

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

Supreme Court adopted amendments to Rules 1.8 and 7.1 of the Rules of Criminal Procedure and Sup. Ct. R. 6-6 by per curiam order dated September 26, 2013. A copy was included in the weekly mailout.

Amendments to Rules 8 and 9 of the Rules of Procedure of the Judicial Discipline and Disability Commission were adopted on September 26th.

Amendments to Rule 1.15 of the Rules of Professional Conduct and Section 28 of the Procedures Regulating Professional Conduct were adopted on September 26th.

CRIMINAL

Halstead v. Sex Offender Assessment Committee, 2013 Ark. App. 445 [**agency review**] There was substantial evidence to support the Committee's assessment of appellant as a level three sex offender. (Fitzhugh, M.; CV-13-14; 8-28-13; Gruber, R.)

Walker v. State, 2013 Ark. App. 437 [**forfeiture**] The State proved by a preponderance of the evidence that forfeiture of appellant's vehicle was appropriate pursuant to Ark. Code Ann. § 5-64-505. (Hearnsberger, M.; CV-12-1067; 8-28-13; Gladwin, R.)

Robinson v. State, 2013 Ark. App. 464 [**motion to suppress**] Because appellant's vehicle, which had a broken taillight, was not in "good working order" pursuant to Ark. Code Ann. § 27-32-101, the law enforcement official had probable cause to stop the vehicle. Thus, the trial court properly denied a challenge to the lawfulness of the stop. (Pope, S.; CR-12-784; 9-4-13; Walmsley, B.)

Jones v. State, 2013 Ark. App. 466 [**Confrontation Clause**] Appellant's Confrontation-Clause challenge was without merit because he failed to comply with Ark. Code Ann. § 12-12-313(d)(2), which requires a defendant to give at least ten days' notice prior to a proceeding if he or she requests the presence of the laboratory analyst who performed the analysis to appear at the proceeding for the purpose of cross-examination. (Cottrell, G.; CR-13-69; 9-4-13; Wynne, R.)

Boykins v. State, 2013 Ark. App. 463 [**admission of evidence**] The trial court did not abuse its discretion when it excluded evidence, which offered a motive or opportunity for a third party to commit the crime for which appellant was charged but failed to point directly to the guilt of the third party. (Jones, B.; CR-13-17; 9-4-13; Gladwin, R.)

Cole v. State, 2013 Ark. App. 492 [**jury instructions**] Because the evidence clearly supported the theft-of-property charge, the circuit judge was not obligated to give a lesser-included-offense instruction of attempted theft of property. (Henry, D.; CR-12-755; 9-18-13; Gladwin, R.)

Cosen v. State, 2013 Ark. App. 507 [**admission of evidence**] The trial court did not abuse its discretion when it excluded from appellant's trial certain ballistic evidence, which appellant argued implicated a third party's involvement in the crime for which he was charged, because the excluded evidence did not directly establish the guilt of the third party but rather could have only created an inference of his involvement in the crime. (Dennis, J.; CR-12-913; 9-18-13; Glover, D.)

Malcum v. State, 2013 Ark. App. 499 [**continuance**] The trial court did not abuse its discretion when it refused to grant appellant's request for a continuance, which was based upon the unavailability of a witness. [**jury instructions**] Because the circuit court properly instructed the jury using the model instructions before jury deliberations began, the circuit court's prior recitation of non-model instructions on credibility, personal observations, and experiences was harmless error. (Griffen, W.; CR-12-564; 9-18-13; Harrison, B.)

State v. Miller, 2013 Ark. 329 [**termination of obligation to register as a sex offender**] The circuit court did not clearly err when it concluded that appellant was not likely to pose a threat to the safety of others, a finding that was required before appellant's obligation to register as a sex offender could be terminated. (Griffen, W.; CR-12-1034; 9-19-13; Danielson, P.)

Mott v. State, 2013 Ark. App. 529 [**revocation of probation**] The trial court erred when it revoked appellant's probation because prior to the revocation the court had entered an order sentencing appellant to two years in a regional correctional facility and directing that her previous order of probation was satisfied by serving time in the correctional facility. (Cottrell, G.; CR-13-68; 9-25-13; Glover, D.)

