

# APPELLATE UPDATE

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

Administrative Plans must be submitted to the Supreme Court by July 1, 2013.

## CRIMINAL

*Mahomes v. State*, 2013 Ark. App. 215 [**revocation**] The circuit court's decision to revoke appellant's probation was not clearly against the preponderance of the evidence. [**continuance**] The circuit court did not abuse its discretion when it denied appellant's request for a continuance. (Ramey, J.; CACR 12-549; 4-3-13; Gruber, R.)

*Holloway v. State*, 2013 Ark. 140 [**Rule 37**] Appellant failed to meet his burden of demonstrating that his trial counsel's performance was deficient and that he was prejudiced by this deficient performance to the extent that he was deprived of a fair trial. Thus, the circuit court did not clearly err in denying appellant's petition for postconviction relief without a hearing. (Ramey, J.; CR 11-836; 4-4-13; Hoofman, C.)

*Wakeley v. State*, 2013 Ark. App. 231 [**illegal sentence**] Appellant's sentences, which exceeded the statutory sentencing range, were illegal. (Green, R.; CACR 11-935; 4-10-13; Vaught, L.)

*Breeden v. State*, 2013 Ark. 145 [**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 into evidence photographs of the victim, which were offered to establish her age

at the time the crimes occurred. (Green, R.; CR 12-588; 4-11-13; Corbin, D.)

*Golden v. State*, 2013 Ark. 144 [**Rule 37**] The Supreme Court concluded that there was not a reasonable probability that the jury in appellant's case would have acquitted appellant if they had heard certain testimony regarding his alibi. Accordingly, the appellate court held that the circuit court did not clearly err when it found that appellant failed to demonstrate that he was prejudiced by his attorney's failure to introduce the testimony. (Reynolds, D.; CR 12-129; 4-11-13; Corbin, D.)

*Taylor v. State*, 2013 Ark. 146 [**Rule 37**] The circuit court did not err by denying appellant's Rule 37 petition, which asserted that his trial attorney was ineffective for incorrectly identifying letters used to impeach a witness and for failing to call two witnesses. (Wright, H.; CR 12-340; 4-11-13; Baker, K.)

*Banks v. State*, 2013 Ark. 147 [**Rule 37**] The decision by appellant's trial counsel not to call three alleged alibi witnesses was a matter of trial tactics or strategy, which was supported by reasonable professional judgment. Such a decision is not a proper basis for relief under Rule 37.1. Therefore, the trial court properly denied appellant's petition for postconviction relief. (Piazza, C.; CR 11-660; 4-11-13; Goodson, C.)

*Turnbough v. State*, 2013 Ark. App. 235 [**testimony**] The trial court was not required to hold a pretrial hearing to determine whether a child witness's testimony would be reliable. (Pearson, W.; CACR 12-846; 4-17-13; Gladwin, R.)

*Alexander v. State*, 2013 Ark. App. 240 [**jury instructions**] *Blueford v. Arkansas*, 132 S.Ct. 2044 (2012) did not modify or obliterate the model jury instructions. Arkansas's jury instructions only require a reasonable doubt, not an acquittal before a jury may consider a lesser-included offense. The jury is always free to reconsider its determination on any charge while deliberations are ongoing. (Sims, B.; CACR 12-678; 4-17-13; Harrison, B.)

*Flemons v. State*, 2013 Ark. App. 239 [**sufficiency of the evidence; delivery of cocaine and delivery of a counterfeit substance**] There was substantial evidence to support appellant's convictions. [**motion in limine**] The trial court did not abuse its discretion when it concluded that certain testimony was not patently unreliable and granted its admission over appellant's objection. (Tabor, S.; CACR 12-867; 4-17-13; Walmsley, B.)

