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CRIMINAL

Brooks v. State, 2014 Ark. App. 84 [**status as an accomplice**] The trial court erred by refusing appellant's request to submit the issue of accomplice status to the jury. (Proctor, R.; CR-12-1115; 2-12-14; Pittman, J.)

Blankenship v. State, 2014 Ark. App. 104 [**terms and conditions; probation**] Because appellant never received written notice that performance of community service was a condition of her suspended sentence, the trial court erred when it revoked appellant's suspended sentence based upon her failure to complete community service. (Cottrell, G.; CR-13-612; 2-12-14; Whiteaker, P.)

Stone v. State, 2014 Ark. App. 110 [**hearsay exception; excited utterance**] The trial court did not abuse its discretion when pursuant to the excited-utterance exception to the hearsay rule, it permitted a witness to testify about what the victim, who was visibly injured, very upset, and in great pain, told the witness immediately following the crime. (Piazza, C.; CR-13-600; 2-12-14; Hixson, K.)

Bean v. State, 2014 Ark. App. 107 [**rape-shield statute**] The trial court did not abuse its discretion when it excluded evidence of the victim's actions towards two classmates because: (1) the testimony was not similar in nature or extent to the crimes for which appellant was convicted: (2) the evidence

was on a collateral issue that was not relevant; and (3) the testimony had little probative value. **[amendments to criminal information]** Because appellant was not unfairly surprised, the trial court did not err when it permitted the State to make amendments to the criminal information in appellant's case. (Fitzhugh, M.; CR-13-384; 2-12-14; Vaught, L.)

King v. State, 2014 Ark. App. 81 **[sufficiency of the evidence; possession of methamphetamine with the purpose to deliver]** There was substantial evidence to support appellant's conviction. **[mental evaluation]** Appellant's statement that he was "depressed" did not give the circuit court reason to believe that mental disease or defect would be an issue in appellant's case nor did the statement give the circuit court reason to doubt appellant's fitness to proceed. Thus, the circuit court's decision to deny appellant's request for a psychological evaluation was not clearly erroneous. (Looney, J.; CR-13-639; 2-12-14; Gladwin, R.)

Rogers v. State, 2014 Ark. App. 133 **[witness list]** Appellant failed to demonstrate that he was prejudiced by the State's omission of a witness's name from its witness list. Accordingly, the trial court did not abuse its discretion when it permitted the witness to testify in appellant's trial. (Sims, B.; CR-13-521; 2-19-14; Hixson, K.)

Washington v. State, 2014 Ark. App. 122 **[jury instructions]** Because there was some evidence to support the lesser included offense of third-degree battery, the trial court abused its discretion in denying appellant's request to instruct the jury on that offense. (Piazza, C.; CR-13-225; 2-19-14; Walmsley, B.)

U.S. Currency in the Amount of \$70,000 v. State, 2014 Ark. App. 127 **[forfeiture]** The odor of narcotics detected by a dog trained to recognize such odors is not a "forfeitable controlled substance." Thus, the circuit court erred when it applied the rebuttable presumption found in Ark. Code Ann. § 5-64-505(a)(7) to appellant's case. (Huckabee, S.; CV-13-578; 2-19-14; Gruber, R.)

Gooch v. Hobbs, 2014 Ark. 73 **[writ of habeas corpus]** Appellant was sentenced correctly and in accord with the appropriate sentencing statutes. Because appellant's judgment of conviction was not illegal on its face, habeas relief was not warranted, and the circuit court did not err in dismissing his petition without holding a hearing. (Dennis, J.; CV-12-690; 2-20-14; Danielson, P.)

Johnson v. State, 2014 Ark. 74 **[Rule 37]** Trial counsel cannot be ineffective for failing to make an objection or argument when the objection or argument is without merit. (Dennis, J.; CR-12-741; 2-20-14; Goodson, C.)

