

# APPELLATE UPDATE

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## CRIMINAL

*Williams v. State*, 2011 Ark. App. 521 [**admission of evidence**] Because the requirements of Ark. R. Evid. 901 were satisfied through witness testimony, the trial court did not abuse its discretion when it admitted a videotape into evidence. (Keaton, E.; CACR 10-943; 9-14-11; Gladwin, R.)

*McElroy v. State*, 2011 Ark. App. 533 [**voir dire**] The trial court did not abuse its discretion by allowing certain questions from the prosecutor during voir dire. (Sims, B.; CACR 11-30; 9-14-11; Abramson, R.)

*Smith v. State*, 2011 Ark. App. 539 [**motion to suppress**] The facts and circumstances leading up to appellant's arrest were sufficient to permit a person of reasonable caution to believe that the appellant had committed a felony. Thus, appellant's arrest was valid. Accordingly, the trial court did not err in denying appellant's motion to suppress his statements and the items found in appellant's possession at the time of his arrest. [**expungement**] Appellant's expunged felony conviction could be used as proof in his felon-in-possession charge pursuant to Ark. Code Ann. § 5-73-103 (a)(1). (Pope, S.; CACR 10-1244; 9-14-11; Brown, W.)

*Miller v. State*, 2011 Ark. App. 554 [**revocation of suspended imposition of sentence**] Failure to strictly comply with Ark. Code Ann. § 5-4-309 does not deprive a trial court of jurisdiction to hear a petition to revoke or void a trial court's action on the petition to revoke. The sixty-day hearing requirement that is found in Ark. Code Ann. § 5-4-310 is mandatory only when the defendant is arrested for the violation of the conditions of his suspension or probation. If a defendant has actual

notice of the time and place for the revocation hearing, written notice is not necessary. The exclusionary rule does not generally apply to revocation hearings. (Laser, D.; CACR 10-1043; 9-21-11; Hoofman, C.)

*Risner v. State*, 2011 Ark. App. 549 [**appeal from district court to circuit court**] Because appellant did not comply with Rule 36 of the Arkansas Rules of Criminal Procedure, the trial court did not err when it dismissed a part of appellant's appeal. (Sullivan, T.; CACR 11-181; 9-21-11; Gruber, R.)

*Porter v. State*, 2011 Ark. App. 545 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motion requesting a mistrial, which was based upon questions that were asked pursuant to Rule 609 of the Arkansas Rules of Evidence during the State's cross-examination of appellant. (Reynolds, D.; CACR 11-104; 9-21-11; Robbins, J.)

*Jones v. State*, 2011 Ark. App. 543 [**revocation; motion to suppress**] The exclusionary rule does not apply in revocation hearings unless the defendant demonstrates that the officers conducting the search acted in bad faith. Although appellant sought to have evidence excluded from his suppression hearing, he did not argue that the officers acted in bad faith during the search. Thus, the trial court did not err by denying appellant's motion to suppress the evidence that was seized during a traffic stop. (Tabor, S.; CACR 10-1145; 9-21-11; Hart, J.)

*Butler v. State*, 2011 Ark. 369 [**jury instructions**] Where there was no rational basis for giving a requested jury instruction, the trial court did not abuse its discretion in refusing to give the requested instruction. (Wright, H.; CR 10-1104; 9-22-11; Hannah, J.)

*Whiteside v. State*, 2011 Ark. 371 [**sufficiency of the evidence; capital-felony murder**] There was substantial evidence to support appellant's conviction. [**cruel and unusual punishment**] Imposition of a life-without-parole sentence for a juvenile capital-felony-murder offender does not violate article 2 section 9 of the Arkansas Constitution. [**sentencing**] A statute prescribing a mandatory life sentence does not impermissibly conflict with the jury's right to fix punishment. A defendant's due-process rights are not violated by the imposition of a mandatory-statutorily-fixed sentence. (Sims, B.; CR 10-1200; 9-22-11; Brown, R.)

*Washington v. State*, 2011 Ark. 372 [**suppression of statement**] Based on a review of the totality of the circumstances and remaining mindful that issues of credibility are within the province of the circuit court, the Supreme Court concluded that the trial court's finding on the voluntariness of appellant's confession was not clearly against the preponderance of the evidence. Thus, the trial court did not err when it denied appellant's motion to suppress the statements. (Hearnberger, M.; CR 10-1036; 9-22-11; Gunter, J.)

*Davis v. State*, 2011 Ark. 373 [**confrontation clause**] Where the witness was available in court for cross-examination by the appellant and the appellant chose not to question the witness, the appellant cannot later argue that his Sixth Amendment Right to confront the witness was violated. (Humphrey, M.; CR 10-1143; 9-22-11; Danielson, P.)