*Scamardo v. State*, 2013 Ark. 163 [**Ark. R. Evid. 613(b); prior inconsistent statement**] The trial court abused its discretion when it refused to admit extrinsic evidence of a prior inconsistent statement, which was made by the victim, for impeachment purposes. [**hearsay**] The trial court abused its discretion when it allowed the victim's father to testify about what the victim told him about the incident approximately one month after it occurred. (Tabor, S.; CR 12-554; 4-18-13; Danielson, P.)

*Pankau v. State*, 2013 Ark. 162 [**writ of habeas corpus; Ark. Code Ann. § 16-112-201**] Because the new evidence would not raise a reasonable probability that appellant did not commit the offense for which he was convicted, the circuit court did not err in denying appellant's request for additional scientific testing of certain evidence pursuant to Ark. Code Ann. § 16-112-20 *et seq.* (Storey, W.; CR 12-288; 4-18-13; Danielson, P.)

*White v. State*, 2013 Ark. 171 [**Rule 37**] The circuit court correctly determined that appellant was wrongfully denied his right to testify and to pursue a justification defense. However, because appellant failed to establish that there was a reasonable probability that the fact-finder would have reached a different outcome if the defense had been pursued, the circuit court correctly denied appellant's Rule 37 petition. (Sims, B.; CR 11-751; 4-25-13; Hannah, J.)

*Adams v. State*, 2013 Ark. 174 [**Rule 37; petition**] The circuit court did not abuse its discretion when it did not consider additional issues that were raised in appellant's amended petition, which exceeded the page limitations. [**Ark. R. Evid. 615**] Appellant did not establish that he was prejudiced by the circuit court's failure to exclude trial counsel from the courtroom while the other witnesses testified at the Rule 37 hearing. [**ineffective assistance of counsel**] Appellant failed to establish that trial counsel's decision not to call certain witnesses was not supported by reasonable professional judgment. Appellant could not demonstrate that he was prejudiced by trial counsel's failure to raise certain objections because the record revealed that the objections, if made, would have been unsuccessful. (Edwards, R.; CR 12-375; 4-25-13; Goodson, C.)

*Jackson v. Norris*, 2013 Ark. 175 [**sentencing; juvenile**] Relying upon *Miller v. Alabama*, \_\_ U.S. \_\_ (2012), which held that mandatory life imprisonment without parole for individuals under the age of eighteen at the time their crimes were committed violates the Eighth Amendment's prohibition on cruel and unusual punishments, the Arkansas Supreme Court determined that portions of Ark. Code Ann. § 5-10-101 (c) were unconstitutional as applied to juveniles. Thus, the Court severed the constitutionally suspect language from the statute. After the severance, the statutory language now provides: "capital murder is a Class Y felony." Thereby, leaving only the discretionary Class Y sentencing options available for juveniles who are convicted of capital murder. [**habeas corpus**] Based upon the foregoing analysis, the Arkansas Supreme Court granted a *habeas corpus* petition, which was filed by Jackson who was less than eighteen at the time his crime was committed and who was sentenced to life imprisonment without the possibility of parole, and remanded the matter to the original trial court to hold a sentencing hearing in which Jackson will be permitted to introduce mitigation-type evidence. (Wyatt, R.; 09-145; 4-25-13; Hart, J.)

*Whiteside v. State*, 2013 Ark. 176 [**sentencing; juveniles**] Following the rationale outlined in *Jackson v. Norris*, 2013 Ark. 175 (2013), the Arkansas Supreme Court held that Whiteside's capital-murder sentence should be reversed and the case should be remanded for resentencing under the discretionary range for a Class Y felony. At the resentencing hearing, Whiteside will be permitted to offer mitigation evidence as discussed in *Miller v. Alabama*, \_\_ U.S. \_\_ (2012). (Sims, B.; CR 10-1200; 4-25-13; Hoofman, C.)

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

*Piper v. State*, 2013 Ark. App. 237 (breaking or entering) CACR 12-718; 4-17-13; Pittman, J.