Williamson v. State, 2013 Ark. 347 [**sufficiency of the evidence; first-degree murder**] There was substantial evidence to support appellant's conviction. [**suppression of confession**] Based upon the totality of the circumstances, the circuit court did not err when it found that appellant was adequately apprised of his constitutional rights and that he voluntarily waived those rights when he gave a statement to law enforcement officials. (Wright, J.; CR-12-1130; 9-26-13; Hoofman, C.)

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

Hicks v. State, 2013 Ark. App. 439 (rape) CR-12-980; 8-28-13; Walmsley, B.

Inthisone v. State, 2013 Ark. App. 482 (attempted capital murder) CR-12-840; 9-11-13; Whiteaker, P.

Baca v. State, 2013 Ark. App. 524 (residential burglary; possession of a firearm by a felon) CR-13-192; 9-25-13; Pittman.

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:

Ortiz v. State, 2013 Ark. App. 442 (suspended sentence) CR-13-73; 8-28-13; Wynne, R.

Rodriguez v. State, 2013 Ark. App. 454 (probation) CR-13-62; 8-28-13; Wood, R.

Robison v. State, 2013 Ark. App. 456 (probation) CR-12-1002; 8-28-13; Brown, W.

Coupey v. State, 2013 Ark. App. 446 (suspended sentence) CR-13-121; 8-28-13; Glover, D.

Breeden v. State, 2013 Ark. App. 522 (probation) CR-13-205; 9-25-13; Gladwin, R.

CIVIL

Hardcastle v. Cerrato, 2013 Ark. App. 438 [**service**] Summons left with defendant's mother was not proper service as mother's house was not defendant's usual place of abode. Furthermore, defendant did not consent to such service. (Wood, R.; CV 12-1099; 8-28-13; Pittman, J.)

Purser v. Buchanan, 2013 Ark. App. 449 [**deed**] Deed to Arkansas property was subject of hearing in a Mississippi probate case. Mississippi court did not have jurisdiction to determine the validity of the Arkansas deed. (Harkey, A.; CV 13-107;8-28-13; Whiteaker, P.)

Brown v. Johnson, 2013 Ark. App. 457 [**negligence**] In case claiming negligence in fire and the lack of smoke alarms, plaintiff failed to show that the defendant owed a duty to maintain the premises. (Wyatt, R.; CV 13-113; 8-28-13; Brown, W.)

Mercy Health System v. McGraw, 2013 Ark. App. 459 [**prom. estoppel**] In malpractice action, doctor defaulted; she sued hospital claiming that it promised “to take care of complaint,” but failed to do so. Jury found defendant hospital liable based on theory of promissory estoppel. (Comstock, J.; CV 13-229; 8-28-13; Brown, W.)

Edgmon v. Little Rock Police Dept., 2013 Ark. App. 470 [**employment termination**] A de novo appeal from the civil service commission does not require the circuit court to make express findings of fact or conclusions of law. (Fox, T.; CV 12-964; 9-4-13; Vaught, L.)

Sears v. Zumwalt, 2013 Ark. App. 490 [**jurisdiction**] Circuit court did not have jurisdiction to review ABC’s decision because the decision in question was not adjudicatory in nature. The ABC director’s decision approving the application was predicated upon the contents of the application file alone. No hearing or other process whereby testimony was received took place. Therefore, the director’s decision in the instant case did not constitute an “adjudication” for the purposes of the APA. Since the director’s decision did not constitute an adjudication, the circuit court lacked subject-matter jurisdiction to review it. (McGowan, M.; CV 13-124; 9-11-13; Brown, W.)

Berryhill v. Synatzske, 2013 Ark. App. 483 [**limitations**] Synatzske was deceased when the complaint was filed. As a result, she was not a proper defendant, and the complaint against her was void ab initio. At the time the original complaint was filed, a personal representative for her estate had not been appointed and could not be named as a proper defendant. By the time a personal representative had been appointed and an amended complaint naming therepresentative had been filed and served, the statute of limitations had expired. The attempt to use the John Doe statute was inapplicable because it does not apply here to toll the limitations period. This statute was designed to address those instances in which the identity of a potential tortfeasor is unknown. It does not apply in situations such as this when there is no question regarding the identity of the alleged tortfeasor. Because the original complaint was void ab initio, it was not subject to amendment, relation back, or substitution of parties under either Ark. R. Civ. P. 15(c) or 25. (Williams, C.; CV 13-19; 9-11-13; Whiteaker, C.)