Stutte v. State, 2014 Ark. App. 139 **[motion to suppress]** A law enforcement official witnessed appellant violate several traffic laws including speeding, failing to maintain a proper traffic lane, and crossing a double yellow line. Thereafter, the officer attempted to stop appellant's car by using his lights, siren, and spotlight. Appellant refused to stop and the officer followed appellant to his house. After appellant arrived home and got out of his vehicle, he would not stop and talk to the officer. The officer then stepped into appellant's garage, grabbed appellant's arm, and told him to stop. At

this time, the officer smelled intoxicants, observed appellant was sweating, and arrested appellant for suspicion of drunk driving. At trial, and on appeal, appellant asserted that his arrest was unlawful because the officer entered his home without a warrant or exigent circumstances. The Court of Appeals concluded that under the circumstances of the case, the trial court's decision that appellant's warrantless arrest was reasonable was not clearly against the preponderance of the evidence. (Storey, W.; CR-12-1027; 2-26-14; Walmsley, B.)

Nelson v. State, 2014 Ark. 91 [**error coram nobis**] Ineffective-assistance-of-counsel claims are not cognizable in error coram nobis proceedings. (Wright, H.; CR-12-644; 2-27-14; Danielson, P.)

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

Norwood v. State, 2014 Ark. App. 97 (possession of methamphetamine) CR-13-616; 2-12-14; Gruber, R.

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:

Fellows v. State, 2014 Ark. App. 85 (probation) CR-13-211; 2-12-14; Pittman, J.

Flurry v. State, 2014 Ark. App. 128 (suspended sentence) CR-13-618; 2-19-14; Glover, D.

CIVIL

First State Bank v. Metro District Condominiums, Inc., 2014 Ark. 48 [**ACA 18-13-116/foreclosure**] The statute applies not only to sales in the ordinary course of business but also to foreclosure sales. Under the statute, under a foreclosure sale, unpaid assessments owed to the property owners association survive and the purchaser at foreclosure becomes liable for them. (Beaumont, C.; CV-13-349; 2-6-14; Corbin, D.)

Gemini Capital Group, LLC v. McFarland, 2014 Ark. App. 83 [**rule 15/amended complaint**] After failing to attach copy of contract to the complaint as required by Ark. R. Civ. P. 10, plaintiff amended complaint and attached the document. The circuit court erred as a matter of law by dismissing the original complaint and disregarding the compliance with Rule 10 via the amendment. The amended complaint related back to the filing of the original complaint, thereby curing any defects. (King, K.; CV-13-645; 2-12-14; Gladwin, R.)

Campbell v. Graf, 2014 Ark. App. 98 [**setoff**] Funds deposited into a joint account are owned by both parties and funds in the account may be used for personal benefit of one and do not need to be used only for payments that benefit both account holders. (Clawson, C.; CV-13-196; 2-12-14; Gruber, R.)

Johnson v. Windstream Communications, Inc., 2014 Ark. App. 99 [**mandate**]. The mandate reversed the order of summary judgment, making it void, and remanded to the circuit court with directions to use the *McDonnell Douglas* framework in reviewing Windstream's motion for summary judgment and include its analysis in its summary-judgment order. On remand, directions in mandate were not followed. (Fox, T.; CV-13-379; 2-12-14; Gruber, R.)

Petrohawk Energy Corp. v. Butler, 2014 Ark. App. 89 [**rule 60**] Eight months after entry of dismissal order, the circuit court set the dismissal order aside and reinstated cross-claim because order was entered in error and the case needed to be opened to resolve cross-claims. Subsequently, claims were resolved by summary judgment and appeal followed. Trial court's reinstatement was in error because it was outside the time limits of Rule 60. The circuit court simply lost the power to vacate its order that dismissed the entire case because the reinstatement order was entered more than ninety days after the Rule 41 dismissal had occurred—and no Rule 60(b) or (c) exceptions apply. Because the order reinstating the case was void from its inception, the subsequent summary judgment must also be vacated as a matter of law and the reinstated case dismissed. (Maggio, M.; CV-13-574; 2-12-14; Harrison, B.)