*Scallion v. State*, 2013 Ark. App. 245 (manufacturing methamphetamine; possession of drug paraphernalia; endangering the welfare of a minor) CACR 12-889; 4-17-13; Gruber, R.

*Garner v. State*, 2013 Ark. App. 250 (criminal trespass) CACR 12-770; 4-17-13; Whiteaker, P.

*Dobbins v. State*, 2013 Ark. App. 269 (aggravated robbery; aggravated residential burglary) CACR 12-986 4-24-13; Glover, D.

*Johnson v. State*, 2013 Ark. App. 271 (terroristic threatening) CACR 12-1069; 4-24-13; Vaught, L.

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:

*Gasca v. State*, 2013 Ark. App. 214 (suspended sentence) CACR 12-810; 4-3-13; Wynne, R.

*Bragg v. State*, 2013 Ark. App. 261(probation) CACR 12-813; 4-17-13; Wood, R.

## CIVIL

*Deutsche Bank v. Fineline Development, LLC*, 2013 Ark. App. 216 [**foreclosure sale**] Trial court erred in refusing to set aside commissioner's sale because of woefully inadequate bid price. (Taylor, J.; CA 12-826; 4-3-13; Glover, D.)

*Singleton v. Williams*, 2013 Ark. App. 226 [**contract/damages**] Although plaintiff sought damages in excess of \$30,000 but was awarded approximately \$10,000. This award was supported by the evidence. (Moody, J.; CA 12-699; 4-10-13; Harrison, B.)

*Edgin v. Central United Life Ins. Co.*, 2013 Ark. App. 233 [**ins/summary judgment**] In granting summary judgment, court made findings of fact as to insurer's state of mind and the reasonableness of its policy interpretation. These are fact questions for the jury. (Weaver, T.; CA 11-915; 4-10-13; Brown, W.)

*Worden v. Crow*, 2013 Ark. App. 234 [**lease/ consideration**] A subsequent agreement that purports to modify an existing agreement must be supported by consideration other than the consideration involved in the original agreement.. The consent to sublet was not supported by consideration. (Rogers, R.; CA 12-807; 4-10-13; Brown, W.)

*Warren v. Treet*, 2013 Ark. App. 229 [**partition**] Tenants in common agreed upon a division of the property and not merely to possession of the property. (Story, B.; CA 12-671; 4-10-13; Gruber, R.)

*Beavers v. Bd. Examiners in Counseling*, 2013 Ark. App. 222 [**licensing**] Board acted within its authority in denying request to waive requirement denying eligibility for licensure to person who has committed a felony. The fact that appellant believes that he has been rehabilitated does not give him the right to obtain a license to practice counseling in Arkansas. (Fox, T.; CA 12-732; 4-10-13; Gladwin, R.)

*Rose v. Rose*, 2013 Ark. App. 256 [**trusts**] Evidence supported court's finding that persons were defacto trustees even though trust documents had not been formally amended. Defacto trustees are entitled to be reimbursed for their expenses. (Fox, T.; CA 12-598; 4-17-13; Vaught, L.)

*Newsom v. Rabo Agrifinance*, 2013 Ark. App. 259 [**ucc/security interests**] Financing statements adequately described the collateral (crops), as they enabled third parties, aided by inquiries, to identify the property. Facts do not support imposition of an equitable lien to prevail over a perfected secured security interest in the absence of inequitable conduct or unjust enrichment. Lender liability claim was precluded by release signed by the debtor which was enforceable and not the result of duress. The release was the product of attorney-driven negotiations by sophisticated business people. (Lineberger, J.; CA 12-634; 4-17-13; Hixson, J.)

*Lopez v. United Auto. Ins.*, 2013 Ark. App. 246 [**insurance/subrogation**] Settlement check was written to insured and insurer as co-payees. The insurer is only entitled to subrogation if the insured has been made whole, which has not been shown to be true in this case. There is no evidence that the insurer has a valid lien against the insured because there is no evidence that it has obtained a judicial determination that the insured has been made whole. (Scott, J.; CA 12-777; 4-17-13; Gruber, R.)

