

# APPELLATE UPDATE

PUBLISHED BY THE  
ADMINISTRATIVE OFFICE OF THE COURTS

APRIL, 2011  
VOLUME 18, NO. 8

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

## ANNOUNCEMENTS

### **REMINDER: Administrative Plans are due July 1st.**

On April 21<sup>st</sup>, the Supreme Court amended Administrative Order Number 14 to remove restrictions on the assignment of subject-matter cases to judges. This change may impact preparation of new administrative plans which are due by July 1<sup>st</sup>. A copy of the per curiam order was included in the weekly mailout.

## CRIMINAL

*Tucker v. State*: [**sufficiency of the evidence; aggravated residential burglary; aggravated robbery**] There was sufficient evidence to corroborate the testimony of appellant's accomplices. Additionally, when the accomplice testimony is eliminated, the remaining evidence independently establishes that the crimes were committed and that appellant was connected with their commission. Accordingly, the trial court did not err when it denied appellant's motion for a directed verdict. [**mistrial**] The trial court did not abuse its discretion when it refused to grant appellant's motion for a mistrial that was made after a witness referenced appellant's previous criminal history during her testimony because the reference was "invited" by questions posed by appellant's attorney. [**change of venue**] Appellant failed to demonstrate that he did not receive a fair trial as a result of the circuit court's denial of his motion to change venue. Thus, the trial court did not abuse its discretion in denying the motion. (Pearson, W.; CR 10-919; 4-7-11; Corbin).

*Hughes v. State*: **[appellate procedure]** A right to a direct appeal from a judgment of acquittal based upon mental disease or defect does not exist in Arkansas. (Cox, J.; CR 10-907; 4-7-11; Baker).

*Lovett v. State*: **[Ark. R. Evid. Rule 609]** The trial court did not abuse its discretion when it admitted evidence of appellant's conviction pursuant to Rule 609 of the Arkansas Rules of Evidence. **[admission of evidence]** The trial court did not abuse its discretion when it admitted a photograph that depicted the victim's body as it appeared when it arrived at the medical examiner's office. (Yates, H.; CACR 10-36; 4-13-11; Gruber).

*Lauderdale v. State*: **[continuance]** The trial court did not abuse its discretion when it denied appellant's motion for a continuance, which was made the day before his trial. **[motion to suppress]** The affidavit in support of the search warrant, which was issued in appellant's case, was not so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable. Thus, the trial court did not err in refusing to suppress the evidence obtained during the search. Appellant was not illegally detained during the search of his vehicle. Accordingly, the trial court did not err in denying appellant's motion to suppress. (Fogleman, J.; CACR 09-410; 4-13-11; Pittman).

*Camp v. State*: **[sufficiency of the evidence; first-degree murder]** The trial court did not err in denying appellant's motion for a directed verdict. There was sufficient evidence to corroborate appellant's accomplice's testimony, to independently establish that a crime occurred, and to connect appellant to the crime. **[404 (b)]** The circuit court did not abuse its discretion when it allowed a fellow inmate to testify about appellant's attempt to hire him to murder an accomplice. The inmate's testimony was admissible pursuant to Rule 404 (b) of the Arkansas Rules of Evidence because it reflected appellant's consciousness of guilt for having committed the crime charged and it was independently relevant. (Yeargan, C.; CR 10-290; 4-14-11; Hannah).

*Scott and Crain v. State*: **[voir dire]** The trial court, who conducted the initial round of *voir dire* and allowed the parties to question the potential jurors, did not abuse its discretion when it thereafter restricted additional *voir dire* of the jury. (Whiteaker, P.; CACR 10-1040; 4-20-11; Hoofman).

*Morrison v. State*: **[pedophile exception]** The trial court properly admitted testimony regarding appellant's prior bad acts, which occurred forty-two years before his trial, pursuant to the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. (Piazza, C.; CACR 10-1005; 4-20-11; Wynne).

*Glaze v. State*: **[amendment to criminal information]** Because appellant suffered no prejudice or surprise, it was not error for the trial court to allow the State to amend the criminal information to add a sentencing enhancement on the morning of appellant's trial. **[sentencing]** Appellant was charged and convicted under the provisions of the Arkansas Criminal Code. Thus, it was error to enhance his sentence pursuant to Ark. Code Ann. § 16-90-201 rather than Ark. Code Ann. § 5-4-501. (Reynolds, D.; CACR 10-1091; 4-20-11; Vaught).