Hobson v. Entergy Ark., Inc., 2014 Ark. App. 101 [**fraud**] Misrepresentations cited as fraudulent were promises of future events rather than statements of fact, and will not support an action for fraud. Additionally, there was no fraud based on nondisclosure. [**contract damages**] Claim for lost earnings was neither a direct nor an indirect consequence of alleged breach. A plaintiff seeking consequential damages must prove more than mere knowledge by the defendant that a breach will entail special damages. There must be some evidence that the defendant tacitly agreed to assume responsibility for such damages. (Fox, T.; CV-12-450; 2-12-14; Glover, D.)

Board of Trustees of Univ. Ark. v. Burcham, 2014 Ark. 60 [**sovereign immunity**] Complaint alleging wrongful termination seeking monetary damages was barred by sovereign immunity. (Medlock, M.; CV-13-448; 2-13-14; Danielson, P.)

J.B. Hunt, Inc. v. Thornton, 2014 Ark. 62 [**creditors remedy/trusts**] Judgment creditor could not garnish future distributions from a trust because the distributions were contingent on the individual's survival – nor could an equitable lien be imposed. (Schrantz, D.; CV-12-1667; 2-13-14; Danielson, P.)

Hoosier v. Interinsurance Exch. of the Auto. Club, 2014 Ark. App. 120 [**ins. policy/choice of law**] Insured's move from Texas to California did not cause California-issued insurance to be "converted to a Texas Policy." The policy-change declarations page did reflect a change of residence but the original California policy remained in effect despite residence change. The policy should be interpreted under the law of California because the law of the place where the contract was made prevails. The validity, interpretation and obligation under a policy applied for, executed and delivered to the insured in one state has been held governed by the law of that state, though the insured subsequently moved elsewhere. (Hearnberger, M.; CV-13-524; 2-19-14; Pittman, J.)

Wilson v. Ark. State Highway Comm'n., 2014 Ark. App. 130. *No issues preserved on appeal.* (Beaumont, C.; CV-13-767; 2-19-14; Whiteaker, P.)

Diamond State Ins. Co. v. Rippy, 2014 Ark. App. 145 [**ins.**] Student was assaulted by fellow students during school day. School was sued and school's insurer argued that incident fell within exclusion of coverage. Issue was whether negligent acts of school employees were within exclusion – "unless arising out of an employment wrongful act." Exclusion was ambiguous. The contract is construed against insurer, and circuit court's decision that the policy afforded coverage is affirmed. (Gibson, R.; CV-13-679; 2-26-14; Gruber, R.)

Clegg v. Sullivan, 2014 Ark. App. 143 [**deed**] Finding by trial court that grantor lacked mental capacity was supported by the evidence and order setting aside the deed was affirmed. (Maggio, M.; CV-13-459; 2-26-14; Wynne, R.)

Splawn v. Wade, 2014 Ark. App. 151 [**contract**] In rendering summary judgment, trial court made a finding of fact, deciding what a "reasonable time" for performance would be to seek specific performance of the contract where the contract did not clearly specify a period of time for performance. The trial court found that a reasonable period of time would be "days, not years" after the contingency was fulfilled in which to demand performance. Thus, summary judgment was entered in error as a result of factual findings. (Wright, J.; CV-13-704; 2-26-14; Hixson, K.)

Duncan v. Olive, 2014 Ark. App. 152 [**request/admission**] Requests for admission were deemed admitted, and court did not err by not allowing the admissions to be withdrawn. (Cook, V.; CV-13-77; 2-26-14; Brown, W.)

Jones v. McLemore, 2014 Ark. App. 147 [**malicious prosecution**] Summary judgment was proper as there were no outstanding fact questions as to the element of "lack of probable cause." (Humphrey, M.; CV-137; 2-26-14; Glover, D.)