*First Arkansas Bank v. Gill Elrod, LLC*, 2013 Ark. 159 [**securities/law firm**] Law firm was not subject to liability under the Arkansas Securities Act for failure to disclose an underlying mortgage in the Official Statement published for sale of bonds related to real estate project. Law firm was not a seller or an agent of seller. Claim for legal malpractice remanded as summary judgment was not appropriate. (Griffen, W.; SC 12-540; 4-18-13; Hannah, J.)

*Graham v. Cawthorn*, 2013 Ark. 160 [**collateral estoppel**] In state court litigation following federal court litigation over propriety of an arrest, the state court claim alleging violations of civil rights under the Arkansas Constitution was collaterally estopped as issue of whether the police officer had probable cause to make an arrest was fully litigated in federal court. On remaining claim of violation of right of remonstrance, officer had qualified immunity. (Hughes, T.; SC 12-959; 4-18-13; Hannah, J.)

*McLemore v. Weiss*, 2013 Ark. 161 [**state police retirement**] Trial court properly found that the uniform and travel-expense allowance provided by statute to state police officers was not reportable as a portion of payroll (If they were reportable as salary would have affected officers' contribution to retirement and would have increased retirement benefits). (Brantley, E.; SC 12-958; 4-18-13; Corbin, D.)

*Lux Tan, Inc. v. JK Products, Inc.*, 2013 Ark. App. 275 [**personal jurisdiction**] It was not unreasonable to enforce forum-selection clause which provided that litigation should be brought in Arkansas, especially in light of the fact that the defendant used the clause as a shield in having litigation dismissed in North Carolina. (Honeycutt, P.; CA 12-850; 4-24-13; Wood, R.)

*Grinnell v. Garnet Real Estate, LLC*, 2013 Ark. App. 273 [**guaranty**] Guaranty obligation was enforceable and the notice provisions in the document were followed. Although there were other assignments of the guaranty, the current holder of it gave notice to the guarantor prior to filing suit to enforce it consistent with the terms of the document. (Tabor, S.; CA 12-762; 4-24-13; Vaught, L.)

*Spears v. Recontrust Company, N.A.*, 2013 Ark. App. 272 [**claim preclusion**] Dismissal order was proper on res judicata grounds because all allegations in the complaint could have been raised in earlier litigation and complaint did not plead facts as to events that occurred after the first litigation that could not have been raised in it. (Moody, J.; CA 12-382; 4-24-13; Vaught, L.)

*Porocel Corp. v. Saline County Circuit Court*, 2013 Ark. 172 [**workers' comp**] Although worker's claim was time-barred to preclude it from being heard by Workers' Comp Commission, the circuit court had no jurisdiction to hear civil suit on the claim. Matter was still within the exclusive jurisdiction of the commission. Fact that it was time-barred did not mean that it was not "covered" by workers' comp. (Arnold, G.; SC 12-500; 4-25-13; Hannah, J.)

*Ark. Dept. Career Educ. v. Means*, 2013 Ark. 173 [**whistle-blower act**] Independent contractor was a "public employee" within provisions of whistle-blower act and was entitled to sue under it. Complaint made to an immediate supervisor constituted an "appropriate authority" under the act. (Wright, H.; SC 12-723; 4-25-13; Corbin, D.)

