later than twelve months after the date a juvenile enters foster care. She claimed it arbitrarily and capriciously placed a time limit on parental rights and denied parents their due process rights. However, appellant did not preserve the issue for appeal, nor did she notify the Attorney General as required under Ark. Code Ann. 16-111-106. It is generally reversible error when the Attorney General fails to receive notice of a constitutional attack of a statute. **Maxell v. Arkansas Dep't of Human Servs., 90 Ark. 223, 205 S.W. 3d 801 (2005).***

Court of Appeals reversed and trial court affirmed on termination of parental rights. Despite the numerous opportunities and assistance by DHS, the trial

*court found the defendant continued to be an unfit parent and there was little likelihood that she would ever be ready to be reunited with her children. The court noted that the case had gone on for more than two years and its resolution was long overdue, especially in light of the convincing evidence that appellant failed to remedy the serious problems that caused her children's removal. **Trout v. Arkansas Dep't of Human Servs., 359 Ark.283, 197 S.W. 3d 486 (2004).***

The termination was upheld. First, appellant argued that the court erred in failing to appoint counsel at the adjudication hearing and that if counsel was waived it was not knowingly or intelligently made. Although this challenge was not timely, the Court reviewed the remainder of the case to ensure that appellant was not deprived of fundamental fairness leading up to the termination. The Supreme Court noted that appellant was appointed an attorney following the adjudication hearing. The Court also gave no consideration to the testimony given by the appellant at the adjudication hearing because appellant was not represented by counsel.

*The TPR was based on clear and convincing evidence. The child had remained out of the home for over two years and appellant had manifested an incapacity or indifference to correct the conditions that caused removal. **Jefferson v. Arkansas Dep't of Human Servs., 356 Ark. 647, 158 S.W. 3d 129 (2004).***

*The termination was upheld where the trial court found that parents' persistently refused to remedy the conditions in the home that caused removal, which was an intolerable dirty condition that made it unsafe for the children to reside there. For fourteen months DHS worked with the family to provide services, but the appellants failed to demonstrate that they were capable of creating a safe and clean environment for their children. **Browning v. Arkansas Dep't of Human Servs., 85 Ark. App. 495, 157 S.W.3d 540 (2004).***

*TPR reversed where appellant had successfully completed a six-month drug treatment program at the time of the termination hearing. Appellant's children were removed from home due to drug use. Her drug tests were negative from July 2002 - December 2002. She relapsed in January 2003 and then enrolled and completed a six-month residential drug program. The trial court acknowledged appellant's progress. The court's concern about appellant's relationship with a known drug user was speculative. Further, the court was mistaken as to how long the children had been removed from the home. **Knight v. Arkansas Dep't of Human Servs., 87 Ark. App. 230, 189 S.W.3d 486 (2004).***

*Termination upheld where conditions that caused removal were not remedied. Trial court found that there was potential for further harm to the child if left in appellant's custody due to the extensive physical and sexual abuse the child endured by appellant's boyfriend. The appellate court noted that the record was replete with evidence that the appellant cared more for the boyfriend than her child. It is not enough for a parent to refrain from personally harming a child; a parent has a duty to protect the child from harm. Further, completion of a case plan is not determinative. What matters is whether completion of the case plan achieved the intended result of making the appellant capable of caring for her child. **Wright v. Arkansas Dep't. Of Humans Servs., 83 Ark. App.1, 115 S.W. 3d 322 (CA 02-1253; 8-27-2003).***

*Termination of parental rights was warranted. Evidence revealed that the children had been out of the home over a year, and although mother had made some progress, she was still not able to adequately care for her children. The doctor testified that, in his opinion, mother could not adequately parent her children. The Court of Appeals affirmed the trial court's finding that there were no compelling reasons to continue attempting to reunify because it was not in the children's best interest. **Walters v. Arkansas Dept. of Human Servs., 77 Ark. App 191, 72 S.W. 3d 533 (2002).***

*TPR affirmed when the court found that the children remained out of the home for more than a year, appellant suffered from paranoid schizophrenia, and that appellant was unable and unwilling to provide protection, security and care for her children. Appellant argued that DHS failed to provide appropriate reunification services and that TPR was contrary to her children's best interests. **Cassidy v. Arkansas Dep't of Human Servs., 76 Ark. App. 190, 61 S.W. 3d 880 (2001).***

*Termination was appropriate where the child had been out of the home for 12 months and the conditions that warranted removal had not been remedied by the parent despite DHS' meaningful efforts. **Ruble v. Arkansas Dep't of Human Servs., 75 Ark. App. 321, 57 S.W. 3d 233 (2001).***

The evidence was sufficient to support the TPR where the appellant's children remained out of the home for more than a year and the conditions that caused removal had not been remedied. Appellant failed to take advantage of the

psychiatric treatment, drug and alcohol abuse treatment and parenting classes, and had repeated positive tests indicating continued cocaine usage. Further, the Arkansas Supreme Court held that assuming that a mother had a due process right to counsel in a proceeding to terminate her parental rights, her request to waive counsel was not unequivocal and, therefore, it would have been error for the trial court to accept that waiver, because her request did not satisfy constitutional standards for the waiver of counsel. **Bearden v. Arkansas Dep't of Human Servs.**, 344 Ark. 317, 42 S.W.3d 397 (2001).

TPR affirmed on the ground that appellant's children had been adjudicated dependent-neglected and had continued out of the home for 12 months and that, despite a meaningful effort by the department to rehabilitate the home and correct the condition that caused removal, those conditions had not been remedied by the mother where she had not managed to consistently maintain her home in a sanitary condition or to acquire a steady job which would have enabled her to provide for her children. There was also evidence that the physical abuse of the children had not ended. **Dinkins v. Arkansas Dep't of Human Servs.**, 344 Ark. 207, 40 S.W.3d 286 (2001).

The termination order was upheld where the children had been out of her home for the majority of their lives, and evidence revealed that appellant failed to provide a home and to demonstrate her ability to adequately parent the children after receiving rehabilitation services for over three years. **Moore v. Arkansas Dep't of Human Servs.**, 69 Ark. App. 1, 9 S.W. 3d 531 (2000).

The termination was upheld where appellant repeatedly failed to comply with the court's orders designed to remedy the situation that caused removal. Any attempts at compliance were sporadic and inconsistent, and her pattern of inconsistent visitation continued to harm the children. Further, a finding by the trial court that appellant was unable to provide her children with the consistency and supervision that they needed was sufficient to show that she was an unfit parent.

Appellant also argued that the trial court erred in not placing her children with her mother; however, the evidence revealed that the grandmother had refused custody initially, failed to visit the children while in foster care, and indicated an unwillingness to take responsibility for her grandchildren. **Baker v. Arkansas Dep't of Human Servs.**, 340 Ark. 42, 12 S.W.3d 201 (2000).

Appellants argued that the termination of parental rights was not based on clear and convincing evidence. Although the petition to terminate parental rights was filed before the 12 month period required by the statute, the order

*was entered after the child had been out of the home for 12 months. The evidence was sufficient to support a finding that DHS made meaningful efforts to rehabilitate the home. The medical evidence indicated that the child's injuries could not have occurred in the manner in which the father testified, and they were inflicted at a time when only the appellants were present with the child. Appellants demonstrated a pattern of abuse that was sufficient to show that return home would be contrary to the child's health and safety, and appellants manifested an indifference to remedy the situation. **Ullom v. Arkansas Dep't. Of Human Servs. 340 Ark. 615, 12 S.W.3d 204 (2000).***

*TPR upheld where DHS offered services for three years; however, appellant failed to participate and failed to rehabilitate her home and the conditions which caused the removal. In addition, the trial court found that appellant's children had been out of the home over 12 months and that the appellant had failed to provide significant material support or to have meaningful contact with them. **Wade v. Arkansas Dep't of Human Servs., 337 Ark. 353, 990 S.W. 2d 509 (1999).***

*On March 10, 1997, the trial court terminated appellant's parental rights finding that the appellant had not remedied the conditions that caused removal; that DHS had made a meaningful effort to rehabilitate the home and correct the conditions that caused removal; that termination of parental rights was in the interest of the children; and that DHS had an appropriate placement plan for the children. There was evidence of appellant's failure to care for the special medical and psychological needs of her children, a condition that was not remedied despite DHS' meaningful efforts of parenting classes, housekeeping services and counseling. The trial court did not commit reversible error in granting the TPR petition because it was filed before both the children were out of the home for more than 12 months. **Donna S. v. Arkansas Dep't. of Human Servs., 61 Ark. App. 235, 966 S.W. 2d 919 (1998).***

Appellant's parental rights were terminated as to her four children; however, her appeal is limited to her two youngest children. The children were first removed in April 1990, returned home in August 1992, and removed again in July 1994. The trial court found the children to be dependent-neglected based on evidence that J.T. had been physically abused and S.T. had been sexually abused and sexually exploited. In December 1994, appellant was found guilty of raping J.T. and in March 1994, she plead nolo contendere to the rape of R.T. In September 1995, DHS filed a petition to terminate parental rights. The grounds supporting termination included that the children had been adjudicated dependent-neglected; the children had been out-of-home for 12 months despite DHS' efforts to rehabilitate the home and correct the conditions

*which caused the removal; and that the conditions which caused removal had not been remedied by the parent. **Thompson v. Arkansas Dep't. of Human Servs.**, 59 Ark. App. 141, 954 S.W. 2d 292 (1997).*

On August 31, 1995, the department filed a petition to terminate parental rights on the ground that the child had resided outside of the home for a period in excess of one year and, that despite meaningful efforts by DHS to rehabilitate the home and correct the conditions which caused the removal, the conditions had not been remedied to the extent that appellant was able to provide for the essential, basic, and emotional needs of the child.

The trial court's finding that the appellant did not have the capacity to be the type of parent the child needed was not clearly erroneous. T.T., who was 13 at the time of the termination hearing, testified that she wanted her mother's parental rights taken away. The mother was diagnosed as being bipolar, experiencing mental states from manic to psychotic to depression. Various professionals testified that T.T. needed an extremely stable environment and that despite the appellant's efforts, she could not give the stability that the minor child needed.