*Harlmo v. State*: [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court did not abuse its discretion when it admitted hearsay testimony from a forensic nurse pursuant to the medical-treatment exception to the hearsay rule. It was not error for the trial court to admit into evidence a drawing, which was made by the victim, because the evidence could have assisted the jury in its understanding of the victim's testimony. (Glover, D.; CACR 10-785; 4-27-11; Martin).

*Murrell v. State*: [**motion to suppress**] The law enforcement official established a sufficient basis for concluding that he had reasonable suspicion to believe that appellant was driving while intoxicated, thereby justifying a traffic stop to further investigate pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure. Because the challenged evidence was obtained during a lawful traffic stop, the trial court correctly denied appellant's motion to suppress. (Clinger, D.; CACR 10-1025; 4-27-11; Glover).

*Goss v. State*: [**hearsay**] Because the challenged hearsay evidence was cumulative to other evidence that was admitted without objection in appellant's trial, it was not reversible error for the trial court to admit the hearsay evidence. [**mistrial**] It was not an abuse of discretion for the trial court to deny appellant's mistrial motion, which was based upon the State referring to appellant's attorney as a "public defender." (Medlock, M., CACR 10-1133; 4-27-11; Hart).

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

*Dillahunty v. State*: (second-degree terroristic threatening; third-degree assault) CACR 10-1251; 4-20-11; Vaught.

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

*Reeves v. State*: (suspended imposition of sentence) CACR 10-847; 4-6-11; Hoofman.

## **CIVIL**

*Ark. Beverage Retailers Assoc. v. Langley*: [**liquor permit transfer**] Board's decision in approving transfer of permit was supported by the evidence. (Brantley, E.; CA 10-823; 4-6-11; Wynne)

*Central Ark. Foundation Homes v. Choate*: [**rule 60**] Motion under Rule 60 to set aside judgement because defendant did not receive notice of trial was timely and properly granted. [**contract**] Court's rescission of building contract due to numerous defects in the finished product was justified. [**quantum meruit**] Amount awarded was proper in light of evidence in the case. Owner would be able to use and thus benefitted from septic system and utility lines

constructed, but builder was not entitled to any amounts for house itself other than what it received in relocating structure or through salvage. (Reynolds, D.; CA 10-902; 4-6-11; Gruber)

*McClure v. City of Mayflower*: **[exculpatory contract]** Plaintiff agreed to perform public service to work off criminal fines, and he signed a release relieving the city from liability in connection with the work to be performed. The plaintiff was injured in a car accident in connection with his public service. Release of the city was enforceable and did not violate public policy nor was it unconscionable. (Clark, D.; CA 10-992; 4-6-11; Abramson)

*Spill Responders, Inc. v. Felts*: [No issue preserved for review] (Kilgore, C.; CA 10-883; 4-6-11; Martin)

*King v. French*:**[burial plots]** Under facts of case, court did not err in dismissing funeral home from suit. Planitiffs' claims were against the cemetery regarding location of graves. Funeral home's action in digging graves did not go to wrongdoing alleged in the complaint. **[laches]** Laches was properly invoked against burial plot owners in regard to timely objecting to location of graves.(Dennis, J.; CA 10-736; 4-6-11; Robbins)

*Ark. Dept, Humans Services v. Cole*:**[Initiated Act 1-Adoption and Foster Care Act]** Act prohibits cohabitating sexual partners from fostering or adopting children. It is unconstitutional because it burdens a person's fundamental right to privacy. The State has a compelling interest in protecting children but the means employed by the state must be examined under an heightened-scrutiny analysis. The state must employ the least restrictive means of serving the state's compelling interest which it has not done in this instance. (Piazza, C.; SC10-840; 4-7-11; Brown)

*Rubber and Gasket Co. v. Zimmerman*: **[settlement agreement]** Summary judgment was improper because evidence indicating that both parties made their acceptances of terms subject to further writings that were not consummated; therefore, it cannot be said as a matter of law that the parties had concluded their settlement agreement. (Brantley, E.; CA 10-778; 4-13-11; Robbins)