## DOMESTIC RELATIONS

*Gray v. Gray*, 2013 Ark. App. 223 [**order of protection—modification; contempt; attorney's fees**] The parties' divorce decree provided for a division of personal property, and reserved the issue of the appellant father's visitation with their 7-year-old daughter because he had pending criminal charges based upon his alleged sexual assault of his 10-year-old stepdaughter. He was also subject to a temporary order of protection forbidding his contact with either girl. A final order of protection was entered subsequently. The appellant entered a plea to a reduced charge of harassment, later filed for modification of the order of protection to permit visitation with his daughter, then filed for modification of the divorce decree to grant him primary custody. He filed a contempt petition alleging that appellee did not give him all the personal property to which he was entitled under the

decree. The trial court denied modification of the protective order, the change-of-custody petition, and the contempt petition. The Court of Appeals affirmed, finding that the trial court did not err in finding that he failed to prove a material change in circumstances or that it would not be in the child's best interest to dissolve the protective order. The court also affirmed the award of attorney's fees. The appellant had argued that the trial court erred in awarding them because the court erred in ruling on the merits of the case and that the appellee was not the prevailing party. Given the fact that it upheld the decree, the court said appellant failed to demonstrate that appellee was not the prevailing party. (Lindsay, M.; No. CA 12-430; 4-10-13; Pittman, J.)

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

*Lane v. Blevins*, 2013 Ark. App. 270 [**paternity; custody**] The parties were never married but had two children over the six-year period they lived together. OCSE filed a complaint against the plaintiff for child support and to establish paternity, which he admitted. He filed a third-party complaint against the appellee for custody. The trial court found that he failed to establish a material change in circumstances, said that appellee should maintain primary custody, and that appellant should have the right to reasonable visitation. The Court of Appeals reversed and remanded on the issue of custody, citing cases in which the Court of Appeals has held that a change in circumstances need not be proved in cases in which there has never been an order awarding custody to either party that would justify a change in custody requirement. *Donato v. Walker*, 2010 Ark. App. 566, 377 S.W.3d 437 (2010), and *Harmon v. Wells*, 98 Ark. App. 355, 255 S.W.3d 501 (2007). The paternity/custody determination between these parties was the initial custody determination, so upon remand the trial court should employ the correct analysis. (Mason, C.; No. CA 12-649; 4-24-13; Glover, D.)

## **PROBATE**

*Gilliam, et al. v. Sanders*, 2013 Ark. App. 227 [**guardianship**] The trial court's order granting guardianship to the appellee of her four grandchildren was affirmed because the appellants' argument that service of the original summons on separate appellant Day, mother of the children, was defective, was not decided by the trial court. Although they raised the issue below, they failed to get

a ruling from the court. Therefore, the appellants' arguments on appeal were not preserved for appellate review. (McGowan, M.; No. CA 12-766; 3-10-13; Harrison, B.)

*Stautzenberger, et al. v. Stautzenberger, et al.*, 2013 Ark. 148 [**guardianship; decedent's estate**] Appellees, two siblings of appellant, guardian of the estate of their late mother, challenged his management of her estate after her death. The trial court adopted the findings of the master it had appointed, disallowing certain expenditures, finding that he failed to act as a reasonably prudent investor, and finding that he failed to account for a specific withdrawal from the estate account. The appellant was found to be personally liable for the specific withdrawal and for the appellees' attorney fees. Appellees filed a Rule 60 motion to correct the judgment. Taking into account that other heirs had stood by the appellant in the action, the court modified the judgement to reduce the amount appellant would have to repay personally by sixty percent for disallowed expenditures and investment losses. The opinion included testimony describing the decedent's lifestyle. The court noted that the appellant had always taken care of his mother and that, before she became incapacitated, she preferred that he be appointed her guardian. He testified that in deciding whether to pay expenses or to make expenditures, he always analyzed expenses based upon his mother's wishes and what she had done historically. He spent the estate's funds liberally, in conformity with her history of generosity with friends and family, giving gifts, buying dinners, and having parties. Some expenditures were for her own food, clothing and personal expenses. He paid to support a son, for schooling for a disabled grandchild, and to support a woman whom the decedent treated as a daughter, although she was not a blood relative. In affirming in part and reversing and remanding in part, the Supreme Court found that many of the expenditures were reasonable, given the nature of the decedent, her past spending habits, and her accustomed lifestyle. The court said, "Our probate code does not require that a ward be maintained in an austere and joyless environment." The court remanded for the trial court to make findings consistent with the Supreme Court opinion. (Duncan, X.; No. SC 12-432; 4-11-13; Hart, J.)