*Appellant challenged the trial court's order because the court did not make a finding of the appellant's unfitness as a parent. The proceeding to terminate parental rights is a two-step process, requiring the court to find the parent unfit and that the termination is in the best interest of the child. Although the court did not actually use the word "unfit," it clearly made a finding that the appellant was unable to be the type of parent that T.T. needed which is a sufficient finding of appellant's unfitness. **J.T. v. Arkansas Dep't of Human Servs.**, 329 Ark. 243, 947 S.W. 2d 761 (1997).*

Appellant's children had been out of her home for over a year and appellant failed to comply with the trial court's orders and to correct the circumstances that caused her children to be removed. Appellant argued that she was unable to avail herself of services while incarcerated. However, appellant failed to comply with the court's orders while incarcerated and for the brief period that she was not incarcerated. In addition, there was evidence that she directly disobeyed the court's orders regarding supervised visitation.

*Imprisonment does not toll a parent's responsibilities towards his or her children. The appropriate inquiry where a parent has been ordered to comply with a court order and is incarcerated is whether the parent utilized resources available to maintain a close relationship. **Malone v. Arkansas Dept. of Human Servs.**, 71 Ark. App. 441, 30 S.W.3d 758 (2000).*

*The trial court's ruling was reversed after appellant successfully argued that DHS failed to prove by clear and convincing evidence that she failed to remedy the conditions that caused the removal. She asserted that she secured a stable residence, maintained regular employment, completed a drug and alcohol assessment, submitted to random drug screens, attended her child's physical therapy and medical appointments, cooperated with parenting classes and consistently exercised her visitation. **Minton v. Arkansas Dept. of Human Servs.**, 72 Ark. App. 290, 34 S.W.3d 776 (2000).*

- (2) The juvenile has lived outside the parent's home for a period of 12 months, and the parent has willfully failed to provide significant material support in accordance with the parent's means or to maintain meaningful contact with juvenile. **Ark. Code Ann. §9-27-341(b)(3)(B)(ii)(a) (Supp. 2007).**
 - (a) Material support consists of either financial contributions or food, shelter, clothing or other necessities when such contribution has been requested by the juvenile's custodian or ordered by the court. **Ark. Code Ann. §9-27-341(b)(3)(B)(ii)(c) (Supp. 2007).**
 - (b) To find willful failure to maintain meaningful contact, it must be shown that parent was not prevented from visiting or having contact with juvenile by juvenile's custodian or other person, taking into account distance of juvenile's placement from parent's home. **Ark. Code Ann. §9-27-341(b)(3)(B)(ii)(b) (Supp. 2007).**
 - (c) It is not necessary that the 12-month period referenced in this subdivision immediately precede the filing of the petition for TPR, or that it be for 12 consecutive months. **Ark. Code Ann. §9-27-341(b)(2)(B)(ii)(d) (Supp. 2007).**

*Circuit court affirmed for finding children out of the father's custody for over 12 month and that he willfully failed to maintain meaningful contact with his children during that time. Appellant was in prison six months of that time and only visited his children two times when he was not in prison. Appellant's argument that he had to move out of state to find work was not persuasive. The Court stated it is for the circuit court to determine appellant's credibility as to the reasons he did not comply with court ordered visitation. **Posey v. Arkansas Dept. Of Human Servs.**, ___ Ark. ___, ___ S.W. ____ (06-1274, September 12, 2007).*

*It was an error for the chancellor to conclude that failure to support constituted an additional ground to terminate where he failed to find that the parent willfully failed to provide support and DHS conceded that it never requested support from appellant. **Dinkins v. Ark. Dep't. Of Human Servs.**, 344 Ark. 207, 40 S.W.3d 286 (2001).*

*Order terminating father's parental rights to four-year-old daughter was not clearly erroneous; evidence that father never took any action to protect daughter from mother's significant usage of illegal drugs and unsafe conditions at mother's residence, that he never asked to intervene in the dependency-neglect case involving his daughter, he failed to avail himself of options to locate daughter, and had seen daughter only twice in past year was clear and convincing evidence that it was in daughter's best interest that her father's parental rights be terminated. **Larscheid v. Arkansas Dep't of Human Servs.**, 343 Ark. 580, 36 S.W.3d 308 (2001).*

*TPR reversed. Appellant argued that while she did not pay the ordered child support, she did bring the child gifts and clothes, maintained a residence where the child could live and paid court fines so that she could provide transportation for her daughter. Appellant did not willfully refuse to pay support and there was no appreciable evidence that appellant had the ability to pay even a nominal amount of support. **Minton v. Arkansas Dept. of Human Servs.**, 72 Ark. App. 290, 34 S.W.3d 776 (2000).*

*Evidence was sufficient to refute the appellant's claim the he maintained meaningful contact with the child. **Jones v. Arkansas Dept. of Human Servs.**, 70 Ark. App. 397, 19 S.W.3d 58 (2000).*

*Father's parental rights were terminated where there was clear and convincing evidence that the two sons lived apart from the father for twelve months and that he failed to provide monetary support for them or to make sufficient contact with them. **Crawford v. Arkansas Dep't. of Human Servs.**, 330 Ark. 152, 951 S.W.2d 310 (1997).*

- (3) The presumptive legal father is not the biological father of the juvenile and the welfare of the juvenile can best be served by terminating the parental rights of the presumptive legal father. **Ark. Code Ann. §9-27-341(b)(3)(B)(iii) (Supp. 2007).**
- (4) Abandonment by the parent. **Ark. Code Ann. §9-27-341(b)(3)(B)(iv) (Supp. 2007).**

- (5) A parent has executed consent to termination of parental rights or adoption of the juvenile, subject to the court's approval. **Ark. Code Ann. §9-27-341(b)(3)(B)(v) (Supp. 2007).**
- (a) A parent may withdraw the consent for termination of parental rights within ten calendar days after it is signed by filing an affidavit with the clerk of the court in the county designated by the consent as the county in which the TPR will take place. **Ark. Code Ann. §9-27-341(g)(1)(A) (Supp. 2007).**
- (b) No fee shall be charged and if the ten day period ends on a weekend or holiday, it may be filed the next working day. **Ark. Code Ann. §9-27-341(g)(1)(B-C) (Supp. 2007).**
- (6) The court has found the juvenile to be a victim or a sibling dependent-neglected as a result of neglect or abuse that could endanger the life of the child, sexual abuse; or sexual exploitation; any of which was perpetrated by the juvenile's parent, parents, step-parent, or step-parents. **Ark. Code Ann. §9-27-341(b)(3)(B)(vi)(a) (Supp. 2007).**

Such findings by the court shall constitute grounds for immediate termination of the parental rights of one or both of the parents. **Ark. Code Ann. §9-27-341(b)(3)(B)(vi)(b) (Supp. 2007).**

*The trial court found by clear and convincing evidence that the child was the victim of abuse that could endanger his life; that he sustained multiple fractures over a period of two to three weeks evidencing Battered Child Syndrome; and that these injuries were perpetrated by the mother and/or father. Appellants argued that the chancellor's finding was clearly erroneous. While they did not deny that the child was abused, they argued that there were others who had access to the child who could have inflicted the abuse. **Gregg v. Arkansas Dep't. of Human Servs., 58 Ark. App. 337, 952 S.W.2d 183 (1997).***

- (7) Subsequent to the filing of the original petition for dependency-neglect, other factors or issues arose which demonstrate that return of the juvenile to the custody of the parent is contrary to the juvenile's health, safety or welfare, and that despite the offer of appropriate family services, the parent has manifested the incapacity or indifference to remedy the subsequent issues or factors or rehabilitate the parent's circumstances, which prevent return of the juvenile to the custody of the parent. **Ark. Code Ann. §9-27-341(b)(3)(B)(vii)(a) (Supp. 2007).**

Appellant argued that there was insufficient evidence to terminate her

parental rights. She also argued that the trial court should not consider other reasons for terminating her rights that were not consistent with the original issue that caused removal. Although the child was initially removed due to appellant's health problems other significant issues arose in the case including lack of progress with her health care and failure to follow her doctor's recommendations, lack of food in the home, her inability to provide a stable home environment, combative behavior and psychological problems, and her inability to follow the court's orders for more than two years. The trial court was correct to consider events and conditions that occurred after the juvenile was removed. Jones v. Arkansas Dep't of Human Servs., 361Ark. 164, 205 S.W. 3d 778 (2005).

- (a) DHS shall make reasonable accommodations in accordance with the Americans with Disabilities Act to parents with disabilities to allow them meaningful access to reunification and family preservation services. **Ark. Code Ann. §9-27-341(b)(3)(B)(vii)(b) (Supp. 2007).**
- (b) For purposes of this subsection, said inability or incapacity to remedy or rehabilitate includes, but is not limited to, mental illness, emotional illness, or mental deficiencies. **Ark. Code Ann. §9-27-341(b)(3)(B)(vii)(c) (Supp. 2007).**

Appellant failed to establish that she was entitled to ADA protection; therefore, any ADA arguments were not preserved for appeal. Appellant did not inform DHS that she was disabled and she did not identify any needed services. Termination was appropriate where the child had been out of the home for twelve months and the conditions that warranted removal had not been remedied by the parent despite DHS' meaningful efforts. Ruble v. Arkansas Dept. of Human Servs., 75 Ark. App. 321, 57 S.W.3d 233 (2001).

Appellant lacked standing to raise the issue of whether Ark. Code Ann. § 9-27-341(b)(2)(E) creates an unconstitutional presumption that the mentally ill have the inability to rehabilitate their circumstances. The trial court's order specifically stated that appellant had the mental capacity to remedy her conditions and that termination was not granted under this subsection. Appellant lacked standing to challenge the constitutionality of a statute where it was not applied in a discriminatory manner. Donna S. v. Arkansas Dep't. of Human Servs., 61 Ark. App. 235, 966 S.W. 2d 919 (1998).

Parent failed to demonstrate that her rights pursuant to the

Americans with Disabilities Act, 42 U.S.C. §12132, were violated when she was denied visitation with her child and her parental rights were terminated, where parent was not denied any services on the basis of her mental disability, but denial of visitation and termination of parental rights was based solely on the best interests of the child. The A.D.A. must be subordinated to protect the rights of the child. J.T. v. Arkansas Dep't. of Human Servs., 329 Ark. 243, 947 S.W.2d 761 (1997).