*Pam's Investment Properties, LLC v. McCampbell*: **[restrictive covenant]** Covenant was not ambiguous, and it precluded the splitting of lots into smaller parcels. (Wyatt, R.; CA 10-1017; 4-13-11; Martin)

*Evans v. Mobley*: **boundary line]** Owner failed to establish title by acquiescence. (Smith, P.; CA 10-819; 4-13-11; Martin)

*Rennels v. Four Seasons HVAC Distributors*: **[default]** Trial court's striking of late answers and entering default judgment was affirmed. (Laser, D.; CA 10-1003; 4-13-11; Wynne)

*Combined Healthcare Fed. Credit Union v. Arands Corp.*: **[post-trial motions]** The remedy for entry of an order for which no notice has been given to a party is an extension of time within

which to file a notice of appeal rather than a motion under Rule 60 to vacate judgment. (Williams, L.; CA 10-320; 4-13-11; Martin)

*Ark. Research Medical Testing, LLC v. Osborne*: **[tort -failure to act in good faith]** Arkansas does not recognize a cause of action in tort for breach of the implied covenant of good faith and fair dealing separate and apart from a breach of contract. (Humphrey, M.; SC 10-750; 4-14-11; Danielson)

*Optical Partners, Inc. v. Dang*: **[covenant not to compete]** A covenant not to compete in a lease agreement is not enforceable because the party attempting to enforce it did not have a legitimate business interest to protect. It was not in competition with the other party nor did it provide the same services. **[damages]** Court capping loss-profit damages at 30 days from the day of notice of lease termination placed the injured party in the same position as if the contract had not been breached. (Tabor, S.; SC 10-629; 4-14-11; Gunter)

*Campbell v. Asbury Automotive, Inc.*: **[unauthorized practice of law/adtpa]** The legislature under the Ark. Deceptive Trade Practices Act may create a cause of action against a person who attempts to practice law without a license. The test is whether the legislation interferes with Amendment 28, which is not true in this case. *Preston v. Stoops* is clarified. **[breach of fid. duty/class action]** Court properly denied plaintiff's request to amend his class action to add a breach of fiduciary duty claim. **[financing fee claim]** Court abused its discretion in finding a lack of superiority and denying class certification of the claim. **[unjust enrichment]** The mere existence of a contract does not always foreclose a claim of unjust enrichment. **[unauthorized practice of law]** Completion of forms by corporation for a fee constituted the unauthorized practice of law because the forms used in context of automotive sales transaction did not fit within guidelines of the *Suggs* and *Creekmore* cases. Charging a fee for completion of the forms is outside of these guidelines. By virtue of its unauthorized practice of law, the corporation is held to the same standard of care as a lawyer, including having a fiduciary relationship with its customers. (Moody, J.; SC 10-575; 4-14-11; Danielson)

*Milner v. Luttrell*: **[jury]** A juror's vocational knowledge did not constitute extraneous prejudicial information under Rule 606 (b). (Guthrie, D.; CA 09-757; 4-20-11; Hoofman)

*First Security Bank v. Geels*: **[deed]** Unacknowledged and unrecorded deed effectively passed title to the property between the parties when it was signed and delivered. There was present intent to convey title and actual delivery of the deed. (Cottrell, G.; CA 10-969; 4-20-11; Abramson)

*Chenal Restoration Contractors v. Carroll*: **[arbitration]** Underlying dispute involved interstate commerce; therefore, federal arbitration act applied, and FAA permits arbitration of tort claims. (Henry, D.; CA 10-893; 4-2-11; Wynne)

*Bell-Corley Construction v. Orange State Realty*: **[attorney's fees]** Matter had been resolved in arbitration proceeding and attorney's fees were denied by arbitrator. Party attempted in circuit court to have fees awarded but trial court did not abuse its discretion in denying request based on his decision not to revisit the issue that had been fully vented in arbitration. (Guthrie, D.; CA 10-968; 4-20-11; Robbins)

*McLain v. City of Little Rock Planning Commission*: **[jnov]** Court erred in granting JNOV because verdict was supported by substantial evidence when jury found that commission approval of subdivision application and preliminary plat were unlawful. (Brantley, E.; CA 10-514; 4-20-11; Hart)

