

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 or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On November 21st, the Supreme Court issued an opinion addressing the approval of administrative plans that have been submitted by circuit and district courts. A copy of the per curiam order was included in the weekly mailout.

CRIMINAL

Benca v. Benton County Circuit Court, 2013 Ark. 448 [**contempt**] After a thorough review, the record reflects that the circuit court repeatedly warned appellant to refrain from interrupting. Yet, the attorney continued to do so, leading to the circuit court's ultimate finding of contempt. Circuit court's contempt finding affirmed. (Green, R; CR-13-588; 11-7-13; Hoofman, C.)

Gipson v. State, 2013 Ark. App. 651 [**rape shield**] The trial court did not abuse its discretion when pursuant to the rape shield statute, it excluded evidence regarding the presence of another man's semen on the victim's bed sheets from appellant's trial. [**habitual offender**] The trial court did not abuse its discretion when it allowed the State to introduce certified copies of judgments from another state to establish that appellant was a habitual offender. (Sims, B.; CR-13-105; 11-6-13; Hixson, K.)

Davis v. State, 2013 Ark. App. 658 [**sufficiency of the evidence; aggravated robbery**] There was substantial evidence to support appellant's conviction. [**motion to suppress**] The law enforcement officer had reasonable suspicion to stop the vehicle in which appellant was riding. Thus, the trial court did not err in denying appellant's motion to suppress the evidence that was obtained during the stop. [**revocation**] The State established by a preponderance of the evidence that appellant violated a condition of his probation. Therefore, the trial court did not err when it revoked appellant's probation. (Thyer, C.; CR-13-307; 11-6-13; Wood, R.)

Sex Offender Risk Assessment Committee v. Wallace, 2013 Ark. App. 654 [**administrative procedure; sex offender notification level**] Substantial evidence supported the Committee's Level 2 assessment of appellee. Thus, the trial court erred when it found the assessment arbitrary and capricious. (Wright, J.; CV-13-297; 11-6-13; Hixson, K.)

Ingram v. State, 2013 Ark. 446 [**jury**] The circuit court did not abuse its discretion when during appellant's trial, it removed a juror, who may have communicated with witnesses. (Erwin, H.; CR-13-270; 11-7-13; Danielson, P.)

Ross v. State, 2013 Ark. App. 664 [**admission of evidence**] The trial court did not abuse its discretion when it refused to admit into evidence a letter that was not properly authenticated. (Cox, J.; CR-13-271; 11-13-13; Pittman, J.)

Schubert v. State, 2013 Ark. App. 698 [**revocation**] The trial court's finding that appellant had violated a condition of his suspended sentence was clearly against the preponderance of the evidence. It was also clearly against the preponderance of the evidence for the trial court to conclude that appellant's failure to comply with the conditions of his suspended sentence was inexcusable. (Medlock, M.; CR-13-451; 11-20-13; Wood, R.)

Smith v. Simes, 2013 Ark. 477 [**writ of certiorari**] The circuit court exceeded its jurisdiction by disqualifying the local prosecutor and appointing a special prosecutor. (Simes, L.; CR-13-781; 11-21-13; Baker, K.)

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

Cauffiel v. State, 2013 Ark. App. 642 (aggravated assault on a family or household member; first-degree terroristic threatening) CR-13-308; 11-6-13; Whiteaker, P.

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:

Collier v. State, 2013 Ark. App. 643 (suspended sentence) CR-13-421; 11-6-13; Whiteaker, P.

CIVIL

Giles v. Ozark Mtn. Reg. Water Authority, 2013 Ark. App. 639 [**condemnation/attorney's fees**] Property owners were not entitled to attorney's fees from condemning authority, which was a public-water authority and not a municipality, because the statute does not provide for such an award. (Webb, G.; CV-13-38; 11-6-13; Wynne, R.)