- (8) The parent is sentenced in a criminal proceeding for a period of time which would constitute a substantial period of the juvenile's life. **Ark. Code Ann. §9-27-341(b)(3)(B)(viii) (Supp. 2007).**

Parent had been sentenced in a criminal proceeding to 40 years, a substantial period of time as set forth in the statute. Thompson v. Arkansas Dep't. of Human Servs., 59 Ark. App. 141, 954 S.W. 2d 292 (1997).

- (9) The parent is found by a court of competent jurisdiction, including the juvenile division of circuit court, to have:
- (a) committed murder or voluntary manslaughter of any child; or **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(1) (Supp. 2007).**
 - (b) to have aided or abetted, attempted, conspired, or solicited to commit such murder or voluntary manslaughter. **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(1) (Supp. 2007).**

Termination upheld where trial court found that each parent as either an offender or as an accomplice committed a felony battery against another child that resulted in the child's death. Both appellants challenged the sufficiency of the evidence. Appellant Nelson also argued that DHS failed to prove the grounds for termination and that the court erred in not giving her a year to remedy the situation that caused removal.

The termination was granted as to the appellant's child after Nelson's grandchild was seriously injured in their home and died as a result. Todd was charged with capital murder and after testimony from the termination hearing the court found that each parent, either as the offender or as an accomplice, had committed a felony battery against the child resulting in the

child's death. The doctor's testimony concerning the time and extent of the injuries supported the court's conclusion that Nelson was in the home when the injuries were inflicted, despite her testimony otherwise. Further, the statutory ground relied on in this case allowed for immediate termination. Todd and Nelson v. Arkansas Dep't of Human Servs., 85 Ark. App. 174, 151 S.W. 3d 315 (2004).

- (c) to have committed a felony battery or assault that results in serious bodily injury to any child or to have aided or abetted, attempted, conspired, or solicited such a felony battery that results in serious bodily injury; **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(2) (Supp. 2007).**

A juvenile court is a court of competent jurisdiction to determine that a parent committed a felony assault that results in serious bodily injury to the child. A criminal conviction is not required. Brewer v. Ark. Dep't. Of Human Servs., 71 Ark. App. 364, 32 S.W.3d 22 (2001).

Nothing in this chapter shall be construed to require reunification of a surviving child with a parent who has been found guilty of any of the offenses listed. **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(b) (Supp. 2007).**

- (d) to have subjected the child to aggravated circumstances:
 - (i) a child being abandoned; **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(3)(i) (Supp. 2007).**
 - (ii) a child being chronically abused; **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(3)(i) (Supp. 2007).**
 - (iii) a child being subjected to extreme or repeated cruelty or sexual abuse; **Ark. Code Ann. §9-27-41(b)(3)(B)(ix)(a)(3)(i) (Supp. 2007).**

TPR affirmed. Appellant argued that the circuit court erred in basing the TPR finding upon on an issue unrelated to the original adjudication order and that there was insufficient evidence to support the finding that he sexually abused his child. The child was originally adjudicated dependent-neglected for educational neglect;

however, during the case the child disclosed sexual abuse and testified to such at a hearing, along with other witnesses including the investigator. DHHS filed for TPR on three grounds, including aggravated circumstances subjecting a child to sexual abuse.

*The appellate court noted that the circuit court made explicit findings that the child's statements were credible along with other testimony at the TPR hearing sufficient to establish that the appellant perpetrated sexual abuse. **Albright v. Arkansas Dep't of Human Servs., 97 Ark. App. 277, ___ S.W. 3d ___ (2007).***

- (iv) a determination by a judge that there is little likelihood that services to the family will result in successful reunification; or **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(3)(i) (Supp. 2007).**

*Appellant argued that the trial court erred in finding that the children had been subject to aggravated circumstances; specifically that the "trial court found that there was little likelihood that services to the family would result in successful reunification." The Court found no error where the parent engaged in repeated cruelty to her children, including physical abuse and failure to protect from physical abuse from a boy-friend. Appellant was offered repeated assistance in Arkansas and Louisiana yet she failed to avail herself to services, gain employment over a two-year period, complete a GED, or comply with the case plan goals. Her lack of progress demonstrated that despite the offer of services there was little likelihood it would result in reunification with her children. **Davis v. v. Arkansas Dep't of Human Servs., 98 Ark. App. 275, ___ S.W. 3d ___ (2007).***

TPR affirmed based on aggravated circumstances, that there is little likelihood that the services to the family will result in successful reunification. The trial court made eight specific findings of fact to

*support the TPR ruling. The only challenge made by the appellants was to the finding that the mother had been in counseling for nine years to no effect, despite direct evidence that supported this finding at the TPR provided by Dr. DeYoub, the caseworker, and the mother's older daughter. **Yarborough v. Arkansas Dep't. of Human Servs., 96 Ark. App. 247, ___ S.W. 3d ___ (2006).***

*The trial court's finding of TPR based on aggravated circumstances as to W. was affirmed based on either the fact that appellant's rights had been involuntarily terminated as to D. (W.'s older sibling) or the determination by the judge that there was little likelihood that services to the family would result in successful reunification. The court noted that the case had gone on for more than two years and its resolution was long overdue, especially in light of the convincing evidence that appellant failed to remedy the serious problems that caused her children's removal. **Trout v. Arkansas Dep't of Human Servs., 359 Ark. 283, 197 S.W. 3d 486 (2004).***

(v) a child has been removed from the custody of the parent or guardian and placed in foster care or the custody of another person three times in the last fifteen months. **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(3)(ii) (Supp. 2007).**

(e) had parental rights involuntarily terminated as to a sibling of the child, or **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(4) (Supp. 2007).**

The trial court's finding of TPR based on aggravated circumstances as to W. was affirmed based on either the fact that appellant's rights had been involuntarily terminated as to D. (W.'s older sibling) or the determination by the judge that there was little likelihood that services to the family would result in successful reunification. The court noted that the case had gone on for more than two years and its resolution was long overdue, especially in light of the convincing evidence that appellant failed to remedy the serious

problems that caused her children's removal. Trout v. Arkansas Dep't of Human Servs., 359 Ark. 283, 197 S.W. 3d 486 (2004).

Appellant argued that the trial court erred in using a previous termination of parental rights as a basis for terminating parental rights of another child because the prior termination was pending on appeal. The appellate court affirmed the trial court stating that the appellate review is de novo conducted on a record already made and is not a trial de novo where cases are tried anew. Paslay v. Arkansas Dep't of Human Servs., 343 Ark. 580, 36 S.W. 3d 308 (2001).

- (f) abandoned an infant, as defined in Ark. Code Ann. § 9-27-303(1) (Supp. 2007). **Ark. Code Ann. §9-27-341(b)(3)(B)(ix)(a)(5) (Supp. 2007).**

7. Effect of TPR Order

- a. Terminates the parent-child relationship and divests parent and juvenile of all legal rights, powers, and obligations between each other, including the right to withhold consent to adoption. **Ark. Code Ann. §9-27-341(c)(1) (Supp. 2007).**

Grandmother's rights are derivative of her daughter's parental rights and as a result were terminated. Consequently, the grandmother did not have a recognized interest in the subject matter of the adoption to warrant her intervention as a matter of right. Suster v. Arkansas Dep't. of Human Servs., 314 Ark. 92, 858 S.W.2d 122 (1993).

- b. Juvenile's right to inherit from the parent is not terminated until a final order of adoption is entered. **Ark. Code Ann. §9-27-341(c)(1) (Supp. 2007).**
- c. Termination of one parental relationship shall not affect the relationship between the other parent and the juvenile, if rights have been legally established.
 - (1) If no legal rights have been established, the putative parent must prove that significant contacts existed with the juvenile in order for such rights to attach. **Ark. Code Ann. §9-27-341(c)(2)(A)(i-ii) (Supp. 2007).**
 - (2) When the petitioner has actual knowledge that an individual is claiming to be or is named as the putative parent of the juvenile and the paternity of the juvenile has not been judicially

determined, the individual is entitled to notice of the petition to terminate parental rights. **Ark. Code Ann. §9-27-341(c)(2)(B)(i) (Supp. 2007).**

- (3) Putative parent notice shall:
- (a) identify the rights sought to be terminated and those which may be terminated; and
 - (b) specify that the putative parent must prove that significant contacts existed with the juvenile for the putative parent's rights to attach. **Ark. Code Ann. §9-27-341(c)(2)(B)(ii-iii) (Supp. 2007).**
- d. TPR order may authorize DHS to consent to adoption of the juvenile. **Ark. Code Ann. §9-27-341(c)(3) (Supp. 2007).**

DHS testified that it was unwilling to consent to the adoption for numerous concerns which the court found were well reasoned, appropriate and in good faith.” The trial court found that the appellants had not met the burden of proof by clear and convincing evidence that the adoption was in the children’s best interests and stated specific facts to support this finding.

The Court of Appeals limited its review to the findings of the trial court discounting any finding based on the trial court’s conclusion that it should give some deference to DHS’ refusal to consent to the adoption. The factual findings of the trial court were sufficient to support a finding of the children’s best interest and DHS’ consent was not addressed. Luebker v. Arkansas Dep’t of Human Servs., 93 Ark. App. 173, 217 S.W.3d 172 (2005).