Hartsfield v. Blann, 2013 Ark. App. 487 [**trusts**] The revocability provision said that the “donors” (plural) could change the beneficiaries; it does not allow a donor (singular) to do so. All trust provisions have a plural subject and are limited in duration. Only the donors, Robert and Robena jointly, could execute a written instrument to change the trust. Both of their signatures are required. Robena’s second amendment had her signature only and was executed after Robert had

died and is invalid. The trust is unambiguous and the circuit court was incorrect when it found that the trust was ambiguous and allowed extrinsic evidence regarding intent. (Rogers, R.; CV 13-218; 9-11-13; Wood, R.)

Reynolds v. GFM, LLC, 2013 Ark. App. 484 [**boundary**] Fence was not a boundary by acquiescence and party was not entitled to a prescriptive easement in a road. While the road may have been used often in the past, there is no evidence that the use was anything other than permissive. There is a lack of evidence that for seven years the party adversely used the road. (Harkey, A.; CV 13-29; 9-11-13; Vaught, L.)

Marrufo v. Ark. DHS, 2013 Ark. 484 [**Child Maltreatment Registry**] The failure to conduct an administrative hearing within the statutory time frame of 180 days was caused by the petitioner's request for a continuance; thus, the delay was attributable to him. (Yeargan, C.; CV 12-1006; 9-12-13; Hart, J.)

Bank of the Ozarks v. Walker, 2013 Ark. App. 517 [**arbitration**] The arbitration clause was not unconscionable; therefore, the motion to compel arbitration should have been granted. (Huckabee, S.; CV-13-3; 9-18-13; Wood, R.)

Aceva Tech., LLC v. Tyson Foods, Inc., 2013 Ark. App. 495 [**recess**] The trial court did not abuse its discretion in denying a recess because it is not at all apparent that a short recess would have changed the outcome of the trial. [**reopen record**] Trial court did not abuse its discretion in refusing to reopen the record to present surrebuttal testimony. [**limitation of liability clause**] A second agreement did not encompass the limitation of liability provision in an earlier agreement. [**indemnification**] Indemnity covered costs expended in bringing suit as a plaintiff and was not limited to indemnify only if it is sued by a third party. [**prejudgment interest**] It is irrelevant that the damages were contested. Since the amount of loss was ascertainable on specified date, prejudgment interest was in order. (Smith, K.; CV-12-293; 9-18-13; Pittman, J.)

Hall v. Hall, 2013 Ark. App. 537 [**directed verdict**] Directed verdict was proper on the breach-of-contract claim. There was not substantial evidence of mutual agreement. Even if the parties were leaning toward creating a contract and not a gift, there was no meeting of the minds as to the percent of ownership to be transferred. (Philhours, R.; CV-12-660; 9-25-13; Wood, R.)

Kirkwood v. Dial, 2013 Ark. App. 536 [**contract for sale**] The issue is under what circumstances the seller in a contract-of-sale of real property may be held liable for subsequent injuries to an unknown tenant on the property. Even assuming that tenant was a licensee under Arkansas law, a property owner owes a licensee no duty unless her presence on the premises is known or reasonably should be known. There is no evidence that seller knew or should have known tenant was residing on the property or that he injured her through willful or wanton conduct. (Proctor, R.; CV-12-897; 9-25-13; Hixson, K.)

Stephens Prod. Co. v. Blackard, 2013 Ark. App. 530 [**settlement agreement**] Settlement agreement was enforceable. It did not contain a time limit for the condition being satisfied, and the trial court specifically found that the condition was fulfilled in a reasonable amount of time. The parties were dealing at arms length in trying to compromise and settle adverse claims, and there was no allegation of fraud or undue influence. [**attorney's fees**] Even though the underlying case was in the nature of a quiet-title action, it was necessitated by a dispute concerning the terms of oil/mineral/gas leases. The trial court limited the award of fees to those associated with the settlement agreement, and, in addition, the underlying dispute arose out of language in a lease, which is in the nature of a contract. (Sutterfield, D.; CV-12-921; 9-25-13; Glover, D.)