DOMESTIC RELATIONS

Ryburn v. Ryburn, 2014 Ark. App. 108 [**divorce; property-settlement agreement; contempt; child support**]. The parties entered into a property-settlement agreement that was written into the divorce decree entered in 2004. The agreement provided for appellee wife to remain in the marital home with the minor children. In August of 2009, the appellant husband wrote her a letter that he was beginning foreclosure on the marital home, and that she would have about sixty days before the bank would evict her. The circuit court subsequently denied appellant's request to sell the home based upon the conditions set out in the parties' contract. In a later hearing, the court found the appellant in contempt for refusing to make the mortgage payments as ordered. The court also ordered appellant to pay appellee \$104,000, the assessed value of the home, for not making the mortgage payments as agreed. Appellant appealed pro se from two separate orders, raising ten points of alleged error. The Court of Appeals, noted that pro se litigants are held to the

same standards as attorneys. The parties' agreement clearly provided for the appellee and the children to remain in the marital home until she acquired alternative housing or the parties agreed to sell the home. It provided for appellant to pay the mortgage, credit cards, and all utilities until appellee was able to pay them through her own income. The Court of Appeals found that the circuit court did not clearly err in finding appellant in contempt for failure to pay the mortgage. He breached their contract by not paying the mortgage, so there was no clear error in awarding her the assessed value of the home. Finally, the appellant argued that the circuit court erred by not including in its order a determination of his income or a list of reasons for deviating from the chart, as required by Administrative Order No. 10. The Court of Appeals remanded on that point for compliance with Administrative Order No. 10. All other issues were either not properly before the court or lacked merit. The case was affirmed in part and reversed and remanded in part. (McCallister, B.; No. CV-13-653; 2-12-14; Vaught, L.)

Massey v. Massey, 2014 Ark. App. 111 [**divorce—marital property**] When the parties were divorced, the trial court found that 357 acres of farm land and appellant husband's thirty-percent ownership interest in a limited liability company were marital property and ordered an equal division between the parties. On appeal, the appellant husband alleged that the farm was a gift to him from his father, who made all the payments on the property while he made none. He also alleged that his thirty percent interest in the limited liability company was a gift from his parents, that they purchased investment property and financed the development, and that he made no financial contributions. In affirming the circuit court, the Court of Appeals said that, for the farm property, the appellant signed an offer and acceptance, the bank prepared a credit proposal on him, he signed the loan application and a promissory note, and both appellant and appellee signed a mortgage on the property. Their joint tax returns showed mortgage deductions claimed by both parties. Finally, evidence showed that calves and timber were sold off the land to contribute to note payments. On the issue of the limited liability company, evidence showed that the appellant and his father were grantees of the property. However, both parties testified that the appellant worked for eight months as a construction worker in developing apartments on the property. The appellee testified that appellant's job during that time was to build the apartments and that the parties' investment in the company was his labor. During that time, the appellee paid their marital expenses from her employment. The Court of Appeals said that the trial court found that the business venture was capitalized by the appellant's parents, but that he had contributed his skill and labor to the venture during the marriage. The chief distinction between a gift and a sale is consideration and the evidence supported that his "sweat equity" was his consideration for his interest in the company. The decision was affirmed. (Reynolds, D.; No. CV-13-465; 2-12-14; Hixson, K.)

Walton v. Walton, 2014 Ark. App. 105 [**divorce; contempt**] The appellant husband appealed from a divorce decree, alleging on appeal that (1) the circuit court erred in finding that the appellee established and corroborated her grounds of general indignities, and (2) the circuit court erred in finding him in contempt and ordering him to pay a fine and attorney's fees. The Court of Appeals found no error in the trial court's finding that appellee established the grounds of general indignities. The trial court did not err in finding that the appellee's witness corroborated the grounds, noting that when the evidence is clear that there is no collusion, corroboration may be

comparatively slight. The decision was affirmed. (Story, B.; No. CV-13-611; 2-12-14; Whiteaker, P.)

Blackwell v. Sampley, 2014 Ark. App. 134 [**modification of visitation, of child custody, and child support**] In July, 2012, the circuit court entered an agreed order leaving custody of the parties' child with the appellee father and modifying the appellant mother's visitation schedule. One month later, the appellant filed a motion to modify custody, relying on occurrences before the July order that she alleged constituted a material change in circumstances. At a hearing, the appellee's attorney moved that testimony be restricted to things that had occurred since the agreed order was entered the month before. On appeal, the Court of Appeals held that the circuit court did not clearly err in finding no material change in circumstances. The circuit court did not err in excluding evidence of incidents that the appellant knew of before the July agreed order was entered. Finally, the Court of Appeals affirmed the award of attorney's fees to the appellee. (Medlock, M.; No. CV-13-660; 2-19-14; Wood, R.)