*Gold v. Vines*: **[summary judgment]** Summary judgment was proper in which court rescinded contract to purchase property because of the failure to insure the property as the contract required and because of monetary defaults. (McCormick, D.; CA 10-754; 4-27-11; Vaught)

*PHH Mortgage Corp. v. Yeager*: **[default judgment]** Request to set aside a default judgment was not warranted by the evidence because defendant's failure to attend to its business does not constitute excusable neglect under Rule 55. However, court erred in awarding damages because the amount awarded did not strictly conform to and were not supported by the allegations in the complaint. (Moody, J.; CA 10-868; 4-27-11; Abramson)

*Gibbs v. Stiles*: **[adverse possession]** Court erred in finding adverse possession because law requires not only the establishment of the common law elements but also that the person had both color of title and had paid property taxes. The evidence on the latter two points did not satisfy the legal requirements. (Smith, K.; CA 10-1315; 4-27-11; Vaught)

*Cooper Tire v. Phillips County Circuit Court*: **[certiorari/discovery]** Trial judge abused his discretion in ordering disclosure of trade secrets. (Neal, O.; SC 10-1074; 4-28-11; Gunter)

*Combs Revocable Trust v. City of Russellville*: **[attorney's fees]** Party was not entitled to attorney's fees pursuant to Section 18-15-605 (b) because case does not involve municipal waterworks or a water project. (Coker, K.; SC 10-1161; 4-28-11; Baker)

*Conway v. HI-Tech Engineering*: **[summary judgment]** Court properly granted summary judgment based on limitation issues in case that was controlled by North Carolina law. (Williams, L.; SC 09-1049; 4-28-11; Corbin)

## **DOMESTIC RELATIONS**

*Piccioni v. Piccioni*: **[registration of foreign judgment]** This is the second appeal by these parties. In the first, the Circuit Court of Lonoke County was affirmed in deferring jurisdiction of the parties' domestic relations case to a court in Pennsylvania pursuant to the UCCJEA and

dismissing any pending matters in Arkansas. This appeal is from the Saline County Circuit Court's registration of a Pennsylvania child custody judgment in which the appellee was awarded custody of the parties' minor child, and also the Lonoke County order transferring jurisdiction to Pennsylvania. The appellant contended that the petition did not conform to statutory requirements and that its registration was error. In affirming, the Court of Appeals said the statutory provisions ensure that a person entitled to notice has an opportunity to be heard. The appellant had notice of the hearing on registration of the foreign judgment, filed a motion to dismiss, and appeared to argue her motion. Therefore, any technical deficiencies did not prejudice her ability to present her case to the circuit court. Her other arguments were based on the premise that Arkansas retains jurisdiction of the case, which the Court of Appeals has already addressed and found otherwise. (McCallister, B.; No. CA 10-613; 4-6-11; Gladwin).

*Johnson v. Johnson*: **[divorce - division of property]** The appellant husband challenged the circuit court's property award to the appellee wife. He objected specifically to interests in the value of improvements to appellant's nonmarital real property, rental income, proceeds from the sale of a business, an IRA, a 401(k) plan, and funds removed from a joint account. The Court of Appeals affirmed the trial court's decision, finding that, in many instances, the court's decision was based upon the credibility of the appellant, and that the appellate court defers to the circuit court's superior position to determine the credibility of witnesses and the weight to be given their testimony. (Wilson, R.; No. CA 10-842; 4-13-11; Glover).

*Orantes v. Orantes*: **[change of custody]** At the time the parties divorced in 2005, they entered into a separation and property settlement agreement that was incorporated into the divorce decree. Among other things, it provided that the appellant would have sole custody of their child, and that appellee would pay child support, have reasonable visitation, and would pay transportation costs for visitation. Appellee filed for a change in custody, based upon several factors he alleged as changed circumstances, which the circuit court granted. The Supreme Court reversed, holding that none of the alleged factors constituted a material change in circumstances, because all had existed at the time of the entry of the original custody decree. A general rule is that factors affecting best interests that are not presented to the trial judge at the time of the original custody order can be considered on a change in custody case. However, that exception to that general rule does not apply when the parties are aware of the circumstances, yet enter into an agreement approved by the court. That occurred here. Therefore, the appellee failed to prove a material change of circumstances. (Shirron, P.; SC No. 10-405; 4-14-11; Baker).