Ballesteros v. Nationwide Ins. Co., 2013 Ark. App. 662 [**auto insur.**] Husband had insurance with personal injury protection coverage. Wife owned another car with coverage by another insurer and did not have such coverage. Husband had accident while driving wife's car and his insurer refused to pay his personal injury claim. Ark. Code Ann. Section 23-89-204 (a) provides that personal injury coverage applies only to occupants of the insured vehicle and to no other. (Mason, C.; CV-12-1072; 11-6-13; Brown, W.)

Rentco, Inc. v. Farmers Ins. Co., 2013 Ark. App. 628 [**third party beneficiary**] Equipment rental company was not a third party beneficiary of insurance contract between renter and his insurance company. In accident, equipment was damaged. Rental company obtained judgment against renter but was unable to collect and sought to collect against insurer. Rental company has no standing to enforce policy; there is no privity of contract. The contract is enforceable by an intended beneficiary but not by an incidental beneficiary. (Tabor, S.; CV-12-1126; 11-6-13; Gladwin, R.)

Diamante Golf Club, LLC v. Dye, 2013 Ark. App. 630 [**arbitration**] There was a valid arbitration agreement governed by the FAA, but the party waived its right to compel arbitration because of unnecessary delay and prejudice to other party. (Arnold, G.; CV-13-198; 11-6-13; Gladwin, R.)

Crittenden County v. Davis, 2013 Ark. App. 655 [**contract**] Two agreements were distinct and should not be construed together. The agreement was unambiguous; therefore, it was error to allow course of dealing evidence to be used to interpret the contract. When the parties have expressed their intentions in clear and unambiguous language, it is the court's duty to construe the writing in accordance with the plain meaning of the language employed. The contract plainly provided that Davis would be discharged without backpay if convicted, but that he would receive backpay if acquitted. The contract entered into by the parties did not cover the contingency that actually occurred, and the County did not contract to give Davis backpay if his indictment was dismissed. (Hill, V.; CV12-726; 11-6-13; Hixson, K.)

Roeder v. U.S., 2013 Ark. 451 [**certified question accepted**] Whether "malicious" conduct, under Ark. Code Ann. § 18-11-307(1), includes conduct in reckless disregard of the consequences from which malice may be inferred?" (W.D. Ark.; CV-13-955; 11-7-13; per curiam)

Corn v. Farmers Ins. Co., 2013 Ark. 630 444 [**UIM insur.**] The policy language, together with this court's holding in *Birchfield v. Nationwide Insurance*, 317 Ark. 38 (1994), required the insured to exhaust all policies against all tortfeasors before receiving UIM benefits. The modification of joint and several liability by Act 649 of 2003 (Civil Justice Reform Act) did not do away with the exhaustion requirement. A change in the state's public policy requires action by the General Assembly. [**policy construction**] The policy language is not ambiguous and, under the terms of the policy, UIM coverage is not triggered until all policy limits have been exhausted. (Mason, C.; CV-13-42; 11-7-13; Hannah, J.)

Patel v. Lawyers Title Ins. Corp., 2013 Ark. App. 670 [**summary judgment**] Summary judgment was not in order as there is an inherent ambiguity in the property description resulting in an issue as to what property was intended to be covered by the policy. (Johnson, L.; CV-13-382; 11-13-13; Wynne, R.)

Brumfield v. Johnson, 2013 Ark. App. 674 [**contempt**] Contempt finding was in error because to establish civil contempt there must be a willful disobedience of a valid court order and the court in this case found that the contempt was not willful. (Welch, M.; CV-13-391; 11-13-13; Glover, D.)

Collins v. Board of Embalmers and Funeral Directors, 2013 Ark. App. 678 [**admin. appeal**] Board's decision not to reinstate revoked license as a funeral director was supported by substantial evidence. (Davis, B.; CV-13-230; 11-13-13; Hixson, K.)

Pritchett v. Evans, 2013 Ark. App. 679 [**personal jurisdiction**] Facts asserted in complaint support personal jurisdiction over defendant. A nonresident's contacts with Arkansas need only be slight. (Schrantz, D.; CV-13-472; 11-13-13; Wood, R.)