Arnoult v. Arnoult, 2014 Ark. App. 82 [**divorce—order of distribution**] The appellant wife contended that the circuit court's orders of distribution are inconsistent with the divorce decree. The Court of Appeals affirmed. The parties' marital property included two business holdings and a marital residence. Marital debt included the first mortgage on the marital residence of \$273,568.70 and a line-of-credit mortgage lien of \$452,160.05. The circuit court ordered an equal division of marital debt except for the line-of-credit mortgage lien. It ordered the marital residence, furniture, cars, and miscellaneous items to be sold at public auction, with the proceeds to be held subject to an order of distribution by the court. It ordered the business entities to be sold to their business partner, who was to assume the corporate debt except for the line of credit. That amount would be deposited in the circuit court's registry for distribution, as well. In a public auction for sale of the marital home, the appellant bid and purchased the property for one dollar. The sale notice said that the property would be sold subject to a first mortgage of approximately \$270,000, and a second mortgage in excess of \$463,199, "which must be paid in order to obtain clear title to this property." In a letter to the parties, the circuit judge calculated what each party was entitled to from the auction of the marital residence, and stated the responsibility of each party on the mortgages. The court set out the distribution to each party. The appellant claims that the order of distribution is contrary to the law and evidence and to previous judgments in the divorce decree. In affirming, the Court of Appeals said the circuit court has broad powers to distribute marital and nonmarital property to achieve an equitable division, with the overriding purpose to make a division that is fair and equitable. Appellant's argument ignores her continued possession of the marital residence. The circuit court did not overlook the decree's division of debt, but offset that debt against the amount to which the appellee was entitled for his half of the value of the marital home. The decision was not clearly erroneous and was affirmed. (Boling, L.; No. CV-13-506; 2-12-14; Gladwin, R.)

Nichols v. Teer, et al., 2014 Ark. App. 132 [**change of custody—material change of circumstances**] The appellees, paternal grandparents of the appellant mother's four children, have had formal custody of the children since they intervened in the appellant's and their son's divorce case in 2010. The children had been informally in their care since April 2009, because neither parent had stable housing. After a hearing on appellant mother's motion for change of custody,

the circuit court found that she had failed to prove a material change of circumstances and that, while it was not necessary to make a best-interest determination, that it was in the children's best interest to remain in their grandparents' custody. The Court of Appeals affirmed, noting that the trial court had entered a lengthy letter opinion, outlining various parties' testimony. The appellate court defers to the trial court's judgment of the credibility of witnesses, and that the court had not clearly erred in concluding that appellant failed to prove a material change in circumstances. (Johnson, K.; No. CV-13-833; 2-19-14; Vaught, L.)

Smith v. Hudgins, 2014 Ark. App. 150 [**recusal; paternity-child custody**] In this appeal from an award of custody to the appellee mother of the child in a paternity case, the appellant father alleged that the circuit judge erred in failing to recuse at the appellant's request based upon at least the appearance of impropriety. He claimed that the appellee's family and the judge were friends and that the appellee had an ex parte communication with the judge about the case. The judge denied the motion for recusal. The Court of Appeals said that, given the presumption of a judge's impartiality and the absence of objective proof that he was biased or prejudiced, the court did not abuse its discretion in refusing to recuse. The appellant also alleged that the court erred in awarding custody of the child to the appellee. After outlining the law concerning the award of custody to a father in a paternity case, the Court of Appeals held that the trial court did not err. The appellee mother had been the primary caretaker of the child, and the court's finding that it was in the best interest of the child to award custody to her was not clearly erroneous or clearly against the preponderance of the evidence. (Hannah, C.; No. CV-13-475; 2-26-14; Hixson, K.)