*Bowdle v. Hanke, et al.*: **[child support]** The Court of Appeals affirmed the trial court's order that the appellant mother pay child support. Even though the parties' property-settlement agreement stated that she would not pay child support, the duty of child support cannot be bartered away permanently. The trial court's imputing income of \$2,000 for child-support purposes also was not erroneous. Even though she said she was unemployed, she receives money monthly from her property-settlement agreement, considered "income" under Administrative Order No. 10. Finally, the court did not err in requiring her to pay one-half of the medical expenses that were over a year old. The agreement had no provision that invoices had to be submitted within 30 days or were waived. The parties clearly intended to share expenses related to the children's health. She was presented with invoices and under the agreement, she was

responsible for one-half the uncovered medical expenses. (Moore, R.; No. CA 10-760; 4-20-11; Brown).

*Chaffin v. Chaffin*: **[child custody]** The evidence supported a finding of material change in circumstances and that it was in the best interest of the child to change custody from the appellant mother to the appellee father. The circuit court was affirmed. (Medlock, M.; No. CA 10-946; 4-20-11; Abramson).

*Stibich v. Stibich*: **[child custody; bias of the court]** The Court of Appeals affirmed the circuit court's award of custody of the parties' children to the appellee mother. The court said the appellant's argument was based primarily upon refuting the allegations of spousal abuse against him, but there was no evidence that the appellee failed to care for the children properly during the marriage. Neither did he present evidence that the children were not doing well while in their mother's custody. The court said there was no clear error in the custody award. For his second point, the appellant alleged that the trial court was biased against him. The party alleging it must demonstrate bias, which the appellant failed to do. In addition, he never requested that the judge recuse. (Williams, L.; No. CA 09-1411; 4-27-11; Wynne).

*Burns v. Burns*: **[alimony; attorney's fees]** The trial court found that the appellant wife was entitled to alimony and ordered an award of \$2,750 per month. In reversing and remanding, the Court of Appeals noted that the parties were married for more than 25 years. The wife had not worked for the last 20 years of the marriage. She was 51 years old and had health issues. She was not currently insurable. Her monthly income needs far exceeded the alimony awarded. The appellee is a physician with a sizeable income and the ability to pay more alimony than was ordered. Considering all of the factors required in setting alimony, the court found the award clearly erroneous, and reversed and remanded for the circuit court to consider all of the factors in an alimony award. The court affirmed the trial court's award of attorney's fees of \$3,500. (Hannah, C.; No. CA 10-1102; 4-27-11; Glover).

## **PROBATE**

*Gardner, et al. v. Britton*: **[testamentary trust]** The trial court erred in interpreting the settlor's intent. The trustee had the authority to make distribution to the grandchildren of the settlor under the terms of the trust. The applicable rule of construction is that the last clause in the will governs in ascertaining a testator's intentions. Also, as a general rule, in cases of inconsistency between general and specific provisions of a writing, the specific expressions ordinarily qualify the meaning of the general terms. Here, Paragraph 2.IV expressly authorizes the trustee discretion to distribute trust principal or income for the health, education, support, or maintenance of the testator's grandchildren, and the general statement of intent must be read in light of the express and specific provision. (Bell, K; No. CA 10-850; 4-27-11; Pittman).

## **JUVENILE**

*Arkansas Dept. of Human Services v. Cole* **[Act 1]** The Arkansas Supreme Court affirmed the circuit court in finding Act 1 unconstitutional. The court held that the "fundamental privacy

rights implicit in the Arkansas Constitution are substantially and directly burdened by Act 1's prohibition against the ability of cohabitating sexual partners to foster or adopt children." The state's compelling interest is to protect the welfare of children. Under a heightened scrutiny analysis the state failed to use the least restrictive means narrowly tailored to serve that interest with a blanket ban. The court further noted that the overriding concern is the best interest of the child and that is best determined on a case by case determination by the agency and courts. (Piazza, C.; 10-840; 4-7-2011; Brown).