Gartman v. Ford Motor Co., 2013 Ark. App. 665 [**comparative fault**] Fault of the plaintiff is relevant in a crashworthiness case for the purpose of apportioning the overall responsibility for damages. [**expert witness**] Court properly excluded expert opinion. The doctor possessed a general knowledge of blood-alcohol levels, but his testimony regarding the effect of burns on blood alcohol was little more than anecdotal, based on teachings he remembered from his residency. He offered no science or expertise to support his opinion. [**AMI 1013**] There were no mysterious malfunctions that necessitated reliance on circumstantial evidence. Instead, appellants pinpointed the fuel line as the defect and offered direct proof and expert testimony on the cause of the fire that led to their damages. Therefore, the circumstantial evidence portion of the instruction was not relevant. (Williams, C.; CV-13-183; 11-13-13; Pittman, J.)

City of Little Rock v. Herhan, 2013 Ark. App. 671 [**sanctions**] Rule 11 sanctions must be reversed because court cannot impose them on its own initiative. (Griffen, W.; CV-13-20; 11-13-13; Glover, D.)

Bateman v. Heird, 2013 Ark. App. 671 [**attorney's fees**] Upon finding that the party failed to put forth a meritorious defense showing why payment of the small claim was not made within the sixty days allowed under Arkansas Code Annotated section 27-53-402, the circuit court properly recognized that the statute mandated he be awarded a reasonable attorney's fee. However, the court abused its discretion by deciding on the amount of the attorney's fee before giving an opportunity to submit a fee petition, and by reiterating its decision without further explanation even after the fee petition was submitted. Case is remanded to determine the basis of the circuit court's decision regarding the amount of the attorney's fee it awarded. (Wyatt, R.; CV-13-458; 11-13-13; Gruber, R.)

Lonoke County v. City of Lonoke, 2013 Ark. 465 [**funding courts**] The circuit court's conclusion that the County was required to abide by the 1991 order and that nothing in the 2012 statute changed the effect of the 1991 order is affirmed. The 1987 statute and the 2012 statute are virtually the same regarding a county's obligations, as under both versions a county is required to "make an appropriation of a sum sufficient to pay the county's proportion of the expenses." Both statutes allowed for a county to pay a proportion of the district court's expenses in addition to the salaries. The 1991 order reflected that it was the intent of the parties to follow statutory law as amended by the 2012 statute. In doing so, the 1991 order incorporated the language of the 2012 statute—"unless otherwise agreed to by the political subdivisions which contribute to the expenses of the district court." This language in the 2012 statute was new statutory language, as it was not in the 1987 statute, but was contemplated by the 1991 order. Likewise, this language in the 2012 statute anticipated that there could be or were agreements between a county and a city regarding division of payments. Thus, this new language in the 2012 statute preserved existing agreements between a county and a city. (Williams, L.; CV-13-156; 11-14-13; Hart, J.)

Marlow v. United Systems of Ark., Inc., 2013 Ark 460 [**fees and costs/wrongful discharge**] Individual defendant was entitled to award of attorney's fees as a prevailing party in suit brought against him and corporation for wrongful discharge. Plaintiffs sued the individual but he was found to have no personal liability but he was not "irrelevant" to the suit. Plaintiffs invited or induced the award by suing the defendant and cannot now complain. Fees can be awarded in a wrongful discharge against public policy claim. (Johnson, L.; CV-13-185; 11-14-13; Danielson, P.)

Searcy Healthcare Center v. Murphy, 2013 Ark 463 [**arbitration**] Wrongful death beneficiaries were required to arbitrate claims based on documents that the deceased had executed with the facility-provider. A wrongful-death claim is derivative of the claim that the decedent would have had, had he survived. The right of the next of kin to recover under the Arkansas death statute is not a mere continuation of the original right of the decedent; it is a new action in the sense that it arises at a different time, the beneficiaries are different, and the measure of damages is different. However, it is still a derivative action, and arises only where the original right of the decedent has been preserved. Because the wrongful-death claim is derivative, the wrongful-death beneficiaries have the same limitations as the decedent would if the decedent

brought the claim, and are bound by the agreements entered into by the decedent involving the decedent's claims. (Hughes, T.; CV-13-210; 11-14-13; Baker, K.)