Davenport v. Uselton, 2014 Ark. App. 148 [**civil contempt**] The parties' divorce decree prohibited either party from having romantic overnight guests in the presence of the children. The appellee is living with someone with whom she is romantically involved. Upon a remand of this case after the first appeal, the circuit court found that appellee is "willfully exercising visitation with the children" while her romantic partner is present overnight, and found that the appellee was not in contempt. The Court of Appeals said that the facts establish a clear violation of the express terms of the non-cohabitation clause and, as such, it constitutes contempt. The case was reversed and remanded for a determination of what, if any, sanction should be imposed on the appellee for her civil contempt. (Spears, J.; No. CV-13-681; 2-26-14; Whiteaker, P.)

Jones v. Jones, 2014 Ark. 96 [**divorce; property division**] In this appeal of a decree of divorce, the appellant raised four issues concerning the circuit court's division of property. (1) The appellant contended that the circuit court erred in not awarding him an interest in a home the appellee purchased before the parties' marriage. The Supreme Court said that, although appellant's income was used to pay loans encumbering the home, appellee owed only \$16,000 on the home when they married. At the time of divorce, the debt on the home was more than triple that. Marital funds were used to pay on the debt, but the appellant did not show that these contributions increased the equity or value of the home. (2) The appellant contended that the circuit court made an unequal division of the parties' vehicles. The appellee was awarded a Mercedes worth \$22,000, whereas he was awarded two trucks with a combined value of \$13,000. The Supreme Court said that marital property need not be distributed with mathematical precision, but that it must be distributed equitably. He was awarded the two trucks that he uses in his

business. She was awarded no interest in the business. She was awarded no alimony. He was awarded the parties' miniature horses. He failed to demonstrate that the award of the vehicles was clearly wrong in light of the overall circumstances of the case. (3) The appellant claims that the circuit court's awarding the appellee half of the cash value in his life-insurance policies was clearly erroneous. However, the Supreme Court said that he failed to provide the current value of his policies, so it is impossible to determine whether this was or was not an equitable division. The burden is on the appellant to bring up a sufficient record and he failed to meet this burden. (4) The appellant contended that the circuit court erred when it failed to impose a constructive trust for one specific piece of property to be his separately. He argued that the marriage created a confidential relationship and that he executed a deed conveying the property to them as husband and wife based upon appellee's agreement to do the same with her separate home. The testimony was conflicting concerning whether or not she made such a promise and the circuit court resolved that conflict in appellee's favor. The Supreme Court found no reversible error and affirmed the circuit court's opinion in its entirety. (Harkey, A.; No. CV-13-596; 2-27-14; Goodson, C.)

PROBATE

Harbur v. O'Neal, et al., 2014 Ark. App. 119 [**declaratory judgment; revocable trust–undue influence; hearing disability**] A petition for declaratory judgment was filed by the appellees, grandchildren of the decedent, asking the circuit court to strike purported May and November 2011 amendments to the decedent's revocable trust. After a trial, the circuit court determined that, because the appellant had a power of attorney for her mother, the decedent, and because appellant had been helping her mother with her finances, a confidential relationship existed, which shifted the burden of proof to appellant to prove beyond a reasonable doubt that the decedent had the mental capacity and free will to execute the two trust amendments. The court found that the appellant had failed to do so. The appellant alleged on appeal that the court improperly shifted the burden of proof related to undue influence, erred in invalidating one trust amendment and in failing to recognize the other amendments as valid, and erred in addressing her hearing disability. The Court of Appeals held that the circuit court did not improperly shift the burden of proof to the appellant, noting that when a beneficiary procures the making of a trust, a rebuttable presumption of undue influence arises and the burden shifts to the proponents of the trust to prove beyond a reasonable doubt that the trustor had both the mental capacity and freedom of will to render the trust legally valid. The same presumption of undue influence arises when the beneficiary has a fiduciary and/or confidential relationship with the maker of a will or trust such as the relationship between a person who holds power of attorney and the grantor of that power. There was a confidential relationship between the appellant and the decedent, as well as a fiduciary duty based upon the appellant's having a durable power of attorney for the decedent. Also, the appellant had supervisory control over her mother's financial affairs. The trial court had found that appellant procured the two trust amendments. The appellant also alleged that the circuit court failed to accommodate her alleged hearing disability, but she failed to raise the issue in the circuit court. She also argued on appeal that, because of her hearing disability, she might not have been able to follow the testimony of other witnesses, which inhibited her ability to effectively interact with her counsel regarding the testimony of others. However, she failed to bring that to the attention of the circuit court for that court to address the situation. Therefore, she

failed to preserve the issues related to a hearing disability. The decision was affirmed. (Boling, L.; No. CV-13-603; 2-19-14; Gladwin, R.)