## JUVENILE

*Jackson v. Norris*, 2013 Ark. 175 [**Criminal Sentencing**] Jackson was less than eighteen at the time he committed the crime and he was sentenced to life imprisonment without the possibility of parole. Relying upon *Miller v. Alabama*, \_\_ U.S. \_\_ (2012), which held that mandatory life imprisonment without parole for individuals under the age of eighteen at the time their crimes were committed violates the Eighth Amendment's prohibition on cruel and unusual punishments, the Arkansas Supreme Court determined that portions of Ark. Code Ann. § 5-10-101(c) were unconstitutional as applied to juveniles. The court severed the constitutionally suspect language from the statute, now providing: "capital murder is a Class Y felony," leaving only the discretionary Class Y sentencing options available for juveniles who are convicted of capital murder. [**habeas corpus**] On remand from the U.S. Supreme Court, the Arkansas Supreme Court reversed its denial of appellant's writ and issued the writ with instructions. The court remanded the matter to the original trial court to hold a sentencing hearing where appellant will be permitted to introduce *Miller* mitigation-type evidence. (Wyatt, R.; 09-145; 4-25-2013; Hart, J.)

*Whiteside v. State*, 2013 Ark. 176 [**Criminal Sentencing**] This case was on remand from the U.S. Supreme Court involving a mandatory imposition of a life sentence without parole of a juvenile defendant (age 17 at the time of his offense) convicted of capital murder. Following *Jackson v. Norris*, 2013 Ark. 175 (2013), the Arkansas Supreme Court held that appellant's capital-murder sentence should be reversed and the case remanded for resentencing under the discretionary range for a Class Y felony and appellant will be permitted to offer *Miller* mitigation evidence. (Sims, B.; CR 10-1200; 4-25-2013; Hoofman, C.)

*Note: Act 1490 Amended 5-4-104(b) and 5-10-101(c) concerning juveniles under 18 at time of the offense and convicted of capital murder after the effective date of this act. It now provides life imprisonment without parole under 5-4-606 or life imprisonment with the possibility of parole after serving the maximum of 28 years imprisonment.*

*K.A.S. v. State*, 2013 Ark. App. 236 [**Delinquency – sufficiency**] Appellant argued that there was not substantial evidence to support his adjudication of theft of property that he pumped gas and left without paying. The identification in conjunction with other testimony supported the adjudication finding, where the eyewitness provided a physical description of the juvenile and identified the vehicle and license plate number. Appellant testified that he had driven earlier that day and was at the residence listed on the vehicle registration. (Fergus, L.; CA12-969; 4-17-2013; Gladwin, R.)

*Wilson v. Golden*, 2013 Ark. App. 267 [**Adoption – jurisdiction**] This case involved two competing suitable adoption petitions for B.W. following a TPR, appellants (paternal grandfather and his wife) and appellees (foster parents and adoptive parent of B.W.'s half-brother). Appellant's argument that the court lacked jurisdiction to grant appellees' petition because they did not strictly comply with the home study requirement is without merit. The trial court had jurisdiction and any error relying on the home study should have been raised below and is not preserved for appeal. [**best interest**] Appellant then argued that the trial court erred in finding that it was in the B.W.'s best interest to be adopted by appellees because B.W. had spent more time appellees and "most of the factors were a wash." The appellate court will defer to the trial court's personal observations when the welfare of a young child is involved. (Clark, D.; CA12-668; 4-24-2013; Wynne, R)