*Fuson v. State*, 2011 Ark. 374 [**suppression of statement**] Appellant waived having his suppression issue considered on appeal by testifying at trial and adopting as true the material portions of the challenged pretrial statement. (Medlock, M.; CR 10-998; 9-22-11; Henry, C.)

*Hampton v. State*, 2011 Ark. App. 559 [**motion to suppress**] There was adequate probable cause to issue a search warrant for appellant's home and the resulting search was proper. Accordingly, the trial court did not err in denying appellant's motion to suppress. (Dennis, J.; CACR 11-206; 9-28-11; Vaught, L.)

*Davis v. State*, 2011 Ark. App. 561 [**sufficiency of the evidence; breaking or entering; theft of property**] There was substantial evidence to support appellant's convictions. [**jury**] The trial court did not abuse its discretion when it failed to quash the entire jury panel based upon the fact that two members of the venire had been victims of the thefts. (Williams, C. CACR 10-959; 9-28-11; Pittman, J.)

*Howard v. State*, 2011 Ark. App. 573 [**sufficiency of the evidence; theft of property**] There was substantial evidence to support appellant's conviction. [**Batson challenge**] Failing to complete a juror questionnaire may provide a race-neutral reason for striking a potential juror. [**closing arguments; mistrial**] Appellant's failure to request an admonition, which could have cured any prejudice that resulted from statements made by the prosecutor during closing arguments, precludes review of the trial court's actions regarding the statements on appeal. [**404b**] The trial court did not abuse its discretion when it allowed certain witnesses to testify about their suspicions pertaining to appellant and her behavior regarding the stolen property because the testimony established appellant's plan, motive, opportunity, and intent to steal the property. (Wright, H.; CACR 11-29; 9-28-11; Martin, D.)

*Sullivan v. State*, 2011 Ark. App. 576 [**sufficiency of the evidence; permitting the abuse of a minor; hindering apprehension or conviction**] There was substantial evidence to support appellant's convictions. [**speedy trial**] The trial court did not err when it denied appellant's motion to dismiss, which was based upon a speedy-trial argument. [**witness testimony**] The trial court did not abuse its discretion when it admitted testimony from appellant's daughter, appellant's neighbor, and a physician from Arkansas Children's Hospital. [**sex-offender registry**] The circuit court had jurisdiction to amend appellant's judgment to require that appellant register as a sex offender. Permitting the abuse of a minor is a crime for which a court may require the defendant to register as a sex offender. (Phillips, G.; CACR 10-1320; 9-28-11; Brown, W.)

*Vance v. State*, 2011 Ark. 392 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**rape-shield statute**] When consent is not an issue in a rape case, the issue of whether the victim had sexual relations with a third person is entirely collateral to the case and is therefore not relevant. Consent is never an issue in a rape-by-guardian case. Thus, the circuit court did not abuse its discretion when it denied appellant's rape-shield motion. (Arnold, G.; CR 11-160; 9-29-11; Henry, C.)

*Holt v. State*, 2011 Ark. 391 [**sufficiency of the evidence; residential burglary**] There was substantial evidence to support appellant's conviction. [**restraints**] Because the use of restraints was reasonably necessary to maintain order and security in the courtroom, the trial court did not abuse its discretion when it required appellant to be shackled during his trial. (Humphrey, M.; CR 10-1164; 9-29-11; Brown, R.)

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

*Evans v. State*, 2011 Ark. App. 485 (felon in possession of a firearm) CACR 10-1280; 8-31-11; Vaught, L.

*Cash v. State*, 2011 Ark. App. 493 (residential burglary; second-degree terroristic threatening) CACR 11-67; 8-31-11; Abramson, R.

*Riley v. State*, 2011 Ark. App. 511 (aggravated robbery; aggravated residential burglary) CACR 10-1334; 9-7-11; Martin, D.

*Garr v. State*, 2011 Ark. App. 509 (criminal attempt to commit first-degree murder; aggravated robbery) CACR 10-1301; 9-7-11; Gruber, R.

*Jackson v. State*, 2011 Ark. App. 528 (delivery of a controlled substance) CACR 11-208; 9-14-11; Gruber, R.

*Poland v. State*, 2011 Ark. App. 537 (possession of marijuana; possession of drug paraphernalia) CACR 10-1128; 9-14-11; Hoofman, C.

*Arroyo v. State*, 2011 Ark. App. 523 (simultaneous possession of drugs and firearms) CACR 11-68; 9-14-11; Robbins, J.