Locke v. Continental Casualty Co., 2013 Ark. App. 684 [**slip and fall**] There was not proof that defendant knew or by the exercise of reasonable care could have discovered the existence of exposed bolts in the parking lot. (Dennis, J.; CV-13-78; 11-20-13; Gruber, R.)

Safeco Ins. Co. v. Southern Farm Bureau Casualty Co., 2013 Ark. App. 696 [**ins./intentional-acts exclusion**] The evidence, viewed in the light most favorable to Farm Bureau, demonstrated that insured's intentional acts caused the accident. He was admittedly speeding on a road he described as "windy and curvy." [**juror misconduct**] Affidavit alleged that a juror looked up the definition of "intentional" on his phone during deliberations. Because appellants failed to demonstrate that the extraneous information was prejudicial, those portions of the affidavit discussing the jury's use of the information do not fall within the exception to Rule 606(b); therefore, those portions of the affidavit are inadmissible. (Laser, D.; CV-13-67; 11-20-13; Vaught, L.)

Gilder v. Centerridge Farms, Ltd., 2013 Ark. App. 686 [**default/service**] Face of summons had incorrect time on which defendant had to respond, but cover letter served with summons had the correct time. The service requirements of Ark. R. Civ. P. 4(b) were not strictly complied with in this case, and a cover letter cannot cure a defective summons. (Plegge, J.; CV-12-951; 11-20-13; Harrison, B.)

Brann v. Hulett, 2013 Ark. App. 687 [**boundary line**] In dispute over whether driveway encroached on adjoining property, court relied on wrong survey. The survey based on the original GLO survey and guidelines should prevail over a survey that does not reference the original lines. According to the official survey from the state land surveyor, the Hulett land contains a total of 148.56 acres. This is the amount of land that Hulett purchased in 1972 and has been paying taxes on since. Without some reason to deviate from this prima facie evidence (e.g., boundary by acquiescence or adverse possession), this is the amount of land that Hulett owns today. (Smith, P.; CV-13-343; 11-20-13; Wynne, R.)

Rose v. Nutt, 2013 Ark. App. 688 [**collateral estoppel**] An order in a domestic relations case addressed medical bills of child. Current husband sued wife's ex-husband and child's father to collect on these bills. Suit was dismissed based on collateral estoppel. Plaintiff and his wife were in privity for the purpose of the medical expenses. Privity exists when two parties are so identified with one another that they represent the same legal right. The funds alleged to have been spent were for the benefit of wife's child, and wife had the ability to seek reimbursement as part of the domestic-relations case. In filing this action, plaintiff is effectively attempting to recover funds on behalf of his wife. (Scott, J.; CV-13-709; 11-20-13; Wynne, R.)

DHS v. R.F., 2013 Ark. App. 694 [**child maltreatment**] Substantial evidence supports the finding that father maltreated son by forcing him to watch pornographic videos. At the time, son had limited mobility and was strapped in his wheelchair. These findings fall squarely under the definition of sexual abuse under the child-maltreatment statute. (Piazza, C.; CV-13-402; 11-20-13; Whiteaker, P.)

Zepecki v. Veterinary Medical Board, 2013 Ark. App. 697 [**admin. app.**] Given the evidence that Dr. Zepecki ignored the rules and regulations regarding the use of a chiropractor and the keeping of records, and recognizing the specialization and experience of the Board in determining issues affecting its agency, the sanctions imposed by the Board are affirmed and are not arbitrary or capricious. [**denial of continuance**] The record shows that the Board made numerous attempts for nearly a year to schedule a remand hearing acceptable to doctor and he failed to provide acceptable dates and repeatedly requested continuances. The denial of an additional continuance request was not an abuse of discretion. (Gray, A.; CV-12-1116; 11-20-13; Hixson, K.)