*Gantt v. Arkansas Dept. of Human Services*, 2013 Ark. App. 217 [**Guardianship**] Appellant (mom) appeals the trial court's order granting guardianship of her two children with their paternal aunt arising out of a dependency-neglect proceeding where the children had been found to be at substantial risk of serious harm due to appellant's abusive relationship. Appellant first argued that there was no evidence that she was an unfit parent. The court relied on *Fletcher*, finding parental preference does not automatically attach to a natural parent and is only one factor to consider in determining suitability. The key factor in determining guardianship is the best interest of the child. Although appellant had made strides in her case, the trial court specifically found that appellant could not provide for the emotional needs of her children and that it was in their best interest to appoint a guardian. (Williams Warren, J.; CA12-1014; 4-3-2013; Whiteaker, P)

*Drake v. Arkansas Dept. of Human Services*, 2013 Ark. App. 274 [TPR - Best Interest] There was sufficient evidence to support trial court's finding that the termination was in their children's best interest after a six year history with DHS, including income and housing instability, mental illness (including failure to take medication), and alcohol abuse. The mother also had her rights terminated to four other children in another state and the father although aware of his wife's mental health issues failed to adequately understand the harm of leaving the children unsupervised in her care. (Hewett, M.; CA13-5; 4-24-2013; Hixson, K.)

*McDaniel v. Arkansas Dept. of Human Services*, 2013 Ark. App. 263 [TPR – sufficiency] There was sufficient evidence to support to support termination where a three year old child was removed from his parents as a result of their manufacturing methamphetamine in their home and the child was so aggressive that he hurt himself and others. The evidence that appellant either abused or failed to protect the child was overwhelming and there was evidence that the child could never be returned to her care. Appellant argued that it was not in her child's best interest to terminate because it is unlikely that he will be adopted in the near future. The court stated that adoption is not an essential element of a termination and is only a factor to determine best interest. The trial court did not err in finding best interest where there was evidence of the child's traumatization and great fear of the appellant. (Sullivan, T.; CA13-25; 4-24-2013; Pittman, J.)

*Adams v. Arkansas Dept. of Human Services*, 2013 Ark. App. 253 [TPR – sufficiency] Appellant argued that the trial court erred in terminating her rights based on the ground that she was sentenced in a criminal proceeding for a period of time that would constitute a substantial period of her child's life. She argued that it was an error for the court to consider her suspended sentence. Appellate review is of the entire sentence and viewed from the child's perspective. The court did not err in finding that the child should not have to wait in limbo for possible reunification with his mother. (Medlock, M.; CA12-1122; 4-17-2013; Brown, W.)

*Stephens v. Arkansas Dept. of Human Services*, 2013 Ark. App. 249 [TPR – ICWA] J.S. was removed at age one when her mother was arrested for methamphetamine with intent to deliver and child endangerment. Although the child's eligibility for membership in an Indian tribe was suggested, it was never established; although the trial court used the higher standard required by ICWA.

*No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of a qualified expert witness that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. 25 U.S.C §1912(f).*

A qualified expert testified that J.S. would be at serious risk of harm if returned to appellant. J.S. was exposed to appellant's addiction and was remained out of appellant's custody for 16 months. Although appellant asked for more time, the trial court had already given her more time and she still had 15 weeks to complete a 16 week rehab program at the time of the termination hearing. (Hendrix, A.; CA12-1096; 4-17-2013; Glover D.)

*Mancia v. Arkansas Dept. of Human Services*, 2013 Ark. App. 265 [**TPR – No Merit**] Motion to withdraw denied and rebriefing order to supplement the record. (Crow, G.; CA12-947; 4-24-2013; Walmsey B.)

Cases in which the Court of Appeals Affirmed No-Merit TPR and Motion to Withdraw Granted:

*Henderson v. Arkansas Dept. of Human Services*, 2013 Ark. App. 268 (Wilson, R.; CA 13-98; 4-24-2013; Wynne, R.)

*Kitchen v. Arkansas Dept. of Human Services*, 2013 Ark. App. 260 (Thyer, C.; CA 13-30; 4-17-2013; Hixson, K.)