- e. A TPR order does not preclude adoptive parents from allowing contact between an adopted child and the birth sibling or other birth family members. **Ark. Code Ann. §9-27-341(c)(4) (Supp. 2007).**
- f. Sibling visitation shall not terminate if the adopted child was in the custody of DHS and had a sibling who was not adopted by the same family, and before the adoption the circuit court in the dependency-neglect case or the FINS case determined that it was in the best interest of the siblings to continue visitation and ordered sibling visitation to continue after the adoption. **Ark. Code Ann. §9-9-215(c) (Supp. 2007).**

J. Post-Termination of Parental Rights Review Hearings

1. Purpose

- a. Court shall determine if case plan, services, and placement meet the special needs and best interest of the child;
- b. Court shall determine if DHS has made reasonable efforts to finalize an appropriate permanent placement for the juvenile; and
- c. Court shall determine if the case plan is moving toward an appropriate permanency plan for the juvenile. **Ark. Code Ann. §9-27-360(b) (Supp. 2007).**

2. Time Constraints

- a. Hearings shall be held at least six months following an order for termination of parental rights when the goal is adoption and in all other cases six months until permanency is achieved. **Ark. Code Ann. §9-27-360(a) (Supp. 2007).**
- b. DHS and a CASA, if appointed, shall file a court report with the court, including a certificate of service that the report has been submitted to all parties and the CASA volunteer, if appointed, seven business days prior to the scheduled review hearing. **Ark. Code Ann. §9-27-361(a)(1) (Supp. 2007).**
- c. A written order shall be filed and distributed to the parties within 30 days of the date of the hearing or prior to the next hearing, whichever is sooner. **Ark. Code Ann. §9-27-360(d) (Supp. 2007).**

3. Court Reports

- a. The DHS court report shall include a summary of the parties' compliance with the court orders and case plan, including a description of services and assistance the department has provided and recommendations to the court. **Ark. Code Ann. § 9-27-361(a)(2)(A) (Supp. 2007).**

- b. The CASA report shall include but not be limited to:
 - (1) any independent factual information that he/she feels is relevant to the case;
 - (2) a summary of the parties' compliance with the court orders; and
 - (3) recommendations to the court. **Ark. Code Ann. § 9-27-361(a)(2)(B)(3) (Supp. 2007).**
- c. At the review hearing the court shall determine on the record whether the previously filed reports or addendum reports shall be admitted into evidence based on any evidentiary objections made by the parties. The court shall not consider as evidence any report, part of a report, or addendum report that was not admitted into evidence on the record. **Ark. Code Ann. § 9-27-361(a)(4)(A-B) (Supp. 2007); Ark. Code Ann. § 9-27-361(c) (Supp. 2007).**

4. Court Findings

- a. At the Post-TPR Hearing the court shall determine and include in its orders the following:
 - (1) Whether the case plan, services, and current placement meet the special needs and best interest of the juvenile, with the juvenile's health, safety and education specifically addressed; **Ark. Code Ann. § 9-27-360(b)(1) (Supp. 2007).**
 - (2) Whether DHS has made reasonable efforts to finalize a permanency plan for the child; and **Ark. Code Ann. § 9-27-360(b)(2) (Supp. 2007).**
 - (3) Whether the case plan is moving toward and appropriate permanency plan pursuant to A.C.A. §9-27-338. **Ark. Code Ann. § 9-27-360(b)(3) (Supp. 2007).**
- b. The court shall consider extent of parties' compliance with case plan and court orders to finalize the permanency plan. **Ark. Code Ann. § 9-27-360(c) (Supp. 2007).**

XVII. APPEALS

A. Generally

1. Appeal shall be made to the Arkansas Supreme Court or Arkansas Court of Appeals in same time and manner as provided for appeals from circuit court. **Ark. Code Ann. §9-27-343(a)(Supp. 2005); Administrative Order Number 14.**

DHHS appealed arguing that the trial court erred in its disposition concerning custody of the children and in failing to issue findings of fact and conclusions of law as requested by DHHS pursuant to Ark. R. Civ. P. 52. Appeal dismissed because the appellate court lacked jurisdiction due to DHHS' failure to file a timely appeal. On March 11, 2005, the trial court announced its ruling at which time DHHS objected to the custody of the children. On March 28, DHHS filed a motion under Ark. R. Civ. P. 52 (a) requesting the court to "set forth separate written findings of fact and conclusions of law." Within an hour of the motion's filing, the trial court set forth 14 specific findings in an adjudication order. On May 11, 2005, DHHS filed a notice of appeal of the adjudication order, stating that their motion for findings of fact was deemed denied on April 27, 2005.

*The Court of Appeals held that the time to appeal was not tolled by the Rule 52 motion made on March 28. The court distinguished a Rule 52(a) motion from a Rule 52(b) motion and found that DHHS' motion was made under Rule 52(a). Ark. R. Civ. P. 52 was amended in 2004 to specifically provide that motions for findings of facts and conclusions of law made before the entry of judgment are made under Rule 52(a), while Rule 52(b) is reserved for motions or requests made not later than ten days after entry of judgment which ask for amended or additional findings of fact. The appellate court also noted that it disagreed with DHHS assertion that the 52(a) motion was "deemed denied" on April 27. Instead of denying the motion, the trial court entered 14 written findings of fact and conclusions of law; the relief DHHS requested. If DHHS was dissatisfied with findings made by the trial court it was incumbent upon them to move for additional findings or amended findings within 10 days as provided in Rule 52(b). **Arkansas Dep't of Human Servs v. Dix, 94 Ark. App. 139, 227 S.W.3d 456 (2006).***

*Putative father appealed termination arguing that adequate reunification efforts were not provided. The Court did not address this argument because it was not argued before the trial court. The Court further stated that even in a case involving termination of parental rights, where constitutional issues are not argued below, we will not consider arguments for the first time on appeal. **Myers v. Arkansas Dep't of Human Servs., 91 Ark. App. 53, 208 S.W.3d 241 (2005).***

*Appellants failure to file their record in a timely manner procedurally precluded them from pursuing their appeal. **Ulmon v. Arkansas Dep't. Of Human Servs., 340 Ark. 615, 12 S.W.3d 204 (2000).***

*Failure to renew a directed-verdict motion at the conclusion of all the evidence precludes appellate review of the challenge to the sufficiency of the evidence. **Trammel v. State, 70 Ark. App. 210,16 S.W.3d 564 (2000).***

*Probable cause emergency hearing orders are not final and appealable. **Dover v. Arkansas Dep't. of Human Servs., 62 Ark. App. 37, 968 S.W.2d 635 (1998); Johnston v. State, 55 Ark. App. 392, 935 S.W.2d 989 (1996).***

*DHS, although not a party to the original case, had standing to appeal because it first sought relief from the trial court by filing a motion to set aside its September 30 order and DHS had a final judgement to appeal when the court entered its order denying DHS' motion to set aside. **Arkansas Dep't of Human Servs. v. R.P., 333 Ark. 516, 970 S.W. 2d 235 (1998).***

*DHS' appeal of the juvenile court's order to place a juvenile in DHS custody at a detention hearing was dismissed for lack of standing. Any relief to which DHS must be entitled must be afforded to the trial court. If DHS contends that the juvenile court is without jurisdiction to place the juvenile in its custody or has exercised a power not authorized by law, its remedy is to seek relief by way of a collateral attack upon the judgement through a writ of prohibition or a petition for writ of certiorari. **Arkansas Dep't of Human Servs. v. Strickland, 62 Ark. App. 215, 970 S.W. 2d 311 (1998).***

*The court issued a number of orders in a FINS case, and in one ordered DHS to pay for the cost of treatment for a period of time during which Medicaid was denied. DHS is precluded from appealing because it was not a party to the litigation. Its appearances and involvement were pursuant to its obligations under the Juvenile Code, and it entered no appearance by any type of pleading until after the case had been dismissed. **Arkansas Dep't. of Human Servs. v. Bailey, 318 Ark. 374, 885 S.W.2d (1994).***

Appellant appealed the court's order denying his second motion for a new trial. A notice of appeal must be filed within the prescribed time, dated from the entry of the order dealing with the post-trial motion or from the expiration of the thirty days allowed in the absence of a ruling. The appellant's second notice of appeal was filed exactly 30 days after his post-trial motion for a new trial was filed. The court held that the trial court retains jurisdiction of a post-trial motion until the end of the

thirtieth day. A notice of appeal filed before the expiration of the thirty-day period has no effect under Arkansas Rule of Appellate Procedure 4(c). Glover v. Langford, 49 Ark. App. 30, 894 S.W.2d (1995).

The juvenile appealed an order of the juvenile court that granted the state's motion to nol pros three counts of committing a terroristic act. The Arkansas Court of Appeals stated that no appeal can be taken from an order to nolle prosequi because under Arkansas Rule of Criminal Procedure 36.1 only a person convicted of a crime has the right to appeal. Webb v. State, 48 Ark. App. 216, 893 S.W.2d 357 (1995).

B. Delinquency

Petitioner may appeal only under circumstances that would permit the state to appeal in criminal proceedings **Ark. Code Ann. §9-27-343(b) (Supp. 2005)**

Court applied the Contemporaneous Objection Rule holding that it will not consider arguments on appeal that were not raised in the trial court. McClure v. State, 328 Ark. 35, 942 S.W.2d 243 (1997).

The Arkansas Supreme Court held that the provisions of Anders v. California, 386 U.S. 738 (1967), which protect an adult appellant's right to counsel on appeal, apply also to an appeal of an adjudication of juvenile delinquency. Gilliam v. State, 305 Ark. 438, 808 S.W.2d 738 (1991) (per curiam).

An appeal of a pre-adjudication detention order is not a final order; therefore, it is not appealable. K.W. v. State, 327 Ark. 205, 937 S.W.2d 658 (1997).

C. Waiver & Transfers

Waiver and transfer decision is an appealable order **Ark. Code Ann. §9-27-318(l) (Supp. 2005).**

The appellate standard of review in juvenile transfer matters is whether the circuit court's motion to transfer was clearly erroneous. Landrum v. State, 63 Ark. App. 12 (1998); Heagerty v. State, 62 Ark. App. 283, 971 S.W. 2d 793 (1998); Jones v. State, 332 Ark. 617, 967 S.W.2d 559 (1998).