*Halliday v. State*, 2011 Ark. App. 544 (sexual assault in the first degree; sexual indecency with a child) CACR 11-269; 9-21-11; Gladwin, R.

*Phillips v. State*, 2011 Ark. App. 575 (second-degree murder) CACR 11-270; 9-28-11; Hoofman, C.

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

*Colbert v. State*, 2011 Ark. App. 507 (probation) CACR 10-1038; 9-7-11; Wynne, R.

*Solomon v. State*, 2011 Ark. App. 505 (probation) CACR 10-1332; 9-7-11; Robbins, J.

*Terry v. State*, 2011 Ark. App. 519 (suspended imposition of sentence) CACR 10-846; 9-14-11; Hart, J.

*Grissom v. State*, 2011 Ark. App. 551 (probation) CACR 11-232; 9-21-11; Glover; D.

*Boivin v. Hobbs*, 2011 Ark. 384 [**habeas corpus**] The burden is on the petitioner in a petition for writ of habeas corpus to establish that the trial court lacked jurisdiction or that the commitment was invalid on its face; otherwise, there is no basis for a finding that a writ of habeas corpus should issue. A petitioner who does not allege his actual innocence must plead either the facial invalidity of the judgment or the lack of jurisdiction by the trial court and make a showing by affidavit or other evidence of probable cause to believe that he is illegally detained. (Dennis, J.; SC 1180; 9-22-11; per curiam)

## CIVIL

*Stokes v. Mangum Constr. Co.*, 2011 Ark. App. 498 [**default judgment**] Default judgment vacated because of noncompliance with service requirements, which require in the case of service by certified mail, that it be by restricted delivery. Here, there was noncompliance with the restricted delivery requirement; therefore, service was insufficient and the default judgment was void. (Pope, S.; CA 11-65; 9-7-11; Vaught, L.)

*Smith v. Sims*, 2011 Ark. App. 499 [**promissory note**] Court erred in granting directed verdict in suit to collect on note. Question of payment was an affirmative defense. Plaintiff made a prima facie case and defendant had the burden of proving payment. (Gibson, B.; CA 10-979; 9-7-11; Pittman, J.)

*Riceland Seed Co. v. Wingmead, Inc.*, 2011 Ark. App. 502 [**contract**] Evidence did not support contention that written contract had been modified. (Henry, D.; CA 11-089; 9-7-11; Hart, J.)

*Wright v. Briant*, 2011 Ark. App. 510 [**easement**] Easement for access to a septic tank was established by an easement by implication. The apparentness of use is not limited to visibility but includes susceptibility of ascertainment on reasonable inspection. Here, the owner knew or should have known of the shared septic tank. (Glover, D.; CA 10-1261; 9-7-11; Abramson, R.)

*Wilson v. Union Pacific Railroad*, 2011 Ark. App. 508 [**service**] Complaint was properly dismissed because of failure to perfect service within 120 days. (Wyatt, R.; CA 10-1202; 9-7-11; Wynne, T.)

*Villines v. North Ark. Regional Medical Center*, 2011 Ark. App. 506 [**informed consent**] Summary judgment was improper because factual questions remain related to issue of informed consent and proximate cause. (McCorkindale, R.; CA 10-1196; 9-7-11; Robbins, J.)

*Dye v. Anderson Tully Co.*, 2011 Ark. App. 503 [**quiet title**] Court properly determined that disputed land was located in Arkansas County based on the principle of accretion to the Arkansas River. (Pope, S.; CA 11-33; 9-7-11; (Gladwin, R.)

*Deutsche Bank v. Austin*, 2011 Ark. App. 531 [**unjust enrichment**] Value of improvements made to property by purchaser from mortgagor could not be recovered on an unjust enrichment basis to the detriment of the mortgagee. Mortgage was filed of record and purchaser had notice of it. Purchaser sought the value of the improvements “off the top” of any foreclosure proceeds. Improvements may have enhanced the property but were taken at the purchaser’s own risk. (Fitzhugh, M.; CA 11-10; 9-14-11; Glover, D.)

*Morningstar v. Bush*, 2011 Ark. 350 [**municipal utility fee**] Municipality complied with statutory requirements for imposing fee. Assessment constituted a “fee” rather than a “tax.” A tax requires public approval, but a fee can be instituted by city ordinance. (Lineberger, J.; SC 11-143; 9-15-11; Baker, K.)