*Duval v. Arkansas Dept. of Human Services* [**No Merit D-N Adjudication**] Affirmed based on failure to provide for child's essential and necessary physical needs by failing to provide a shelter that did not pose a risk to his health and safety. The trial court found that there were firearms, knives, and broken glass within the child's reach. Appellants argued that DHS was not authorized to enter their home without a warrant and such entry violated their Fourth Amendment rights and as a result any photos taken should have been suppressed. However appellant (wife) consented to the entry of the house at which time the caseworker took the photos so there was no Fourth Amendment violation. (Coker, K.; CA10-1252; 4-6-2011; Glover)

*Beeson v. Arkansas Dept. of Human Services* [**Permanent Custody**] Custody to maternal grandmother affirmed after termination petition filed. Appellant was not in compliance with case plan and demonstrated a lack of stability throughout the case as well as two prior cases. Appellant failed to maintain steady employment or a stable residence, had numerous criminal charges and attempted suicide on four occasions. (Chandler, L; CA11-9; 4-27-2011; Hoofman).

*Myers v. Arkansas Dept. of Human Services* [**TPR**] This is one of five appeals affirming termination of parental rights in cases that resulted in removing children from the Tony Alamo Christian Ministries (TACM). Appellant had her parental rights terminated to two of her sons. The first two arguments in each case are set forth in detail in this decision.

Appellant first challenged that the case plan requiring her to live and work outside of the TACM unduly burdened her constitutional right to free exercise of religion requiring a strict-scrutiny standard. The court found that these requirements were neutral and only incidentally affected appellant's exercise of her religion. The requirement was to provide a safe environment for her children apart from TACM, which the trial court found was and continued to be an unsafe environment. Requiring parents to seek safe and secure housing can be applied to any parent seeking to regain custody regardless of religious practices and does not discriminate against a religious belief or regulate or prohibit conduct because it is undertaken for religious reasons. The Free Exercise Clause does not pertain to this case and the circuit court did not err in rejecting appellant's constitutional challenge. The court overruled *Thorne*, 2010 Ark 443, to the extent that a strict-scrutiny analysis was applied because there was no constitutional infringement.

Appellant argued that the circuit court erred in admitting phone conversations between Alamo and women at the ministry while Alamo was in jail. Appellant is correct that the recordings did

not qualify as business records for the purposes of Rule 803(6). However, the recordings were admissible because they were not hearsay. The conversations were not offered for the truth of the matter asserted but to illustrate Alamo's continued control over the ministry.

Appellant argued that there was insufficient evidence to terminate her parental rights as to her two sons. She argued there was no evidence that her children were mistreated, sexually abused or subjected to fasting. She claimed it was a "witch-hunt" by DHS in retribution for Alamo. The evidence supported the trial court's findings that appellant refused to remedy the conditions that caused her children to be removed and continued to act as a bar to her children's return. Appellant's own admission that Alamo continues to run the ministry supports the circuit court's finding that it is an unsafe environment for her children. (Griffin, J; 10-692; 4-28-2011; Gunter).

*Reid v. Arkansas Dept. of Human Services [TPR]* This is one of five appeals affirming termination of parental rights in cases that resulted in removing children from the Tony Alamo Christian Ministries (TACM). Appellant had his parental rights terminated to his son, C.R. The circuit court was affirmed as to appellant's challenge that the TPR violated his constitutional guarantee of his religious freedom and as to the admissibility of tape phone conversations for the same reasons as set forth in *Myers v. Arkansas Dept. of Human Services*.

Appellant argued that there was insufficient evidence to support the grounds to terminate his parental rights. There was evidence that C.R. would likely be adopted and potential harm included appellant's unwillingness to find suitable housing outside TACM where young girls were repeatedly subjected to marriages, sexual abuse, fasting, and physical abuse. Appellant's psychiatric evaluation indicated that appellant maintained a low-average function and appeared to be easily led. C.R. had been out of the home for over 12 months and despite DHS efforts to provide services, appellant did not remedy the situation that caused the removal. Appellant admitted in his own testimony that he failed to obtain housing and employment outside TACM. He also did not attend all his required counseling and only attended one staffing. (Griffin, J; 10-696; 4-28-2011; Henry).

*Seago v. Arkansas Dept. of Human Services [TPR]* This is one of five appeals affirming termination of parental rights in cases that resulted in removing children from the Tony Alamo Christian Ministries (TACM). Appellant had his parental rights terminated to three of his children, V.S., M.S., and N.S. The circuit court was affirmed as to appellant's challenge that the TPR violated his constitutional guarantee of his religious freedom and as to the admissibility of tape phone conversations for the same reasons as set forth in *Myers v. Arkansas Dept. of Human Services*.