Adams v. Cameron Mut. Ins. Co., 2013 Ark. 475 [**certified question answered/ins**] An insurer in determining actual cash value of a covered loss under an indemnity policy may not depreciate the costs of labor when the term “actual cash loss” is not defined in the policy. (W.D. Ark.; CV-13-456; 11-21-13; Danielson, P.)

Tillman v. Raytheon Co., 2013 Ark. 474 [**General Aviation Revitalization Act**] The statute of repose applies and no exception to its application was demonstrated. Specifically, the fraud exception was not triggered. Furthermore, the failure to revise the plane’s flight manual , as argued, is not a basis to invoke the statute’s new part provision in order to extend the period of repose. (Wright, J; CV-12-261; 11-21-13; Corbin, D.)

DOMESTIC RELATIONS

Watkins v. Watkins, 2013 Ark. App. 632 [**attorney’s fees**] The circuit court granted attorney’s fees to the appellee after the court granted a Rule 41 dismissal of the appellant’s motion to modify the divorce decree to change custody. The Court of Appeals affirmed the award of attorney’s fees because the appellant’s arguments were not relevant to any error that may have occurred. Although she argued on appeal that she had an absolute right to a dismissal without prejudice under Rule 41 of the Arkansas Rules of Civil Procedure, she failed to address Rule 54 (regarding whether the matter had been finally submitted to the circuit court) or the circuit court’s inherent authority to grant attorney’s fees in domestic-relations cases. Because the appellant did not make a convincing argument or cite authority to support her argument, the appellate court did not consider it. The appellant also argued that the trial court abused its discretion by awarding an attorney’s fee of \$1500 without providing evidence of time or costs. Again, she cited no law to support her assertion, so the appellate court did not consider her argument on appeal. (Spears, J.; No. CV-13-300;11-6-13; Gladwin, R.)

Ingle v. Ingle, 2013 Ark. App. 660 [**divorce; property settlement**] The trial court found the appellant in contempt for her failure to return three gold coins to the appellee in conformity with their property settlement agreement. She alleged that, first, the agreement was too indefinite to be complied with, and second, that she has no ability to return the coins to him. The Court of Appeals found that the language of the agreement was clear. She had counsel when the agreement was entered into and could have required more definite descriptions had she wanted. She also said she did not have the specific coins the appellee wants, so she cannot comply with the order. However, the court said if she was unable to produce the coins, she did not argue that she could not fulfill the alternative remedy, to pay him \$20,000. The trial court found the appellee more credible than the appellant, and the Court of Appeals defers to the circuit court for findings of the weight of the evidence and the credibility of the parties. (Putman, J.; No. CV-13-162; 11-6-13; Wood, R.)

Vytlacil v. Vytlacil, 2013 Ark. App. 649 [**divorce—child support; property division; alimony**] When the parties divorced, they were awarded joint custody of their children, with no child support for either party. In joint-custody awards, the court has the discretion to refuse an award of support to either parent. In this case, the appellee paid for nanny services in both parties' homes. In addition, the appellant received one-half of a \$1.5 million marital estate. The court found no abuse of discretion regarding child support. On the issue of the trial court's treatment of the appellee's non-vested stock options, the appellant failed to identify the potential stock options, the future value of the options, or how and when they vest. He failed to demonstrate error and to carry his burden on this point, so this determination was affirmed, as well. Finally, on the issue of alimony, the court said the trial court was in the best position to view the needs of the parties in connection with alimony. The court considered the factors and specifically structured the settlement to give the appellant an opportunity to re-enter the workforce. The Court of Appeals found no abuse of discretion. The decision was affirmed. (Duncan, X.; No. CV-12-800; 11-6-13; Vaught, L.)