The court adopted a prospective rule that an appeal from an order concerning a juvenile transfer from one court to another court with jurisdiction must be considered by way of an

*interlocutory appeal. A juvenile cannot challenge transfer orders from juvenile to circuit court on direct appeal from a judgment or conviction of the circuit court. **Hamilton v. State, 320 Ark. 346, 896 S.W. 2d 877 (1995); Sims v. State, 320 Ark. 528, 900 S.W.2d 508 (1995).***

*Appeal did not satisfy Rule 36.10, which requires prejudicial error. **State v. Gray, 319 Ark. 356, 891 S.W.2d 376 (1995).***

D. Dependency-Neglect Appeals

*Effective July 1, 2007, the Arkansas Public Defender Commission shall serve as appellate counsel for parties found by the Circuit Court to be indigent for purposes of appeal in dependency-neglect proceedings. Notwithstanding the transfer of these appeals to the Arkansas Public Defender Commission, it will continue to be the responsibility of trial counsel to file all notices of appeals in compliance with Arkansas Supreme Court Rule 6-9-(b). It shall also be the responsibility of trial counsel to serve on the Arkansas Public Defender Commission within twenty-four (24) hours of filing the notice of appeal with the Circuit Clerk a file-marked copy of the notice of appeal and the order or orders that are being appealed. Service on the Arkansas Public Defender Commission may be effectuated by electronic submission. Upon receipt of the notice of appeal and orders being appealed, the Arkansas Public Defender Commission shall send a confirmation of receipt to trial counsel. This confirmation will operate to relieve trial counsel of representation of the client for the limited purpose of appeal, and no motion to be relieved as counsel need be filed with the appellate court. **Per Curiam (June 27, 2007)***

1. The following orders may be appealed from any dependency-neglect proceeding:
 - a. adjudication order;
 - b. disposition, review, and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R.Civ. P., Rule 54(b);
 - c. termination of parental rights, and
 - d. denial of the right to appointed counsel pursuant to Ark. Code Ann. 9-27-316(h). **Supreme Court, Rule 6-9(a).**
2. Time Constraints

- a. Notice of appeal shall be filed within 14 days from the entry of the circuit court order from which the appeal is taken. **Supreme Court, Rule 6-**
 - b. Any other party may file a notice of cross-appeal and designation of the record within five days from receipt of the notice of appeal. **Supreme Court, Rule 6-9(b)(2)(E).**
 - c. If appellant alleges indigency for purposes of appeal, the appellant must request an indigency hearing within seven days of the entry of the order from which the appeal is taken. **Supreme Court, Rule 6-9(b)(2)(A).**
 - d. The record for appeal shall be filed with the Clerk of the Supreme Court within 70 days of the notice of appeal. The court reporter shall provide the record to the circuit clerk within 60 days of the notice of appeal and the circuit clerk shall have five days to prepare the record. **Supreme Court, Rule 6-9(d).**
 - e. Appellant shall file a petition for appeal or cross appeal within 20 days after transmission of the record to the Clerk of the Supreme Court. **Supreme Court, Rule 6-9(e)(1).**
 - f. The Appellee may file a response to the petition or cross-appeal within 20 days after the filing of the appellant's petition on appeal. **Supreme Court, Rule 6-9(f).**
 - g. Appellant and appellee have 10 days for reply to the response or cross appeal. **Supreme Court, Rule 6-9(f)(3-4).**
 - h. Petitions for rehearing or review with the Supreme Court shall be filed within five days. **Supreme Court, Rule 6-9(i).**
3. The record for appeal shall be limited to the transcript of the hearing from which the order on appeal arose, any petitions, pleadings, and orders relevant to the hearing and all exhibits entered into evidence at that that hearing. **Supreme Court, Rule 6-9(c)(1).**

*The TPR hearing was held on 6/15/2006 and the TPR order was entered on 7/13/2006 after Ark. Sup. Ct. R. 6-9 became effective. DHHS alleged the appellant's record was deficient because he did not include all relevant orders in the record. The Court found that the "rules limit the "entire record" to the transcript of the termination from the which the termination order on appeal arose; any petitions, pleadings, and orders relevant to the termination hearing and all exhibits entered into evidence at the termination hearing. Ark. Sup. Ct. R. 6-9(c)(1)." All orders relied upon by the circuit court are relevant. The burden is on the appellant to file a proper record to demonstrate that the trial court was in error. Appellant's failure to do so resulted in a dismissal of the appeal. **Busbee v. Arkansas Dept. of Human Servs., 369 Ark 416 ___ S.W. 3d ___ (2007).***

4. The petition (Form 2) shall not exceed twenty pages, excluding the abstract and addendum, and shall be bound and include:
 - a. A statement of the nature of the case and the relief sought;
 - b. A concise statement of the material facts as they relate to the issues presented in the petition on appeal that is sufficient to enable the appellate court to understand the nature of the case, the general fact situation, and the action taken by the circuit court;
 - c. An abstract or abridgment of the transcript that consists of an impartial condensation of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the court for decision;
 - d. A concise statement of the legal issues presented for appeal, including a statement of how the issues arose; and a discussion of the legal authority on which the party is relying with citation to supporting statutes, case law, or other legal authority for the issues raised;
 - e. An addendum which shall include true and legible photocopies of the order, judgment, decree, ruling, or letter opinion from which the appeal is taken, a copy of the notice of appeal, and any other relevant pleadings, documents, or exhibits essential to an understanding of the case. . **Supreme Court, Rule 6-9(e).**

5. The response (Form 3) to the petition or cross appeal shall be bound and not exceed twenty pages, excluding the abstract and addendum and shall include:
 - a. A concise statement of the material facts as they relate to the issues presented by the appellant, as well as the issues, if any, being raised by the appellee on cross-appeal, that is sufficient to enable the appellate court to understand the nature of the case, the general fact situation, and the action taken by the circuit court;
 - b. A concise response to the legal issues presented on appeal and cross-appeal, if any, including a statement of how the issue arose; a discussion of the legal authority on which the party is relying with citation to supporting statutes, case law, or other legal authority for the issues raised; and
 - c. If the appellee considers the appellant's abstract or addendum to be defective or incomplete, the appellee may provide a supplemental abstract or addendum. The appellee's addendum shall only include an

item which the appellant's addendum fails to include. **Supreme Court, Rule 6-9(f).**

6. Trial counsel shall continue to represent his/her client in a dependency-neglect case throughout any appeal, unless permitted by the trial court or appellate court to withdraw. After the notice of the appeal has been filed the appellate court shall have exclusive jurisdiction to relive counsel and appoint new counsel for appeal. **Supreme Court, Rule 6-10(a).**
 - a. The date of appointment;
 - b. The court which appointed counsel;
 - c. The number of hours expended by counsel in research and court appearances and preparation of pleadings and petitions for appeals;
 - d. An itemization of the expenses incurred by counsel which are directly attributable to the case; and
 - e. The relative complexity of the case. **Supreme Court, Rule 6-10(a).**

E. Out-of-Home Placements

1. Pending a review from any case involving a juvenile out-of-home placement, the juvenile court retains jurisdiction to conduct review hearings. **Arkansas Rules of Appellate Procedure, Rule 2(c).**
2. In juvenile cases where an out-of-home placement has been ordered, the following orders are final appealable orders and shall be expedited with respect to civil cases:
 - a. adjudication and disposition;
 - b. review and permanency planning hearings if the court directs entry of a final judgement as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R.Civ. P., Rule 54(b); and
 - c. termination of parental rights. **Arkansas Rules of Appellate Procedure, Rule 2(c) and (e)**

At a termination hearing, testimony was presented that the appellant was pregnant and continued to use drugs. Appellant was not present but was represented by counsel. The court terminated parental rights and found that she was placing an unborn child at risk of imminent harm due to her drug use. The judge issued a pick-up order for appellant. The judge conducted a hearing in which appellant was present but unrepresented for criminal contempt because of her continued drug use in violation of the court's previous orders to

remain drug free. The judge placed appellant in custody until she went into labor and placed the unborn fetus in DHS custody.

The termination order was a final order. The judge lost jurisdiction over the appellant to hold her in contempt for not remaining drug free once appellant's rights were terminated. Since the judge had no jurisdiction the Court's stay of her order was appropriate and a writ of habeas corpus was issued. **Bennett v. Collier, 351 Ark. 447, 95 S.W. 3d 782 (2003).**

DHS petitioned the court for writ of prohibition or in the alternative a writ of certiorari to vacate the court's order placing an unborn fetus in DHS custody and ordering DHS to pay for prenatal care. A writ of prohibition is not appropriate because the court had already taken the action sought to be prohibited.

The juvenile code defines a juvenile as an individual from birth to the age of 18. An unborn fetus does not fall within this definition. A writ of certiorari was granted because the judge exceeded her statutory authority by declaring the fetus to be dependent-neglected, placing the fetus in DHS custody and ordering prenatal care. **Arkansas Dep't of Human Servs. v. Collier, 351 Ark. 380, 92 S.W. 3d 683 (2003).**

Order in proceeding to terminate parental rights was not "final" and therefore it was not appealable; the order merely found that Department of Human Services had proven that the children had been sexually abused by their stepfather, but it did not terminate parental rights Rule 2 (c) Rules of Appellate Procedure-Civil address juvenile appealable matters. The order appealed did not arise from an appealable order pursuant to Rule 2(c) and is dismissed for lack of jurisdiction. **Foreman v. Arkansas Dep't. Of Human Servs., 78 Ark. App. 48, 82 S.W. 3d 176 (2002).**

Appellant argued that the trial court erred in finding that DHS made reasonable efforts to prevent the initial removal following the adjudication and that DHS made reasonable efforts to provide reunification services at the disposition hearing. The Arkansas Rules of Appellate Procedure -- Civil 2(c)(3) provides that orders resulting from adjudication and disposition are final appealable orders where an out-of-home placement has been ordered; however, appellant failed to appeal those orders. Consequently, the Court had no jurisdiction to address the first two issues of her appeal. **Moore v. Arkansas Dep't of Human Servs., 69 Ark. App. 1, 9 S.W. 3d 531 (2000).**

In this motion for attorney's fees pursuant to representation in a termination of parental rights appeal, the attorney did not offer any authority or convincing argument in support of his contention that the appellate court is the proper forum to grant him attorney's fees for his court-appointed representation of an indigent parent in a civil appeal. Arguments

*unsupported by convincing legal authority unless apparent without further research are not well taken. **Webber and Webber v. DHS, 334 Ark. 527, 975 S.W.2d 829 (1998).***

*In a concurring per curiam order the court granted a motion for the appellant to proceed in forma pauperis; however, attorney fees were not granted. The court noted a conflict in case law and stated that the Supreme Court can give direction to attorneys as to whether or not they will be paid for appellate representation of parents who lose their parental rights. **Phillips and Phillips v. Arkansas Dep't. Of Human Servs., 64 Ark. App. 201, 980 S.W.2d 276 (1998)***

F. No-Merit Briefs

The Court of Appeals certified the case to the Supreme Court to decide if DHS is required to submit a reply brief as required under Ark. Supr. Ct R. 4-3(j)(3) and (6-9). The current rule for no-merit briefs in termination of parental rights cases does not expressly require DHS to file a reply brief.