*Robinette v. DFA*, 2011 Ark. 349 [**driver’s license/administrative suspension**] Statutory service requirement was substantially complied with. Person was granted the opportunity to be heard, and he filed within the prescribed time; therefore, there has been no showing of any prejudice. (Sanders, E.; SC 10-1208; 9-15-11; Danielson, P.)

*Johnson v. M.S. Development Co.*, 2011 Ark. App. 542 [**res ipsa loquitur**] Plaintiff was enjoyed riding an inner tube on a “ride” at Magic Springs. Res ipsa loquitur did not apply to claim as inner tube was not in exclusive control of Magic Springs. Furthermore, plaintiff failed to put forth evidence that would allow the jury to eliminate all causes of accident other than defendant’s negligence. (Wyatt, R.; CA 11-246; 9-21-11; Vaught, L.)

*Manufacturers & Traders Trust Co. v. Nickelson*, 2011 Ark. App. 557 [**foreclosure/offset**] Court erred in offsetting only part of the verdict amount from the mortgage debt. Motion for attorney’s fees was filed late under requirements of Rule 54. (Reynolds, D.; CA 10-592; 9-21-11; Brown, W.)

*Richardson v. Union Pacific Railroad*, 2011 Ark. App. 562 [**limine/expert testimony**] Trial court did not err in granting motion in limine to preclude expert from testifying. Ruling related to the scientific validity underpinning expert opinion as to the degree of exposure to an allegedly toxic substance to cause cancer. Causation requires more than mere proof of exposure to above-ambient levels of the alleged toxin, and instead requires evidence of the levels of exposure that are hazardous to human beings generally, as well as the plaintiff’s actual level of exposure. In this case, the scientific evidence did not prove that the levels of the toxin found in diesel exhaust and fuel played a role in causing plaintiff’s disease. (Moody, J.; CA 10-591; 9-28-11; Pittman, J.)

*St. Joseph’s Health Center v. Edwards*, 2011 Ark. App. 567 [**damages**] Nurse accidentally severed infant’s finger. Damages awarded by jury were not grossly excessive. (Williams, L.; CA 10-1015; 9-28-11; Vaught, L.)

*Hamaker v. Pulaski County Election Commission*, 2011 Ark. 390 [elections] Statutes do not require voter to mark ballot within the confines of a voting booth, and a voter may waive the right to vote in secret. (Pierce, M.; SC 11-375; 9-29-11; Hannah, J.)

## DOMESTIC RELATIONS

*Grantham v. Lucas*, 2011 Ark. App. 491 [child custody; division of marital property; retirement fund] The Court of Appeals found that the trial court did not clearly err in finding that it was in the best interest of the child to award joint custody with the appellee having primary physical custody. The Court of Appeals also found that the trial court did not clearly err by failing to make an unequal division of the proceeds from a \$12,000 home-equity loan received a year before the parties separated. Finally, the court found that allowing the appellee to keep all of her retirement benefits was an equitable distribution in this case. The court said that the trial court considered all of the disputed testimony and did not clearly err in its conclusion. (Herzfeld, R.; No. CA 11-72; 8-31-11; Gruber, R.)

*Hobby (Baugh) v. Walker*, 2011 Ark. 494 [child custody—change in circumstances] The trial court did not err in finding that the appellant failed to meet the burden of demonstrating a material change in circumstances to support her argument for change in custody of the parties' child. (Herzfeld, R.; No. CA 11-131; 8-31-11; Martin, D.)

*Paschal v. Paschal*, 2011 Ark. App. 515 [order of protection] A one-year order of protection was entered against the appellant. He was ordered to have only email contact with his former wife and only about their two children. In reversing and remanding, the Court of Appeals found that *res judicata* should have barred the appellee from relitigating matters a second time on a second order of protection petition. Although *res judicata* does not bar a claimant from showing a pattern or practice as its basis for issuing an order of protection, the court did not use past pattern or practice as its basis for issuing the protection order in question. Therefore, *res judicata* was a bar to relitigating the matters a second time in this case. Also, the court said that the acts to which the appellee testified did not constitute domestic violence as contemplated by the statute. In essence, it was a sufficiency of the evidence question. The court's granting an order of protection was reversed. (Martin, D.; No. CA 11-118; 9-7-11; Brown, W.)