Fitzgiven v. Commission, ADE, 2013 Ark. 346 [**sovereign immunity**] Suits were brought against ADE based on its actions when school district was placed under fiscal distress. Judgments against ADE would operate to control the actions of ADE; therefore, the suits are ones against the State and are barred by the doctrine of sovereign immunity. An exception to the doctrine was not plead in the complaints. The complaints fail to state facts sufficient to show that the actions taken by ADE were in excess of its authority, ultra vires, or in bad faith. (McGowan, M.; CV-13-176; 9-26-13; Danielson, P.)

Dorsett v. Buffington, 2013 Ark. 345 [**res judicata**] An express reservation of rights as to litigation on a certain item preserves that subject for future adjudication. Because party was prohibited from bringing a claim for damages in the Louisiana summary proceeding and because the Louisiana Judgment contained an express reservation of rights to future litigation, res judicata did not bar action in Arkansas. [**prejud. interest**] Because the damages were not by their nature capable of exact determination, both in time and amount, the circuit court erred in awarding prejudgment interest. (Haltom, B.; CV-13-255; 9-26-13; Hannah, J.)

DOMESTIC RELATIONS

Woods v. Woods, 2013 Ark. App. 448 [**child custody**] The circuit court did not clearly err in awarding custody to the father of the child. The appellant's allegation that the court erred in not granting her spousal support was not preserved for appeal. The court made no mention of it in its comments from the bench, its letter opinion, or the divorce decree, and the appellant did not request a specific ruling on that issue. (Clawson, C.; No. CV-12-722; 8-28-13; Whiteaker, P.)

Brimberry v. Gordon, 2013 Ark. App. 473 [**paternity; child custody; material change in circumstances**] It is not required that a circuit court find a material change in circumstances in an initial custody decision following establishment of paternity. The court did not clearly err in determining that it was not in the child's best interest to remain in the custody of a mother who did not have a stable home environment. Courts can make custody determinations that include assessment of a parent's morality in the presence of the child. In this case, it was not whether the mother was in a heterosexual or homosexual relationship that resulted in her losing custody to the

child's father. It was her poor judgment and promiscuity in the presence of her child and the fact that the father provided a more stable home. The decision to change custody to the father was affirmed. (Moore, R.; No. CV-12-1057; 9-4-13; Wood, R.)

Hall v. Hall, 2013 Ark. 330 [**child support**] The appellant mother appealed from a denial of her motion to increase child support from the defendant. When the parties divorced in 2010, they had a property-settlement agreement that included \$1,485 a month child support based upon appellee's weekly net-take-home pay from his employment with Falcon Jet. He also agreed to pay one-half of private-school tuition for the parties' two children, but not less than \$715 a month. In exchange, the appellant agreed not to consider his income from his private business, Hall Engineering, in setting child support. In her motion to increase, appellant alleged a material increase in his Hall Engineering income or, alternatively, that the original award was based upon fraudulent figures appellee had provided. After several hearings on motions, the circuit court noted that the appellee had admitted in open court that he had hidden marital assets from appellant and had misrepresented his financial status from her and from the court. The court awarded appellant \$124,698.50, plus attorney fees and costs, plus interest. The court found it could not determine if the concealed funds were regular sources of income or one-time payments, so it denied her motion but said she could pursue her claim at a later time upon proper motion. The Supreme Court said that the distinction between regular sources of income and one-time payments was irrelevant, because all sources of a payor's income are included when determining income for child-support purposes. But, the Supreme Court noted that changed circumstances must be shown before a modification of child support is ordered. The Supreme could not say that the denial of the motion was incorrect. (Smith, V.; No. CV-12-89; 9-19-13; Danielson, P.)

Cervantes v. Cervantes, 2013 Ark. App. 527 [**child custody; contempt; continuance**] The Court of Appeals affirmed the trial court's award of custody to the appellee father of the children, affirmed the trial court's denial of contempt against the appellee for failing to pay spousal support, and affirmed the trial court's denial of appellant's motion for continuance made during the final hearing. (Huckabee, S.; No. CV-13-184; 9-25-13; Wynne, R.)