*Although appellant argued ineffective assistance of counsel, e failed to show prejudice resulted from counsel's actions. The failure to complete services was due to appellant's lack of cooperation. Counsel continually assert appellant's goal of reunification even asking for more time. Review of the transcript indicates that counsel repeatedly questioned witnesses and appellant in such a way to bolster his case. Counsel's motion to withdraw was granted. **Posey v. Arkansas Dept. of Human Servs., ___ Ark. ___ (No. 06-1274 September 12, 2007)***

This is a no-merit brief and a motion to withdraw as counsel filed in accord with Linker-Flores v. Arkansas Dep't of Human Servs., 324 Ark. 224,217 S.W.3d 107 (2005) (Linker-Flores I) and Ark. Sup. Ct. R. 4-3(j)(1). The child came into foster care as a result of a methamphetamine lab raid. A makeshift lab was found in a closet in a room adjacent to the one in which the child slept. At the time of the termination hearing the mother was incarcerated. At the TPR hearing, appellant's attorney filed for a continuance due to her failure to have her client transported from prison to the hearing, but instead, the appellant's testimony was taken via telephone.

Linker-Flores I sets forth the no-merit procedure in termination of parental right appeals. The attorney may petition to withdraw only after a conscientious review of the record in which counsel can find no issue of arguable merit for appeal. Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. The Court of Appeals cited Linker-Flores II and Lewis . In the Lewis case, the Supreme Court held that: "a conscientious review of the record requires the appellate court to review all pleadings and testimony in the case on the question of sufficiency of the evidence supporting the decision to termination when the trial court has taken the prior record into

consideration in its decision.” The Supreme Court further held that only adverse rulings arising at the termination hearing need be addressed . . . because the prior orders are considered final appealable orders pursuant to Ark. R. App. P. – Civil (2)(c)(3).

The trial court’s findings constituted more than clear and convincing evidence to terminate parental rights. The only other adverse ruling of the trial court was the denial of the motion for a continuance. TPR affirmed and counsel’s motion to withdraw granted. **Smith v. Arkansas Dep’t of Human Servs., 93 Ark. App. 395, 219 S.W.3d 705 (2005)**

The Court of Appeals ordered re-briefing in accord with *Linker-Flores v. Arkansas Dep’t of Human Servs.*, 364 Ark., 217 S.W.3d 107 (2005) (*Linker-Flores II*) to address the adverse rulings made at the termination of parental rights hearing. The attorney petitioned the court to reconsider re-briefing and filed an attachment to her petition that specifically addressed all the adverse rulings in the termination hearing, indicating that they had no merit for appeals purposes. The Court of Appeals treated the attorney’s petition as a petition for rehearing. After a review of the record and all adverse rulings, we affirm without rebriefing and grant the attorney’s petition to withdraw as counsel. **Causer v. Arkansas Dep’t of Human Servs., 93 Ark. App. 483, 220 S.W.3d 270 (2005).**

Flores I, was the first time the Court addressed the specific procedures required for a termination of parental rights no-merit brief. The Supreme Court stated that under Ark. Sup. Ct. R 4-3(j), no-merit briefs in termination of parental rights cases shall include an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. In this case in review of the TPR hearing the record revealed three adverse ruling that were not abstracted or included in the argument section. The Court addressed each of these rulings and found no error. However, the Court stated that if a no-merit brief fails to address all adverse rulings the Court will send it back for rebriefing, but it wanted to avoid further delay in this case.

The only issue presented in the no-merit brief filed by counsel was whether there was clear and convincing evidence to support the termination. The parent counsel’s motion to withdraw was granted and the TPR was affirmed. Appellant failed to remedy the situation that caused her children to come into care despite DHS’ meaningful efforts to rehabilitate the home and correct the conditions that caused removal. Appellant failed to maintain stable housing, blamed her children for DHS involvement, had numerous interruptions in therapy due to multiple incarcerations, and was incarcerated again at the time of the termination hearing. She failed to protect her children from abuse and when she eventually acknowledged their abuse one doctor testified that she had “no idea whatsoever of the magnitude of the abuse.”

The Court also requested the Arkansas Supreme Court Ad Hoc Committee on Foster Care and Adoption to make recommendations for changes in the court’s rules of appellate

procedure to expedite these appeals. Linker-Flores v. Arkansas Dep't of Human Servs., 359 Ark.131, 194 S.W.3d 739 (2005) (Linker-Flores I); Linker-Flores v. Arkansas Dep't of Human Servs., 364 Ark. 224, 217 S.W.3d 107 (2005) (Linker-Flores II)

This case was certified from the Court of Appeals to address the issue of whether the no-merit brief must address all adverse ruling in all the hearings or just the TPR hearing. The first question is whether the list of all rulings adverse to the defendant specified under Ark. Sup. Ct Rule 4-3(j)(1) includes all hearings in the record or only the termination hearing. Under the rules of appellate procedure, specifically Ark. R. App. P. - Civ. 2(c)(3), the review of the record for adverse rulings is limited to the termination hearing, because a party is entitled to appeal final orders from the adjudication, review and permanency planning hearings.

However, a conscientious review of the record under Linker-Flores III requires the Court to examine all evidence from all hearings and proceedings in the case when the trial court takes judicial notice and incorporates by reference into the record at the termination hearing all pleadings and testimony in the case that occurred before the termination hearing.

Under Ark. Sup. Ct. R. 4-3(j), no-merit briefs in termination of parental rights cases shall include an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. In this case, a review of the TPR hearing record revealed four adverse rulings that were not abstracted or included in the argument section. The Court addressed each of these rulings in turn and found no error, but noted that if a no-merit brief fails to address all adverse rulings the Court will send it back for rebriefing.

TPR affirmed and attorney's motion to withdraw was granted. There was clear and convincing evidence that the children had been correctly adjudicated dependent-neglected. The children continued out of the parents' home for 17 months despite DHS efforts to provide services to remedy the situation. The father failed to rehabilitate the condition that caused removal in a reasonable amount of time and manifested an incapacity and indifference to remedy the conditions that caused removal, including failing to maintain stable housing and employment, provide child support, or comply with the orders of the court. Lewis v. Arkansas Dep't of Human Servs., 364 Ark. 243, 217 S.W.3d 788 (2005).

The trial court terminated appellants' parental rights in March 2003. TPR affirmed as to father where evidence showed that he failed to address his alcohol and anger management problems. He failed to establish stable and appropriate housing for the children and, at the time of termination, he lived in an apartment with five or six men and at times in a hotel when the apartment became too crowded, despite referrals for housing for his two girls, ages ten and two.

Counsel for the mother filed a motion to be relieved of counsel on grounds that she could find no meritorious issue for appeal. In March 2004, the Court denied counsel's motion to be relieved and ordered the parties to brief the issue of whether counsel representing a parent in a TPR case should be required to file a no-merit brief similar to that required under Anders v. California, 386 U.S. 738 (1967). The Court held that indigent parents have a right to counsel on appeal. An indigent's right to counsel outweighs any additional time required for Anders procedures. Anders procedures shall apply in cases of indigent parents' appeals of a TPR. On a first TPR appeal, counsel may petition to withdraw, if after conscientious review of the record, counsel can find no issue of arguable merit for appeal. Counsel's petition must be accompanied by a brief discussing any arguably meritorious issue for appeal. The indigent parent must be provided with a copy of the brief and notified of his or her right to file and points for reversal within thirty days. The Court will determine after full examination of the record if the appeal is frivolous. The Court may grant dismissal or appoint new counsel to argue the appeal. **Linker-Flores v. Arkansas Dep't of Human Servs, 359Ark. 131, 194 S.W. 3d 739 (2004).**

XVIII. FEES, COSTS, FINES AND RESTITUTION

A. Fees

1. No fees, including but not limited to, fees for filings, copying, or faxing, including petitions for guardianship or adoption, summons, or subpoenas, shall be charged or collected by the clerk or sheriff's office in cases brought in the Circuit Court pursuant to juvenile code by a non-profit corporation, governmental entity, prosecuting attorney, attorney ad litem or DHHS **Ark. Code Ann. §9-27-310(e) (Supp. 2007).**
2. Attorneys' Fees
 - a. The court may order financially able juveniles, guardians or custodians to pay all or part of reasonable attorneys fees and expenses for representation of a juvenile after review of an affidavit of financial means, completed and verified by the parent, and a determination by the court of ability to pay. **Ark. Code Ann. §9-27-316(b)(2) (Supp. 2007).**
 - b. Court shall order financially able parents or guardians to pay all or part of reasonable attorney's fees and expenses for court appointed representation of parent or guardian after a review of an affidavit of financial means, completed and verified by the parent, and a determination by the court of ability to pay. **Ark. Code Ann. §9-27-316(h)(3) (Supp. 2007).**
3. Court Costs
 - a. Court may order juvenile adjudicated delinquent, his/her parent or guardian to pay court costs not to exceed \$35. **Ark. Code Ann. §9-27-330(a)(6) (Supp. 2007).**
 - b. Court may assess an adjudicated FINS court costs not to exceed \$35 to be paid by the juvenile, guardian or custodian. **Ark. Code Ann. §9-27-332(a)(9) (Supp. 2007).**
4. Juvenile Diversion Fee
 - a. A juvenile intake or probation officer may charge a diversion fee only after review of an affidavit of financial means and a determination of ability to pay. **Ark. Code Ann. §9-27-323(i)(1) (Supp. 2007).**
 - b. The diversion fee shall not exceed \$20 a month. **Ark. Code Ann. §9-27-323(i)(2) (Supp. 2007).**

- c. The court may direct that the fees be collected by the officer, the sheriff, or court clerk in the county in which the fee is charged. . **Ark. Code Ann. §9-27-323(i)(3) (Supp. 2007).**
 - (1) The person designated to collect diversion fees shall maintain receipts and account for all incoming fees and shall deposit the fees at least weekly in the county treasury of the county where the fees are collected and the diversion services provided. **Ark. Code Ann. §9-27-323(i)(4) (Supp. 2007).**
 - (2) The diversion fees shall be deposited in the account with the juvenile service fee in accordance to Ark. Code Ann. §16-13-326. **Ark. Code Ann. §9-27-323(i)(5) (Supp. 2007).**
 - (3) Judicial districts with more than one county may designate the treasurer of one county as the depository of all the juvenile fees; however, the treasurer shall maintain separate account for the fees collected and expended in each county. **Ark. Code Ann. §9-27-323(j)(1-2) (Supp. 2007).**
 - (4) Money remaining at the end of the fiscal year shall not revert to any other fund but shall carry over to the next fiscal year. **Ark. Code Ann. §9-27-323(j)(3) (Supp. 2007).**
- d. These funds shall be used by agreement of the judges who hear juvenile cases and the quorum court to provide services and supplies to juveniles at the discretion of the juvenile division of circuit court. **Ark. Code Ann. §9-27-323(j)(4) (Supp. 2007).**

5. Juvenile Service Fee

- a. Juvenile division court may charge a juvenile fee, not to exceed \$20 per month for services provided to the juvenile from the court.
 - (1) The court shall have the authority to direct that such fees shall be collected by the juvenile officer, Sheriff; or the court clerk for the county in which such fees are charged. **Ark. Code Ann. §16-13-326(a) (Supp. 2007).**
 - (2) The officer designated by the court to collect juvenile fees shall deposit such fees not less frequently than once every calendar month in the county treasury of the county in which probation services are provided.
 - (a) In judicial districts having more than one county, the judge of the juvenile division in each such district may designate the

treasurer of one of the counties in the district as the depository of all juvenile fees collected in the district.