Bell v. McDonald, 2014 Ark. 75 [**decedents' estates; pretermitted child**] The appellant appealed the circuit court's dismissal with prejudice of her petition to inherit from the estate of Carl McDonald as a pretermitted child. The circuit court found that she did not meet the statutory requirements of Ark. Code Ann. § 28-9-209(d), which establishes when an illegitimate child may inherit real or personal property from his or her father or the father's relatives. In interpreting this statute, the Supreme Court said that, by its plain language, both the filing of a claim against the estate and the satisfaction of one of the six conditions listed in subsection (d) must be satisfied within 180 days of the death of the father. The court cited *Burns v. Estate of Cole*, 364 Ark. 280, 219 S.W.3d 134 (2005), which it said included a virtually identical argument to the appellant's argument here. The Supreme Court also held that the appellant's constitutional arguments were without merit: that the probate statute in question places burdens on those attempting to inherit as illegitimate children not required of legitimate children. The court previously rejected an equal-protection argument with respect to this statutory provision in *Boatman v. Dawkins*, 294 Ark. 421, 743 S.W.2d 800 (1988). With regard to her due-process claim, because appellant has no right to bring a paternity action in the first instance under the facts of this case, she therefore cannot show an infringement on her due-process rights from the circuit court's interpretation of the statute requiring her to have completed a paternity action within 180 days of the decedent's death. The decision of the circuit court was affirmed. (Hughes, T.; No. CV-13-623; 2-20-14; Hoofman, C.)

JUVENILE

Cordero v. Ark. Dep't of Human Servs., 2014 Ark. 64 [**TPR Indigency Appeal**]

The circuit court's finding that appellant was not indigent for the purpose of his TPR appeal was affirmed. At a hearing on appellant's indigency motion, the circuit court noted that his affidavit was not sworn to, and, without objection, took judicial notice that appellant testified at the TPR hearing that he made \$2100 per month. The burden of establishing indigency is on the person claiming indigency status and is a question of law and fact. The circuit court is directed to use the federal poverty guidelines in determining indigency. (Elmore, B.; CV-13-399; 2-13-14; Hart, J.)

Ingle v. Ark. Dep't of Human Servs., 2014 Ark. 53, [**Review – custody w/father**]

Appellant brought an appeal from a trial court order placing permanent custody of her son, C.N., with his biological father and closing the dependency-neglect case. Appellant argued that the circuit court lacked the authority to vest permanent custody in the father and to close the d-n case, sua sponte, and without notice at the six-month review hearing. She also argued that there was insufficient evidence to support the circuit court's decision not to return C.N. to her custody. The Court of Appeals affirmed the circuit court's decision. After granting a petition for review, the Supreme Court reversed the circuit court's decision and held that the circuit court clearly erred in finding that it was in C.N.'s best interest to be placed in the father's permanent custody. The Supreme Court remanded with directions for the court to return custody of C.N. to appellant. The court noted that “[i]f facts have developed during the pendency of the appeal that would cause

serious concern about returning C.N. to Ingle's care, any party may file a petition requesting the circuit court to address those matters." (Zimmerman, S.; CV-13-570; 2-6-14; Goodson, C.)