Blaylock v. Blaylock, 2013 Ark. 659 [**health insurance; marital property; child support; alimony**] The appellant was ordered in the parties' divorce decree to provide health insurance for the parties' adult daughter. The Court of Appeals reversed on that issue, noting that the general rule in Arkansas is that a parent is legally obligated to support his or her child only until the child reaches majority, absent extenuating circumstances not applicable to this case. The court also reversed on the issue of child support, remanding for the circuit court to make further findings in conformity with Administrative Order No. 10 and Ark. Code. Ann. section 9-12-312. The court affirmed on the issues of the valuation of three notes and in the distribution of this marital property, and on the award of alimony to the appellee. (Mason, C.; No. CV-12-689; 11-6-13; Wood, R.)

Anderson v. Thomas, 2013 Ark. App. 653 [**child custody—modification**] The trial court changed primary custody from the appellant father to the appellee mother based upon changed circumstances and the best interest of the children. The Court of Appeals reversed, finding that none of the factors upon which the court relied, either individually or collectively, amounted to a material change in circumstances to justify changing custody. The court found, also, that even if the appellee had proved a material change in circumstances, the court also erred in finding that a

change in custody was in the children's best interests. Testimony undisputedly indicated that the children were thriving in the custody of their father, and were doing well in school and in every other facet of their lives. Even the appellee testified that the children are not without anything and that their father takes good care of them. To promote stability and continuity and to protect a suitable and beneficial custody arrangement, it was not in their best interest to change custody. (McCallister, B.; No. CV-12-1040; 11-6-13; Hixson, K.)

Calaway v. Crotty, 2013 Ark. App. 637 [**order of protection–modification**] The Court of Appeals held that the circuit court had no authority to amend an order of protection to remove the caution with regard to a firearm and violent history and to reduce the term of the order from three years to eighteen months without affording the appellee/cross-appellant notice and an opportunity to be heard before any modification occurred. A judgment entered in excess of the trial court's power is void. The holding left the original order, from which no appeal was taken, in place. The appeal was dismissed on direct appeal and reversed on cross-appeal. (Landers, M.; No. CV-13-287; 11-6-13; Walmsley, B.)

Ary v. Ary, 2013 Ark. App. 671 [**alimony**] The appellant husband argued on appeal that the trial court erred as a matter of law when it granted the appellee wife alimony *after* it entered the divorce decree. However, the Court of Appeals did not reach the merits of the argument because the appellant failed to raise the issue before the trial court. The appellant also challenged the award of alimony, including the amount of alimony awarded. Decisions regarding alimony lie within a trial court's discretion and will not be reversed absent an abuse of discretion. Here the trial court properly considered the primary and secondary factors to be considered for an award of alimony, including the needs of one party and the ability of the other party to pay. The Court of Appeals concluded that the court did not abuse its discretion, that it applied the correct legal standard, and that the facts as found by the court were supported by the evidence. The decision was affirmed. (McCallister, B.; No. CV-13-591; 11-13-13; Vaught, L.)

Sublett v. Mallett, et al., 2013 Ark. App. 676 [**paternity; intervention–timeliness**] The appellant, Mr. Sublett, was married to separate appellee, Ms. Tullos. During the marriage when the parties were separated, the child in question was born in 2001. When Sublett and Tullos divorced, this child was not mentioned and Sublett did not claim that she was "born of the marriage." Separate appellee, Mr. Mallett, was determined to be the father of the child in a paternity action he filed in 2003. Joint custody was established. After subsequent litigation between Mallett and Tullos, Mallett was awarded full custody and Tullos was ordered to pay child support. In 2011, Sublett attempted to intervene in the action between Mallett and Tullos, claiming that he, not Mallett, was the biological father. The trial court refused his request to intervene, noting that in the years of litigation between Mallett and Tullos, the allegation that Mallett was not the father was made only after Mallett was granted custody and Tullos was ordered to pay child support. The court used judicial and equitable estoppel as the basis for its decision. The Court of Appeals said, first, the motion to intervene was untimely under Ark. Rule of Civil Pro. 24(a). The litigation had progressed too far before the motion to intervene was filed. Second, granting the untimely motion would have caused the other parties to the litigation to suffer great prejudice. Third, Sublett failed to provide a valid reason for his delay in filing the

motion to intervene. The Court of Appeals affirmed the decision under the alternative theory of timeliness. (Reynolds, D.; No. CV-12-1109; 11-13-13; Vaught, L.)