(b) The treasurer so designated by the court shall maintain a separate account of the juvenile fees collected in each county in the district. **Ark. Code Ann. §16-13-326(b) (Supp. 2007).**

(3) The funds derived from the collection of juvenile fees shall be used, by agreement of the juvenile division of circuit court and the quorum court of the county, to provide services to juveniles at the discretion of the juvenile division of circuit court. **Ark. Code Ann. §16-13-326(c) (Supp. 2007); Administrative Order Number 14.**

Note: Acts 61 and 62 of 1994 amended Ark. Code Ann. §16-13-326(a) substituting "juvenile fee" for "probation fee" and "services provided to juveniles by the court" for "probation services." All references to limiting such fees to probation services have been eliminated. Further, the 94 acts eliminated (b)(2) which prohibited these fees from being used to defray the cost of court personnel.

b. Court may order juvenile service fee not to exceed \$20 a month to be paid by juvenile, his/her parent(s), guardian or custodian as a disposition following a FINS adjudication. **Ark. Code Ann. §9-27-332(a)(10) (Supp. 2007).**

5. Family Services

a. In all cases in which family services are ordered, the court shall determine the parent's, guardian's, or custodian's ability to pay, in whole or in part, for said services **Ark. Code Ann. §9-27-333(e)(1) (Supp. 2007); Ark. Code Ann. §9-27-335(c)(1) (Supp. 2007).**

(1) The Court's finding and supporting evidence shall be made in writing in the order requiring family services **Ark. Code Ann. §9-27-333(e)(2) (Supp. 2007); Ark. Code Ann. §9-27-335(c)(2) (Supp. 2007).**

(2) If the court determines that the parent, guardian or custodian is able to pay, in whole or part, for said services, the court shall enter a written order setting forth the amounts the parent, guardian or custodian can pay for the family service(s) ordered, and ordering the parent, guardian, or custodian to pay such amount periodically to the provider from whom family services are received **Ark. Code Ann. §9-27-333(e)(3) (Supp. 2007); Ark. Code Ann. §9-27-335(c)(3) (Supp. 2007).**

(a) "Periodically" is deemed to be a period of time no greater than once per month.

- (b) Parent, guardian, and custodian refers to the individual or individuals from whom custody was removed. **Ark. Code Ann. §9-27-333(e)(4) (Supp. 2007).**
- (3) In making its determination, the court shall consider the following factors:
 - (a) the financial ability of the parent, both parents, the guardian(s), or custodian(s) to pay for such services;
 - (b) the past efforts of the parent, or both parents, the guardian(s), or the custodian(s) to correct the conditions which resulted in the need for family services; and
 - (c) any other factors which the court deems relevant. **Ark. Code Ann. §9-27-333(e)(5) (Supp. 2007).**

B. Restitution

1. Court may order juvenile adjudicated delinquent or parent to pay restitution only after the loss caused by juvenile is proved by a preponderance of the evidence, that the specific damages were caused by the juvenile, and that the juvenile's actions were the proximate cause of the damage. **Ark. Code Ann. §9-27-331(d)(1) (Supp. 2007).**
2. Restitution is limited to \$10,000. **Ark. Code Ann. §9-27-331(d)(2) (Supp. 2007).**

The trial court ordered appellants to make restitution on destroyed property in an amount exceeding \$2,000.00 pursuant to Acts 61 and 62 of 1994, which raised the limit to \$10,000.00. However, the property was destroyed on April 2, 1994, and the new legislation did not take effect until August 26, 1994.

*Restitution is a penalty that falls within the Constitutional prohibition of ex post facto laws, and therefore an increase in the amount of restitution constitutes the increase of a penalty. The scheme of the legislation is punitive because it allows for revocation of probation if restitution is not paid. The statutory limits on restitution apply to each victim. Further, the proof admitted of one victim's damages was hearsay because the only evidence presented was an invoice for repairs. **Eichelberger and Elam v. State, 323 Ark. 551, 916 S.W.2d 109 (1996).***

*The Arkansas Supreme Court held that the limit on restitution applies only to "one loss" and not to a "multiplicity of crimes." **Leach v. State, 307 Ark. 201, 819 S.W.2d 1 (1991).***

C. Fines

1. Court may order juvenile adjudicated delinquent, his/her parent, or guardian to pay a fine not to exceed \$500. **Ark. Code Ann. §9-27-330(a)(8) (Supp. 2007).**
2. Court may order a fine not to exceed \$500 to be paid by the juvenile, parent(s), guardian or custodian as a FINS disposition upon finding the juvenile has exceeded the number of excessive unexcused absences. **Ark. Code Ann. §9-27-332(a)(8) (Supp. 2007).**

D. Nonpayment of Restitution, Fines and Court Costs

1. Nonpayment of restitution, fines or court costs may constitute violation of probation **Ark. Code Ann. §9-27-339(f)(1) (Supp. 2007).**
2. Burden of proof
 - a. Prosecutor's burden of proof by a preponderance of the evidence that the juvenile violated the terms and conditions of probation.
 - (1) Nonpayment of restitution, fines or court costs may constitute violation of probation unless juvenile proves that his default:
 - (a) was not attributable to a purposeful refusal to obey the court;
 - (b) was not due to a failure on his part to make a good faith effort to obtain funds required for payment. **Ark. Code Ann. §9-27-339(f)(1) (Supp. 2007).**
 - (2) Court shall consider juvenile's employment status, earning ability, financial resources, willfulness of juvenile's failure to pay, and any other circumstances that may have a bearing on juvenile's ability to pay. **Ark. Code Ann. §9-27-339(f)(2) (Supp. 2007).**
 - (3) If court determines the juvenile's default in payment is excusable, the court may enter an order:
 - (a) allowing the juvenile additional time for payment;
 - (b) reducing the amount of each installment; or
 - (c) revoking the fine, costs, restitution, or unpaid portion in whole or in part. **Ark. Code Ann. §9-27-339(f)(3) (Supp. 2007).**

*The Arkansas Supreme Court held that the doctrine of sovereign immunity precludes the assessment of costs and restitution against DHS for children who are in the Department's custody. The Court further held that criminal contempt cases constitute an exception to the sovereign immunity doctrine and that a state agency or agent, having full knowledge of a court order and its import, cannot disregard it and claim "sovereign immunity" in response to a contempt citation. **Arkansas Dep't. of Human Servs. v. Arkansas, 312 Ark. 481, 850 S.W.2d 847 (1993).***

XIX. MISCELLANEOUS

A. Educational Rights of Foster Children

1. Foster children shall have continuity in their educational placements. **Ark. Code Ann. §9-27-103(b)(1) (Supp. 2007).**
 - a. DHHS shall consider continuity of educational services and school stability in making foster care placements. **Ark. Code Ann. §9-27-103(b)(2) (Supp. 2007).**
 - b. Local school districts shall allow a foster child to remain in his/her current school and continue his/her education, unless the court finds that the placement is not in the child's best interest and it conflicts with other law, excluding the residency requirements. **Ark. Code Ann. §9-27-103(b)(3). Ark. Code Ann. §9-27-103(b)(3) (Supp. 2007).**
 - c. School districts are encouraged to work out plans for transportation to the extent reasonable and practical. **Ark. Code Ann. §9-27-103(b)(4) (Supp. 2007).**
 - d. Except for emergencies, prior to moving a child from his/ her current school, DHS shall provide a written explanation for the school change to the foster child, the AAL, CASA (if appointed), and the parents, guardians, or any person appointed by the court. **Ark. Code Ann. §9-27-103(b)(5) (Supp. 2007).**
 - e. If the court transfers custody to DHS the court shall issue orders regarding educational issues of the juvenile including:
 - (1) determining if the parent or guardian shall have access to the juvenile's school records
 - (2) determining if the parent or guardian who has access to school records is entitled to information on the child's placement (name and address of foster parent or provider), and
 - (3) determining if the parent or guardian may participate in school conferences or similar activities. **Ark. Code Ann. §9-27-103(b)(6)(A) (Supp. 2007).**
 - f. If custody transferred to DHHS the circuit court may appoint a person to consent to an initial evaluation and serve as a surrogate parent pursuant to the Individuals with Disabilities Education Act (IDEA). **Ark. Code Ann. §9-27-103(b)(6)(B) (Supp. 2007).**

2. Every school district shall identify a foster care liaison, and the liaison's duties shall include: **Ark. Code Ann. §9-27-103(c)(1-2) (Supp. 2007).**
 - a. Ensuring and facilitating the timely school enrollment of foster children. **Ark. Code Ann. §9-27-103(c)(3)(A) (Supp. 2007).**
 - b. Assisting foster children when transferring schools by ensuring the transfer of credits, records, grades, and any other relevant school records. **Ark. Code Ann. §9-27-103(c)(3)(B)(i) (Supp. 2007).**
 - c. Expediting the transfer of school records - liaison in new school must request records within three school days from child's previous school and the liaison from the previous school must provide records within ten school days.
3. If a foster child is subject to a school change, the child's caseworker shall notify the school within two business days and the new school must immediately enroll the foster child even if the foster child is lacking required clothing or records. **Ark. Code Ann. §9-27-103(d)(1) (Supp. 2007).**