Spears v. Spears, 2013 Ark. App. 535 [**child support; marital debt; alimony**] The Court of Appeals affirmed the circuit court's determination of appellant's income for child-support purposes. The Court affirmed but modified the trial court's award of alimony to appellee, reducing it from \$4,000 a month to \$2,500 a month. The appellate court found that two of the expenses, \$400 a month for potential college expenses and \$320 a month for the children's counseling, should not be paid by the appellant, and that others were excessive for a stay-at-home mother with two children at home. The trial court was affirmed for assigning the responsibility for the appellant's medical-school debt solely to the appellant, rather than dividing that debt between the parties. The Court noted that no presumption exists that an equal division of debts must occur. Debts should be allocated to the parties based upon their relative abilities to pay. Here, the court assessed the parties' relative abilities to pay and decided that appellant had sufficient income to pay whereas the appellee did not. Also, he will retain the personal benefit of his education. (Halsey, B.; No. CV-12-645; 9-25-13; Vaught, L.)

PROBATE

Miller v. Gaddy, 2013 Ark. App. 443 [**guardianship**] The case involves the guardianship of the person and the estate of the parties' mother. The circuit court granted guardianship of the person and the estate of the mother, Mrs. Solomon, finding that she was legally incapacitated, necessitating the appointment of a guardian, and that the appellee was most suitable to act as her guardian. The appellant did not challenge these findings or any substantive part of the order. She asked that the outcome be affirmed but that several findings of fact, which she disputes, be reversed. The Court of Appeals said that no opinion would have any practical effect on the legal controversy, and that an issue becomes moot in that circumstance. Appellate courts do not decide issues that are moot or render advisory opinions. The appeal was dismissed with prejudice. (Lindsay, M.; No. CV-12-865; 8-28-13; Wynne, R.)

Hamm v. Hamm, 2013 Ark. App. 501 [**decendent's estate**] Appellant Lynda Hamm and appellee Jerry Hamm were both named beneficiaries in the will of their brother, Tommy Hamm. Appellant Lynda was executrix of the estate and a potential residuary beneficiary. She filed a petition to disinherit the appellee, which the circuit court denied in a written order. The court also entered two additional orders distributing real property to the appellee. The appellant appealed from those three orders. In affirming the circuit court, the Court of Appeals said that, on the issue of the disinheritance, the appellee did not violate an *in terrorem* clause in the will, based upon his alleged tardy filing of waivers of inventory and accounting. The *in terrorem* clause did not impose a time limitation on the filings and, as the circuit court had found, the waiver was filed with no resulting prejudice from any delay in filing. No-contest clauses are strictly construed because applying them results in a forfeiture. The Court of Appeals found no merit in appellant's allegation that the appellee had absconded with estate assets that were devised to her, either because the evidence to support the allegation was "microscopic" or because required portions of the transcript were not abstracted and were not in the record on appeal. She failed in her obligation to bring up a record sufficient to demonstrate error below. The trial court's orders for partial distribution to appellant of real property and denial of a continuance when appellant was hospitalized the day of the hearing were affirmed. Her counsel appeared on her behalf, and she made no proffer to show why justice would be denied by her failing to physically appear. (Hannah, C.; No. CV-13-49; 9-18-13; Harrison, B.)

Johnson v. Mitchell, 2013 Ark. App. 498 [**guardianship**] The Court of Appeals affirmed the circuit court's appointment of the appellee to be the guardian of the person and estate of her grandmother, Ms. Lola Calhoun. The appellant, the daughter of the ward, claimed that in the period of time her mother lived with the appellee, Ms. Calhoun had given gifts to the appellee and her immediate family that had nearly depleted her life savings. She also claimed the appellee had isolated Ms. Calhoun from friends and family. She claimed that she would have been a better choice as guardian and that she met the requirements for a non-resident to serve as guardian. The Court of Appeals noted that the trial court's decision was based in large part on the credibility of the appellant and her witnesses. Impartial witnesses testified that appellee took good care of Ms. Calhoun and that she was happy. She had the means to communicate with other family members but chose not to. She spent much of her life savings at a time when she was competent and "very lucid." She and her late