Appellant argued that termination was not supported by clear and convincing evidence. He argues that nothing in the record suggest that any of his children have ever been mistreated, subject to hunger, lack of medical care, or in real danger of sexual abuse. There was evidence by a sibling of physical abuse and by the appellant that he did not seek separate housing or employment because "of the fear of the Lord and the calling that I have." He also testified that he believed Alamo was a prophet and that his children were not in danger when they lived in his

home. The court found clear and convincing evidence to support termination, specifically that appellant failed to remedy the conditions that caused removal by failing to obtain housing or employment outside of the TACM. (Griffin, J; 10-693; 4-28-2011; Danielson).

*Parish v. Arkansas Dept. of Human Services [TPR]* This is one of five appeals affirming termination of parental rights in cases that resulted in removing children from the Tony Alamo Christian Ministries (TACM). Appellants had their rights terminated as to their children, G.P.1, G.P.2, G.P.3, and G.P.4 and argue it was not supported by clear and convincing evidence. The circuit court was affirmed as to appellant's challenge that the TPR violated his constitutional guarantee of his religious freedom and as to the admissibility of tape phone conversations for the same reasons as set forth in *Myers v. Arkansas Dept. of Human Services*.

The circuit court was not clearly erroneous in terminating their parental rights. Although the appellants completed parenting and a psychological evaluation they failed to comply with any other orders or participate in the case plan. Despite efforts by DHS, appellants failed to show that they could or would provide a safe and stable environment for their children. Appellants also failed to show that they had the ability to support their children and were 7 months in arrears on child support. (Griffin, J; 10-691; 4-28-2011; Hannah).

*Krantz v. Arkansas Dept. of Human Services [TPR]* This is one of five appeals affirming termination of parental rights in cases that resulted in removing children from the Tony Alamo Christian Ministries (TACM). Appellants had their rights terminated as to their six children, L.K., A.K., A.K.2, S.K., C.K. and R.K. The circuit court was affirmed as to appellant's challenge that the TPR violated his constitutional guarantee of his religious freedom and as to the admissibility of tape phone conversations for the same reasons as set forth in *Myers v. Arkansas Dept. of Human Services*.

Appellants challenged the circuit court best interest finding as to potential harm. The court found that there was ample evidence that Alamo still controlled the daily affairs of the TACM and furnished the appellants with housing, transportation, and money to meet their daily needs. The appellants did not consider Alamo's actions, past or present to be a danger to their children. Although appellants testified that they would not permit abuse of their children, the circuit court found that their testimony was not credible. Due deference is given to the trial judge in assessing credibility of witnesses. (Griffin, J; 10-694; 4-28-2011; Baker).

*Ball v. Arkansas Dept. of Human Services [TPR]* Appellant challenged that adoption was an appropriate permanency plan for her children and argued that her oldest child did not want to lose all contact with her even though he did not want to be reunited and that the other children did not understand the finality of termination. The appellate court noted that while a circuit court may consider a child's wishes to be adopted at termination, the court does not need to obtain the child's consent at the termination proceeding. The guiding principal is the child's best interest and no challenge was made to this point on appeal.

Appellant argued that the circuit court erred in admitting a counselor's testimony from a prior review hearing that it may have contained hearsay. Yet, on appeal appellant argued that the testimony was too remote and was not given in a proceeding that applied the clear and convincing evidence standard. A party cannot change their argument on appeal and is bound to the scope of the argument made to the circuit court. Appellant also failed to show why she is entitled to relief or how she was prejudiced by this testimony.

Appellant's final argument that the court was unable to properly evaluate her home without an ICPC study is without merit. An ICPC study was completed and did not recommend placement. (McCallum, R.; CA10-1311; 4-27-2011; Robbins).

*Dority v. Arkansas Dept. of Human Services [TPR]* Appellant only challenged the best interest finding as to her child's adoptability arguing that the evidence of her child's adoptability was weak when compared to the evidence of her child's special needs. The appellate court noted that the trial court's obligation in its best interest analysis is to consider the likelihood that children will be adopted and that factor does not have to be proven by clear and convincing evidence. The potential harm aspect of the best interest analysis favored termination so that the limited evidence on adoptability makes no legal difference. (Hewett, M; CA10-1278; 4-20-2011; Abramson).