DHHS shall provide all know information to the school district that would have an impact on the health and safety of the child being enrolled and others in the school. **Ark. Code Ann. §9-27-103(d)(2) (Supp. 2007).**
4. School districts shall recognize the rights of foster parents pursuant to IDEA. A foster parent may have educational rights to consent to an IEP, if the foster parent is qualified. A foster parent may have educational rights if the court has specifically limited the educational rights of the parent. **Ark. Code Ann. §9-27-103(e)(1-2) (Supp. 2007).**
5. The grades of a foster child may not be lowered due a change in a child's school enrollment, attendance at a dependency-neglect court proceeding or court-ordered counseling or treatment. **Ark. Code Ann. §9-27-103(f)(1-3) (Supp. 2007).**
6. Each school district shall accept for credit course work when the student demonstrates that he/she satisfactorily completed the appropriate education placement assessment. **Ark. Code Ann. §9-27-103(g) (Supp. 2007).**
7. If a child completes the graduation requirements of his/her school district while being detained in a juvenile detention or DYS, the school district that the child last attended shall issue the child a diploma. **Ark. Code Ann. §9-27-103(h) (Supp. 2007).**

8. Nothing in this section shall be interpreted to be in conflict with IDEA. **Ark. Code Ann. §9-27-103(i) (Supp. 2007).**
9. If in the best interest of the foster child may be placed in a non public school as long as no state funding is used for such placement. **Ark. Code Ann. §9-27-103(j) (Supp. 2007).**

B. Foster Care School Notification

1. DHHS shall notify a child's current school by the next business day when DHHS has placed a 72-hour hold on a child or when the court has placed custody with DHHS. **Ark. Code Ann. §9-28-411(b) (Supp. 2007).**
2. DHHS shall notify the child's current school by the next business day when the foster child transfers to a new placement. **Ark. Code Ann. §9-28-411(c) (Supp. 2007).**
3. DHHS may notify the school counselor by the next business day when DHHS has reasonable cause to believe that a foster child has experienced a traumatic event. **Ark. Code Ann. §9-28-411(d) (Supp. 2007).**
4. DHHS may notify the school counselor by the next business day after DHHS knows through an investigation or ongoing protective services case that a foster child has experienced a traumatic event. **Ark. Code Ann. §9-28-411(e) (Supp. 2007).**
5. When appropriate, the school counselor may share information provided by DHHS with the principal and child's teachers. **Ark. Code Ann. §9-28-411(f) (Supp. 2007).**
6. DHHS or its designee, including a foster parent, shall be the decision maker for the child on all general education matters, subject to the court. **Ark. Code Ann. §9-28-411(g) (Supp. 2007).**

C. Foster care placements

1. If a foster parent requests a foster child be removed from his or her home at any time, excluding an emergency that places the child or a family member at risk of harm, then the foster parent shall attend a staffing that shall be arranged by the Division of Children and Family Services of the Department of Health and Human Services within 48 hours to discuss what services or assistance may be needed to stabilize the placement. **Ark. Code Ann. §9-28-410(b)(1) (Supp. 2007).**
 - a. The foster child, the child's attorney ad litem, and a court-appointed special advocate, if appointed, shall be notified so that they may attend and participate in the staffing and planning for the child's placement.

or the agent, employee, or contractor to pay all the costs of the proceedings brought under this section. **Ark. Code Ann. §9-28-410(e)(2) (Supp. 2007).**

D. Juvenile Mental Health Screening/Assessment Requirements

1. When a mental health screening or assessment is provided to the juvenile division of a circuit court, the screening or assessment shall include, but not be limited to, the following:
 - a. The mental health services needed for the juvenile and the juvenile's family; and **Ark. Code Ann. § 9-27-603(a)(3) (Supp. 2007).**
 - b. The services that could be provided to enable the juvenile to remain safely in his or her home and the availability of such services. **Ark. Code Ann. § 9-27-603(a)(2) (Supp. 2007).**
 - c. If the screening or assessment recommends that the juvenile cannot remain safely in his or her home, then the screening or assessment shall state the recommended type of residential treatment or inpatient treatment that is needed for the juvenile which:
 - (1) Meets the treatment needs of the juvenile;
 - (2) Allows the juvenile to remain as close to his or her home and community as possible so that his or her family can participate in the treatment plan;
 - (3) Provides for the least restrictive placement ensuring the health and safety of the juvenile;
 - (4) Provides an anticipated length of time needed for residential or inpatient treatment; and
 - (5) Provides a plan for the reintegration of the juvenile into his or her community, including coordination with local providers when the juvenile is released from residential or inpatient treatment. **Ark. Code Ann. § 9-27-603(b) (Supp. 2007).**

E. Mental Health Assessments Required for Out-of-State Residential Placements

1. Prior to the circuit court's ordering a juvenile to an out-of-state residential placement, excluding border state placements as defined by Medicaid, the court shall refer a juvenile for an assessment by the DHHS or the department's designee to include, but not be limited to: **Ark. Code Ann. § 9-27-602(a) (Supp. 2007).**

- a. An assessment of the mental health services for the juvenile and the juvenile's family; **Ark. Code Ann. § 9-27-602(a)(1)(A) (Supp. 2007).**
- b. If the assessment recommends that the juvenile cannot remain at home, all appropriate in-state placements currently available that are appropriate to meet the juvenile's mental health needs shall be presented to the court:
 - (1) With a preference for the juvenile to remain as close to his or her home and community as possible so that his or her family can participate in the family treatment plan;
 - (2) That provide for the least restrictive placement ensuring the health and safety of the juvenile;
 - (3) That provide an anticipated length of time needed for residential or inpatient treatment; and
 - (4) That provide a plan for reintegration of the juvenile into his or her community, including coordination with local providers when the juvenile is released from treatment; **Ark. Code Ann. § 9-27-602(a)(1)(B) (Supp. 2007).** and
- c. The services that could be provided to enable the juvenile to remain safely in his or her home and the availability of such services. **Ark. Code Ann. § 9-27-602(a)(2)(A) (Supp. 2007).**
- d. If the assessment recommends that the juvenile cannot be served in the State of Arkansas, the assessment shall:
 - (1) Specify the reasons why the juvenile cannot be served in the state; and
 - (2) Recommend what type of placement the child needs out of state and the reasons for such a recommendation. **Ark. Code Ann. § 9-27-602(a)(2)(B) (Supp. 2007).**
- e. The department or its designee shall complete the out-of-state mental health assessment within five business days of referral from the court. **Ark. Code Ann. § 9-27-602(b) (Supp. 2007).**
- f. The assessment completed by the department or its designee shall be admitted into evidence, and the court shall consider the assessment in making its determination as to what services and placement should be ordered based on the best interest of the juvenile. **Ark. Code Ann. § 9-27-602(c) (Supp. 2007).**
- g. The court shall make a determination of the ability of the parent, guardian, or custodian of the juvenile to pay in whole or in part for mental health services. **Ark. Code Ann. §9-27-602(d)(1) (Supp. 2007).**

- h. If the court determines an ability to pay, the court shall enter such an order for payment pursuant to Ark. Code Ann. § 9-27-333(e). **Ark. Code Ann. §9-27-602(d)(2) (Supp. 2007).**

C. Emancipation of juveniles

- 1. A petition for emancipation may be filed in a circuit court by the attorney or AAL for a juvenile who is in the custody of the DHHS pursuant to a dependency-neglect, dependency, or family in need of services case. **Ark. Code Ann. § 9-27-362(a) (Supp. 2007).**
- 2. The petition shall be served along with a notice of hearing to the juvenile's parent, legal guardian, or legal custodian. **Ark. Code Ann. §9-27-362(b) (Supp. 2007).**
- 3. The circuit court has the authority to emancipate a juvenile in a dependency-neglect, dependency, or family in need of services case after a hearing on the petition if the petitioner shows by a preponderance of the evidence that:
 - (A) The juvenile is at least seventeen (17) years of age;
 - a. The juvenile is willing to live separate and apart from his or her parent, legal guardian, or legal custodian;
 - b. The juvenile has an appropriate place to live;
 - c. The juvenile has been managing or has the ability to manage his or her own financial affairs;
 - d. The juvenile has a legal source of income, such as employment or a trust fund;
 - e. The juvenile has health care coverage or a realistic plan on how to meet his or her health needs;
 - f. The juvenile agrees to comply with the compulsory school attendance laws; and
 - g. Emancipation is in the best interest of the juvenile. **Ark. Code Ann. § 9-27-362(c-d)(1) (Supp. 2007).**
- 4. The court shall consider:

- a. the wishes of the parent, legal guardian, or legal custodian in making its decision.
- b. the recommendation of the attorney ad litem. **Ark. Code Ann. §9-27-362(d)(2-3) (Supp. 2007).**

5. Effect of an order of emancipation

- a. The juvenile has the right to obtain and consent to all medical care, including counseling;
- b. The juvenile has the right to enter into contracts;
- c. The juvenile has the right to enroll himself or herself in school, college, or other educational programs;
- d. The juvenile has the right to obtain a driver's license without consent of a parent or other adult so long as the juvenile complies with the remaining requirements of the driver's license law;
- e. The juvenile's parent, legal guardian, or legal custodian is no longer legally responsible for the juvenile;
- f. The juvenile may still be charged with a delinquency and prosecuted in juvenile court;
- g. The juvenile may not marry without parental permission pursuant to Ark. Code Ann. § 9- 11-102;
- h. The juvenile is not relieved from compulsory school attendance;
- i. DHHS is not relieved from the responsibility of providing independent living services and funding for which the juvenile is eligible upon request by the juvenile;
- j. Child support orders are not terminated but may cease upon entry of an order from the court that issued the order of child support;
- k. Until the juvenile reaches the age of majority, the juvenile remains eligible for federal programs and services as a juvenile;
- l. The juvenile is not permitted to obtain items prohibited for sale to or possession by a minor, such as tobacco or alcohol;
- m. The juvenile remains subject to state and federal laws enacted for the protection of persons under eighteen (18) years of age such as the prohibition against a juvenile's obtaining a tattoo; and

- n. No statute of limitations is affected. **Ark. Code Ann. § 9-27-362(e) (Supp. 2007).**