husband had long before given the appellee power and authority over her person and estate, indicating her trust in the appellee. If she gave extravagant gifts and spent her money, to the exclusion of her other relatives, that was her choice. The trial court did not clearly err in finding that appellee was qualified, suitable, and willing to be the guardian of her grandmother's person and estate. Neither did the court commit clear error in determining that the appellant was not a suitable guardian. She and her mother were no longer close; Ms. Calhoun accused her of "playing games," and she said she did not want to live with any of her children, including the appellant. The appellee had traveled to Florida to care for Ms. Calhoun and her late husband when he was ill with cancer. Ms. Calhoun was angry with the appellant for not attending his funeral and for forcing her return to Florida against her wishes for a guardianship proceeding there, at which time she was found to be competent. The decision was affirmed. (Taylor, J.; No. CV-12-990; 9-18-13; Walmsley, B.)

Burger v. Wright, 2013 Ark. App. 516 [**adoption**] The appellant is the stepfather of the child who is the subject of appellant's adoption petition. The trial court denied the adoption based upon the fact that it would not be in the child's best interests to grant the adoption because of the probable loss of a relationship between him and his paternal grandparents. The biological father of the child, the appellee, stopped paying child support and visiting the child in 2009, the same year that the mother married the appellant. Since the marriage, the appellant has taken on the role of father of the child in all respects. Appellant filed for adoption in 2011, based upon Arkansas Code Annotated section 9-9-207(2), the biological father's failure to have significant contact with the child or to support the child without justifiable cause for at least one year. At the hearing, the paternal grandparents testified that appellant was a good father to the child, that their visitation had not been restricted, but they expressed concern that this may change if the adoption were granted. In reversing, the Court of Appeals found that the evidence does not support the denial of the adoption nor that the mother and the appellant would deny the paternal grandparents visitation. The Court of Appeals pointed to the testimony of the child's mother and her husband that they would continue to allow visitation if the adoption were granted. The Court reversed and remanded for entry of a decree of adoption. (Looney, J.; No. CV-12-973; 9-18-13; Wood, R.)

JUVENILE

State v. V.H., 2013 Ark. 344 [**Juvenile Sex Offender Registration Removal**] This appeal arises from a collateral proceeding and the State does not have to comply with the requirements in Rule 3 of the Arkansas Rules of Appellate Procedure – Criminal. The State's argument that the court was without jurisdiction to remove appellee from the sex offender registry because at the time of the order appellee was 25 years of age is without merit. (Isbell, G.; CV12-1018; 9-26-2013; Corbin, D.)

J.A.C. v. State, 2013 Ark. App. 496, *J.A.C. v. State (2)*, 2013 Ark. App. 513, [**Transfer**] Appellant failed to preserve his argument on appeal that the trial court erred in failing to make written findings of each of the statutory factors outlined in A.C.A. 9-7-318(g). (Cole, J.; CR12-1056; 8-18-2013; Vaught, L.)

Burns v. Arkansas Dept. of Human Services, 2013 Ark. App. 521 [**D-N Permanency Planning - Custody**] Appellant failed to argue that the trial court erred in not following the preference under the permanency planning statute for a plan to return a child to parent if the parent was making significant and measurable progress and the child could be returned within three months. The Court went further to note that had appellant's argument been preserved for appeal, the evidence was sufficient to support the trial court's decision to grant custody to the paternal grandparents. Any lack of services was due to appellant's failure to keep DHS informed of where she lived. (Hudson, A.; CV13-403; 9-18-2013; Brown, W.).