Freeman v. Freeman, 2013 Ark. App. 693 [**divorce—proof of residency**] The appellant contended that the circuit court lacked jurisdiction to enter a divorce decree because the appellee did not prove residency in Arkansas for the requisite period of time. The Court of Appeals affirmed the circuit court’s finding that the appellee wife proved residency in Arkansas for the required statutory time, sixty days next before the filing of the divorce complaint, and for three full months before the final judgment granting the decree, and with the required corroboration, which needs to be only “slight.” The court discussed residency and domicile, the latter which focuses on a party’s subjective intent to remain more or less permanently in a particular state. The court also affirmed the trial court’s division of a tenancy by the entirety in one of the parties’ properties and the award of that property to the appellee, as well as the division of other marital property. The court also affirmed the trial court’s division of debt, noting that there is no presumption that an equal division of debt must occur, but that it must be equitable. In this case, the facts that supported an unequal division of marital assets applied with the same force to the unequal division of debt. (Yeargan, C.; No. CV-12-1039; 11-20-13; Glover, D.)

Moix v. Moix, 2013 Ark. 478 [**visitation—non-cohabitation restriction**] The trial court found that it was required by the public policy of Arkansas to impose a non-cohabitation restriction on the appellant father’s long-term, live-in domestic partner, preventing him from being present in their home during any overnight visits with appellant’s minor child. The appellant raised issues based upon federal and state constitutional rights to privacy and equal protection, but the court found it unnecessary to address those because it reversed and remanded based upon appellant’s argument that prior cases do not require the imposition of non-cohabitation provisions in the absence of any finding of evidence of harm to the minor child. The court said that recent cases have emphasized that the policy against romantic cohabitation in the presence of children must be considered under the circumstances of each particular case and in light of the best interest of the children. The court said that the appellant’s partner posed no threat to the child, and that no factors militated against overnight visitation except the prohibition of unmarried cohabitation with a romantic partner in the child’s presence. However, it said that the circuit court made no finding on whether such a provision was in the best interest of the child in this case, so the court reversed and remanded for the circuit court to make this determination. Appellee’s contention in her brief that the case could be resolved by finding that the circuit court erred in finding a material change in circumstances justifying modification of the previous visitation order could not be considered. She had filed no notice of cross-appeal from the circuit court’s order. Therefore, the court had no jurisdiction to address the argument. (Pierce, M.; No. CV-13-76; 11-21-13; Hoofman, C.)

PROBATE

Howard, et al. v. Codling, 2013 Ark. App. 641 [**Rule 2(a)(4), Ark. Rules of App. Pro–Civil**] The Court of Appeals held that the circuit court erred in striking separate appellant Don Howard’s answer as untimely. Service of valid process is necessary to give a court personal jurisdiction over a defendant, but the defense of personal jurisdiction may be waived. Mr. Howard was never

served. He did file a response 153 days after the counterclaim was filed. Rule 12(a)(1) of the Arkansas Rules of Civil Procedure requires a response to be filed within thirty days after service of the pleading. Because he was never served, his response was not untimely under Rule 12(a)(1). The common-defense theory applies so that his answer serves as a defense for the other two separate appellants. Because the circuit court struck the joint response of all three, it did not decide this issue, so the case was remanded for the circuit court to determine. (Duncan, X.; No. CV-13-641; 8-28-13; Gruber, R.)