*Smart v. Arkansas Dept. of Human Services*, 2013 Ark. App. 257 (King, K; CA12-637; 4-17-2013; Vaught, L.)

*Dang v. Arkansas Dept. of Human Services*, 2013 Ark. App. 251 (Hewett, M.; CA 12-119; 4-17-2013; Whiteaker, P.)

*James v. Arkansas Dept. of Human Services*, 2013 Ark. App. 244 (Branton, W.; CA 12-1089; 4-17-2013; Wynne, R.)

*Robertson v. Arkansas Dept. of Human Services*, 2013 Ark. App. 218 (Wilson. CA 12-1050; 4-3-2013; Vaught, L.)

## **EIGHTH CIRCUIT**

*Bradley Timberland Resources v. Bradley Lumber Company* : [**Civil Procedure**] District court did not err in determining, based on the pleadings, Bradley Lumber was fraudulently joined in the case as there was no reasonable basis for imposing liability on Bradley Lumber for constructive fraud. Bradley Timberland's claims against defendant Webster Business were properly dismissed as time barred. (W.D. Ark.; 12-1892; 4-8-13)

*Hess v. Abels*: [**Employment law**] In action brought by an city employee who was terminated after refusing to take a drug test, the district court did not err in granting the defendants' motion for summary judgment based on qualified immunity as it was not clearly established at the time of the termination that such an action violated an employee's Fourth Amendment rights. Plaintiff's Fifth Amendment and Fourteenth Amendment claims failed to allege a constitutional violation. The district court properly dismissed the official capacity claims against the individual defendant and the claims against the City. No error in dismissing claims under the Arkansas Civil Rights Act. (E.D. Ark.; 12-3211; 4-26-13)

## U. S. SUPREME COURT

*Missouri v. McNeely*: **[DWI/Blood test/Search]** McNeely was stopped by a Missouri police officer for speeding and crossing the centerline. After declining to take a breath test to measure his blood alcohol concentration (BAC), he was arrested and taken to a nearby hospital for blood testing. The officer never attempted to secure a search warrant. McNeely refused to consent to the blood test, but the officer directed a lab technician to take a sample. McNeely's BAC tested well above the legal limit, and he was charged with driving while intoxicated (DWI). He moved to suppress the blood test result, arguing that taking his blood without a warrant violated the Fourth Amendment. The trial court agreed, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that McNeely's blood alcohol was dissipating, no circumstances suggested that the officer faced an emergency. The Missouri Supreme Court affirmed, relying on *Schmerber v. California*, which upheld a DWI suspect's warrantless blood test where the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence. This case, the state court found, involved a routine DWI investigation where no factors other than the natural dissipation of blood alcohol suggested that there was an emergency, and, thus, the nonconsensual warrantless test violated McNeely's right to be free from unreasonable searches of his person.

Held: The judgment is affirmed. In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.

Missouri seeks a per se rule, contending that exigent circumstances necessarily exist when an officer has probable cause to believe a person has been driving under the influence of alcohol because BAC evidence is inherently evanescent. Though a person's blood alcohol level declines until the alcohol is eliminated, it does not follow that the court should depart from careful case-by-case assessment of exigency. When officers in drunk-driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, they must do so. Circumstances may make obtaining a warrant impractical such that the alcohol's dissipation will support an exigency, but that is a reason to decide each case on its facts. BAC evidence naturally dissipates in a gradual and relatively predictable manner. Moreover, because an officer must typically take a DWI suspect to a medical facility and obtain a trained medical professional's assistance before having a blood test conducted, some delay between the time of the arrest or accident and time of the test is inevitable regardless of whether a warrant is obtained. The natural dissipation of alcohol in the blood may support an exigency finding in a specific case, as it did in *Schmerber*, but it does not do so categorically.

(No. 11-1425; April 17, 2013)