Contreras v. Arkansas Dept. of Human Services, 2013 Ark. App. 519 [**D-N Permanency Planning - Custody**] Appellant failed to argue that there was insufficient evidence for the trial court to grant custody of her son to his maternal grandmother and it was in her son's best interest. Appellant argued that the PPH statute requires return to the parent before another person. The court stated that even if appellant had preserved her argument for appeal it would not prevail. The Court noted that the permanency statute provides a list in order of preference, including a plan to place custody with a parent under certain conditions. However, it does not require that a child be placed in that order. The trial court was not required to place custody with appellant prior to granting custody of her son with his maternal grandmother. The rights of parents are not proprietary and are subject to their related duty to care and protect the child; the law secures their preferential rights only as long as they discharge their obligations. The trial court had previously found appellant unfit in its adjudication and disposition order. Appellant did not appeal that order and her fitness argument is therefore waived. Further, appellant has the burden to demonstrate genuine sustainable investment in completing the case plan and following the court order in order to authorize more time for a plan to return home. (Zimmerman, S.; CV13-385; 9-18-2013; Brown, W.).

Chase v. Arkansas Dept. of Human Services, 2013 Ark. App. 474 [**D-N Permanency Planning - Custody**] This is the second order on appeal as a result of a remand from the Court of Appeals that resulted in an order of custody to maternal grandparents by the trial court. The law establishes a preference for a natural parent in third party cases unless it is established that the parent is unfit. In *Chase I*, the Court held that appellant fell within the first preference under the permanency planning statute to return a child to a fit parent if it is in the best interest of the child and child's health and safety can be adequately safeguarded. Appellant, along with DHS and the attorney ad litem, argued that there was insufficient evidence to award custody to appellant. The appellate court reversed and remanded with direction to transfer custody to appellant. (Brown, E.; CV13-248; 9-11-2013; Gladwin, R).

McPherson v. Arkansas Dept. of Human Services, 2013 Ark. App. 525 [**TPR**] Appellant argued that the court erred by not giving her more time and failing to enter the termination order within 30 days as required by the statute. Evidence that a parent begins to make improvement as a termination is impending does not outweigh other evidence demonstrating a failure to comply and to remedy the situation that caused removal. The evidence indicated that while appellant had made some strides early in the case, after 16 months she was as unstable as she had been when her children were removed, she missed visitation, failed to take medication and attend her appointments for medication

management and compete parenting classes. Further, appellant does not argue that she was prejudiced or entitled to a specific remedy because the order was not filed within 30 days. The court has previously held that failure to file within the statutory timeframe does not result in the loss of the court's jurisdiction. (Elmore, B.; CV12-292; 9-25-2013; Pittman, J.).

Kelso v. Arkansas Dept. of Human Services, 2013 Ark. App. 509 [TPR – Record] Appellant argued that he trial court erred in relying on a repealed statute to incorporate testimony from prior proceedings into its decision to terminate parental rights and in granting DHS' motion to incorporate the record from prior pleadings and testimony in the case. The Court of Appeals distinguished this case from *Payne v. Arkansas Dept. of Human Services*, 2013 Ark. 284, which was a no merit appeal. The Court of Appeals held that appellant's argument must fail because Ark. Sup. Ct. R. Rule 6-9(c)(1) limits the record for appeal. The Court further found that *Smith v. Arkansas Dept. of Human Services*, 100 Ark. App. 74, was controlling and does not limit what evidence may be considered by the trial court in a termination proceeding. Further, appellant cannot show prejudice by errors in the termination order. (Zimmerman, S.; CV13-304; 9-18-2013; Glover, D).

Simon v. Arkansas Dept. of Human Services, 2013 Ark. App. 535 [TPR – Record] Appellant argued the same issue in *Kelso v. Arkansas Dept. of Human Services*, 2013 Ark. App. 509, and the trial court was affirmed for the reasons set forth in *Kelso*. (Zimmerman, S.; CV13-427; 9-25-2013; Whiteaker, P.).

Alguilera v. Arkansas Dept. of Human Services, 2013 Ark. App. 509 [TPR – Record], Appellant's argument that the trial court erred by incorporating into the record all prior testimony in the case failed for the reasons set forth in *Kelso*. [Sufficiency] Appellant's sufficiency challenge as to her failure to remedy the issue causing removal due to her failure to protect her children from her husband's abusive behavior is a credibility issue and deference is given to the trial court on matters of credibility. The trial court also did not err in finding a subsequent issue of appellant's DUI conviction and her failure to take steps to comply with her plea agreement while under court order to refrain from using alcohol. (Zimmerman, S.; CV13-392; 9-18-2013; Wynne, R.).