Contreras v. Ark. Dep't of Human Servs., 2014 Ark. 51 [**PPH – custody w/ maternal grandparent**] Appellant appealed a permanency planning hearing and closure order granting permanent custody of her child to her mother. Appellant argued that there was not sufficient evidence to show that the placement was in her child's best interest and that she had significantly complied with the court's orders and case plan. The Court of Appeals affirmed the circuit court's decision and on a grant from a petition for review, the Supreme Court reversed. The Supreme Court held that there was sufficient evidence to support the circuit court's finding that it was not appropriate to return J.G. to his mother at the time of the permanency-planning hearing, in accordance with Arkansas Code Annotated section 9-27-338(c)(1), but there was not sufficient evidence to find that permanent placement, pursuant to section 9-27-338(c)(2), which authorizes the circuit court to create a plan to return the juvenile to the parent within three months of the PPH, was not in the child's best interest. (Zimmerman, S.; CV-13-858; 12-6-14; Baker, K.)

Weathers v. Ark. Dep't of Human Servs., 2014 Ark. App. 142 [**TPR - ADA**]

Appellant (mom) argued that all three statutory grounds found by the circuit court were in error because the court was aware of her mental challenges and did not ensure that she was offered reasonable accommodations under the American with Disabilities Act. Appellant admits she failed to raise the issue below, but argues that it falls within the third *Wicks* exception to correct a serious error. To qualify for ADA in a DHS case, a parent must demonstrate that she has a mental impairment that substantially limits one or more of her major life activities. Appellant failed to make an ADA accommodations argument and the court acknowledged her mental status by appointing her an ad litem in addition to her counsel and did not act in a way that flagrantly prejudiced appellant to justify the *Wicks* exception. [**subsequent factors**] To the extent appellant argued that DHS did not provide her meaningful access to rehabilitation services, the appellate court affirmed based on the subsequent factors grounds where appellant lied to the court, dismissed her order of protection against her abusive partner, moved back in with her abuser and would not leave the abusive relationship. [**Aggravated circumstances**] Appellant's (dad) parental rights were affirmed based on the court's finding that there is little likelihood that services to the family will result in successful reunification, where appellant refused to accept responsibility for his violence despite criminal convictions or understand the significance of his violent tendencies, his counseling was unsuccessful, and he thwarted counseling appointments that the mother had. (Branton, W.; CV-13-938; 2-26-14; Harrison, B.)

McElroy v. Ark. Dep't of Human Servs., 2014 Ark. App. 117 [**TPR - failure to remedy**]

The circuit court terminated parental rights of Appellants to their children, H.F. and Z.F. Appellant (mom) argued that the circuit court erred in terminating her parental rights despite her efforts to comply with the circuit court's orders. The court of appeals affirmed the circuit court's ruling as to mom, holding that substantial evidence showed that in the more than twelve months since the children went into care, she had failed to remedy her neglect and parental unfitness that caused the children's removal. [**Continuance**] Appellant (dad) only argued that the circuit court abused its discretion in denying his motion for continuance. The appellate court was precluded from addressing the merits

on appeal because this issue was not raised with the circuit court. (Zimmerman, S.; CV-13-580; 2-12-14; Brown, W.)

McKay v. Ark. Dep't of Human Servs., 2014 Ark. App. 95 [**DN Adjudication – evidence**]

The circuit court adjudicated appellants children, H.G. and J.G., as dependent-neglected because of corporal punishment that left bruising on H.G.'s buttocks and left thigh. Appellants argued that the circuit court erred by allowing a forensic interviewer to testify about her opinion of child's credibility during her interview with the child. The court of appeals held that appellant failed to demonstrate prejudice from any alleged error. The circuit court also acknowledged the possibility of erring in allowing the testimony of the witness; it expressly stated that it based its determination of child's credibility solely on the child's testimony. (Sullivan, T.; CV-13-904; 2-12-14)

Case in which the Court of Appeals Affirmed No-Merit TPR and Motion to Withdraw Granted:
Border v. Ark. Dep't of Human Servs., 2014 Ark. App. 116 (Halsey, B.; CV-13-933; 2-12-14; Wood, R.)

EIGHTH CIRCUIT

Harleysville Worchester Ins. v. Ensminger: [**ins.**] The district court did not err in applying Arkansas's doctrine of mutual mistake to reform an insurance policy where the policy inadvertently failed to include a law enforcement exclusion, as the evidence showed both the insured and the insurer intended to enter into a contract which excluded such coverage. (W.D. Ark.; # 13-2061; 2-4-14)