Grant v. Williams, et al., 2013 Ark. App. 663 [**decedent's estate; vacating an order of final distribution**] On November 15, 2012, the trial court vacated its order of December 15, 2009, which granted a petition for approval to make a final distribution and to determine heirship. The appellant, administrator of the estate of the decedent, argued on appeal that the circuit court had lost jurisdiction to vacate the order; that insufficient evidence existed to set aside the order; and that equitable estoppel prevents appellee Gates Williams from objecting to the order. The Court of Appeals found that the trial court had jurisdiction based upon Ark. Code Ann. section 28-1-115, which provides that the court may vacate an order at any time within the period allowed for appeal after the final termination of the administration of the estate of a decedent. In this case, the administration of the estate had not been terminated. The court also found, on the sufficiency of the evidence issue, that the circuit court's order was not clearly erroneous, and that there was sufficient evidence that a valid agreement had not been reached. The court found, on the issue of equitable estoppel, that the circuit court's finding that the parties did not reach a settlement agreement at their meeting on December 15, 2009, negates appellant's estoppel claim. The decision was affirmed. (Landers, M.; No. CV-13-236; 11-13-13; Gladwin, R.)

Peterson v. Peck, 2013 Ark. App. 666 [**trusts**] The appellant is the daughter and the appellee is the widow of decedent Robert Peck. Before his death in 2006, he was the owner of artwork, a mobile by Alexander Calder, which appellant claims she received by inter vivos gift from her father. In the alternative, she claims she received it through the decedent's June 2001 trust. The Court of Appeals affirmed the trial court's finding that the facts did not satisfy two elements of an inter vivos gift--first, decedent's intent to make an immediate, present, and final gift--and second, decedent's unconditional release of all future dominion and control over the property, since he retained the right to display it. The court said that the trial court was not clearly erroneous in its determinations about an inter vivos gift. The appellant's final point is that she did not forfeit her interest in the trust, although the trial court had found that she lacked standing to sue as a beneficiary of the trust because she had forfeited her share under the share-cancellation provision of the trusts. The trust instrument provided for a forfeiture if any of the decedent's children challenged the provisions of the trusts, attacked the validity of the trusts, sought to remove the appellee as trustee or questioned her actions as trustee. The Court of Appeals said that such provisions are valid, triggered if any of the grantor's children, including the appellant, questioned appellee's actions as trustee. The appellant had asserted that appellee failed to provide proper accountings, that she used trust funds to buy herself a luxury automobile, and that she depleted trust funds by selling the mobile for \$3.7 million and investing it in a fraudulent Ponzi scheme. She asked for accountings and for the payment of damages to replenish the trust. The court said she clearly questioned the appellee's actions as trustee and asked the court to control her actions

as trustee, triggering the provision. The circuit court's finding that she forfeited her interest in the trust, so could not take the piece of artwork through the trust, was not clearly erroneous. (Griffen, W.; No. CV-13-100; 11-13-13; Walmsley, B.)

JUVENILE

K.O.P. v. State, 2013 Ark. App. 667 [**Transfer**] The circuit court, criminal division had jurisdiction of the felony charges but did not have jurisdiction of the misdemeanor charges. (Medlock, M.; CV13-263; 11-13-2013; Walmsley, B.).

Smithee v. Arkansas Dept. of Human Services, 2013 Ark. App. 650 [**TPR – evidence**] Appellants argued that admitting evidence of a prior case was unfair and prejudicial. Failure to develop an argument precludes review. The appellate court noted that even if the argument had been properly developed, appellants failed to demonstrate how the prior case unfairly prejudiced them. Furthermore, the same evidence was contained in the adjudication order, psychological evaluation, and petition for termination; all of which were admitted into evidence at the termination hearing without objection. [**TPR – sufficiency**] Appellants' failure to challenge the alternative termination ground of aggravated circumstances, that was pled in the TPR petition and relied on by the trial court in its order, was sufficient to support the termination. Only one ground for termination must be proved. (Thyer, C. CV 545-11-6-2013; Vaught, L.).