Hannah v. Arkansas Dept. of Human Services, 2013 Ark. App.502 [TPR – Prior Adverse Rulings] Appellant failed to appeal adverse rulings from the adjudication hearing and she is barred from raising them now. (Zimmerman, S.; CV13-322; 9-18-2013; Harrison, B.).

Clements v. Arkansas Dept. of Human Services, 2013 Ark. App.493 [TPR – Petition & Order Errors] Appellant argued that there were errors in the petition and that his rights cannot be terminated on provisions not pled. He argued that the only ground applicable was "other factors" and it was not checked on the courts form order. Although the trial court failed to check the blank for "other factors on the form order, it did circle parents within that section and it is clear that the court relied on this ground to terminate parental rights, which was pled in the petition. [Sufficiency] Appellant's failure to comply with the court order and case plan was sufficient evidence of other factors arising subsequent to the filing of the original petition. [Record] Appellant argued that the

trial court erred in incorporating testimony from prior proceedings and the appellate court adopted the reasoning set forth in *Kelso*. (Zimmerman, S.; CV13-291; 9-18-2013; Gladwin, R.).

Morrison v. Arkansas Dept. of Human Services, 2013 Ark. App. 479 [TPR –Sufficiency] Appellant’s sufficiency challenge as to the court’s best interest finding failed where he never demonstrated to the court that he was capable of providing his children with a safe and appropriate home. (Sullivan, T.; CV13-264; 9-11-2013; Wynne, R.).

Sanchez v. Arkansas Dept. of Human Services, 2013 Ark. App. 479 [TPR –Sufficiency] Appellant’s sufficiency challenge failed after three years of services and where appellant continued to display poor decision making and an inability to protect her children. (Burgess, E.; CV13-277; 9-11-2013; Wood, R.).

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

Williams v. Arkansas Dept. of Human Services, 2013 Ark. App. 534 (Cook, V.; CV 13-404; 9-25-2013; Vaught, L.).

Sloan v. Arkansas Dept. of Human Services, 2013 Ark. App. 511 (Chandler, L.; CV13-334; 9-18-2013; Whiteaker, P.).

Nichols v. Arkansas Dept. of Human Services, 2013 Ark. App. 504 (Spears, J.; CV13-413; 9-18-2013; Wynne, R.).

Calahan v. Arkansas Dept. of Human Services, 2013 Ark. App. 508 (Hudson, A.; CV13-256; 9-18-2013; Glover, D.).

Mancia v. Arkansas Dept. of Human Services, 2013 Ark. App. 497 (Crow, G.; CV12-947; 9-18-2013; Walmsley, B.).

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

D.S. v. State, 2013 Ark. App. 528 (Fryauf, M.; CV 12-779; 9-25-2013; Gruber, R.). Juvenile was adjudicated delinquent for rape, disorderly conduct, and failure to appear and committed to DYS and placed on probation.

EIGHTH CIRCUIT

CMH Homes, Inc. v. Goodner: [**Federal Arbitration Act**] Plaintiffs filed a putative class action in state court raising claims under the Arkansas Deceptive Trade Practices and Unfair Practices acts, and defendants removed the case to federal court and asked the court to compel arbitration of the claims. When asked by plaintiffs to remand the case to state court and dismiss the arbitration petition

for lack of subject matter jurisdiction, the district court properly looked through the arbitration petition to the state court complaint to determine the amount in controversy; however, the case must be remanded for the district court to calculate an amount in controversy and to determine whether it has jurisdiction over the putative class action under 28 U.S.C. Sec. 1332(d)(2). (09/05/2013; No: 12-3381; W. D. Ark.)

Hortica-Florists' Mutual Ins. v. Pittman Nursery Corporation: **[Insurance]** The insured met Arkansas state law requirements for the reimbursement of its attorneys' fees in connection with its defense of a declaratory judgment action, and the district court erred in failing to award it fees. On remand, the court should determine the proper amount of fees owed the insured for defense of the action. Insurer was entitled to judgment as a matter of law on insured's counter-claims for bad faith and negligence; insurer was also entitled to judgment as a matter of law on the insured's breach of contract, breach of fiduciary duty and punitive damages claims. (09/06/2013; No: 12-1352; W. D. Ark.)