*Allen v. Arkansas Dept. of Human Services [TPR]* Appellant argued that there was insufficient evidence that he failed to remedy the conditions that caused removal. He argued that he was in partial compliance and that that ground did not pertain to him because he was not the cause of his children's removal. He cites *K.C.*, 2010 Ark App. 353, as authority to support his argument that to terminate his rights based on the neglect perpetrated by the children's mother is not a ground for which he can remedy. However, this case is distinguished from *K.C.* because in this case the termination petition also alleged the ground of subsequent factors.

Based on *de novo review* the appellate court can hold that other grounds for termination were proven even if not stated in the trial court's order. There was sufficient evidence to terminate based on the subsequent factors ground. Appellant's continued drug use demonstrated an indifference to remedying the problem and potential harm to the children. Failure to comply with the case plan and court orders, including participation in counseling and drug tests, attending NA/AA meetings, and maintaining stable housing also showed and indifference or inability to remedy the subsequent factors. (French, T; CA10-1259; 4-20-2011; Gladwin)

*Harper v. Arkansas Dept. of Human Services [No Merit TPR]* Affirmed and motion to withdraw granted. Appellant failed to remedy prescription drug abuse problem. (Hewett, M; CA10-1204; 4-13-2011; Brown)

*M.J. v. State, [Delinquency Adjudication]* Appellant was charged as a juvenile delinquent for disorderly conduct. Appellant argued that the trial court erred in denying his motion for directed

verdict because the state failed to prove the mental state of the offense, that he either recklessly or intentionally committed the offense.

The evidence established the use of foul language but no demonstration of aggression or violence in his demeanor. Appellant did not engage in purposefully conduct nor was he reckless. Twenty seconds of conduct by a 15 year old boy whose mother was being arrested does not constitute a gross deviation from the standard of care that a reasonable person would observe under circumstances. (Fergus, L.; 10-724; 3-2-2011; Glover).

## **DISTRICT COURT**

*Duffy v. Little*: **[district court appeal]**. Appellant filed a notice of appeal from district court to circuit court and attached a certified copy of the district court proceedings. It was held that appellant did not file a certified copy of the docket sheet and the docket sheet was not included in the transcript; therefore, the mandatory and jurisdictional requirements of District Court Rule 9 were not met. The circuit court lacked jurisdiction to entertain the appeal and the Supreme Court lacked jurisdiction as well. Dismissed. (Proctor, J.; SC10-86; 4/14/11)

*Noe v. State*: **[migratory bird treaties] [Arkansas Game & Fish Commission Codes]**. Appellant was convicted by the St. Francis County Circuit Court of violating Arkansas Game and Fish Commission Codes and fined \$2500. On appeal, it is argued that the convictions must be reversed because the AGFC Codes are preempted by and in conflict with four migratory-bird treaties entered into by the United States of America and that the actions of appellant are in full compliance with federal law. The Court of Appeals disagreed and affirmed. (Neal, J.; CACR10-755; 3/2/11)

## **EIGHTH CIRCUIT**

*GeoVera Specialty Insurance Co v. Graham Rogers Inc.*: **[insurance]** District court erred in granting defendant's motion for summary judgment on plaintiff's contract claims because the parties' agreement placed a duty on defendant to apply plaintiff's underwriting guidelines to all applications for insurance submitted by its retailers under the terms of the contract. (E.D. Ark.; # 10-1943; 4-13-11)

*Chism v. CNH America LLC*: **[products liability]** District court did not abuse its discretion by admitting evidence of two jury verdicts favorable to defendant in cases involving substantially similar accidents. Exclusion of other incidents involving defendant's balers was proper as the other incidents were not substantially similar to plaintiff's accident, and their slight probative

value was outweighed by the danger of confusing the jury. Evidence concerning proximity of pinch point where plaintiff's arm was caught to the baler's tire was properly excluded as the accident did not involve plaintiff standing on the tire Admission of evidence concerning the number of balers manufactured was not plain error. Exclusion of pictures and video of newer model balers was not error. Testimony about the Engineering Code of Ethics was properly excluded as irrelevant since the code has no legal force or effect. (E.D. Ark.; # 10-1701; 4-29-11)