*Duncan v. Duncan*, 2011 Ark. App. 348 [divorce; property settlement agreement; retirement account] The Supreme Court granted review of a case decided by the Court of Appeals, *Duncan v. Duncan*, 2010 Ark. App. 561. The trial court had ordered that the appellant former husband was personally liable for \$115,936.81, the amount appellee's share of appellant's retirement account had declined in value between the time her share was fixed to the time distribution was made. The delay in distribution was the result of appellee's disputing the amount due her. The Supreme Court found that the circuit court had erred in its order. The parties had a property-settlement agreement that specifically contemplated a QDRO could be necessary. Undisputedly, the parties entered into and implemented a QDRO, which separated appellant's retirement plan into an account for each of them and specifically provided that neither party had any right, control,

or interest in the account of the other. The fact that the appellee elected not to take her distribution when it was available did not transform her separate, segregated account into property for which the appellant became responsible. “The account belonged to her and any detriment due to her tardiness in exercising her legal right to it cannot be borne by appellant where the circuit court made no finding that appellant intentionally interfered with appellee’s property right.” The court reversed and remanded the decision of the circuit court and vacated the Court of Appeals’ opinion. [Note: The Court of Appeals also had reversed and remanded the circuit court’s decision.] (Harkey, J.; No. SC 10-966; 9-15-11; Gunter, J.)

*Robbins v. Robbins*, 2011 Ark. App. 541 [**attorney fees**] The appellant claimed the court’s award of attorney fees against him was erroneous because the appellee’s motion for fees was not timely filed and did not contain the requisite statutory basis for granting the fee. Because the argument was not made to the trial court, the Court of Appeals could not consider it. The trial court’s order granting the award of fees was affirmed. (Wright, J.; No. CA 10-841; 9-21-11; Vaught, L.)

*Stevenson v. Stevenson*, 2011 Ark. App. 552 [**child support; contempt**] When the parties divorced, they were awarded joint custody of their daughter. The appellant mother had primary care and control and the appellee father had substantial visitation. They agreed upon child support of \$350/month, with each party to pay half of the transportation costs of visitation. The child support amount was a deviation from the Child Support guidelines, although the circuit court gave no reason for the deviation except to state that it was by agreement of the parties. The decree did not provide for an abatement of child support during extended visitation. About two months after the divorce, the appellee filed an emergency petition alleging several things. The appellant filed an answer and a counter-petition, including a request that the court review the child-support determination and enter a more specific visitation schedule. Both parties requested that the other be held in contempt. After a hearing, the trial court denied both motions for contempt. The court ordered a more specific visitation schedule and allocated related travel expenses. The court kept the child support at the agreed-upon amount, allowing abatement under certain circumstances. Again, no reason was given for the deviation from the guidelines, except that it was the amount to which the parties agreed. In reversing and remanding on the child-support issue, the Court of Appeals said that while the general rule is that a court cannot modify the parties’ contract incorporated into the decree, an exception to the rule exists for child-custody and child-support matters. A trial court always retains jurisdiction in those cases as a matter of public policy. No matter what an independent contract states, either party has the right to request modification of child support. Here, the existing child-support award was \$350, while the presumptive amount on the chart was \$542. The decree gave no reason why the presumptive amount was inappropriate or unjust, which the law requires. The court directed the trial court upon remand to award support according to the guidelines or to make findings to explain a deviation. The court affirmed the trial court’s denial of the appellant’s motion for contempt, finding no abuse of discretion. (Huckabee, S.; No. CA 11-144; 9-21-11; Abramson, R.)

*Bamburg v. Bamburg*, 2011 Ark. App. 546 [**divorce; child custody; division of property; reimbursement for expenses attributable to a paramour**] The parties’ appealed and cross-appealed from their divorce case, each raising multiple issues. The Court of Appeals reversed on appellant’s issue concerning the division of the parties’ business and personal property interests.

With respect to the business property, the trial court had ordered that the appellee retain her gift-store inventory, which she estimated at \$18,000, for a business she operated only two months a year. The trial court ordered that the appellant would retain the value of his law practice, which he was in the process of closing. In fact, his private practice was already out of business. Its only value was the contents of the building, which were also set out on the parties' personal property lists that they split equally. The Court of Appeals agreed with appellant that he was deprived of \$9000, half the inventory of her business, his portion of a marital asset that appellee retained in full. He also argued that the trial court erred in unequally dividing the parties' four vehicles, giving two to each. He contended that the aggregate value he received was \$3000 and the aggregate value she received was \$24,000, therefore unfairly depriving him of \$10,500 in marital assets. The court noted that the appellant had testified to his desire that the vehicles not be ordered sold, but that each party be given two. He testified to which two he hoped to receive, based upon actual use and preference. He also testified that he would be satisfied however the trial court decided the issue. The court said he cannot now be heard to complain about the court's division. (Smith, V.; No. CA 10-1158; 9-21-11; Robbins, J.)

*Fincher v. Fincher*, 2011 Ark. App. 563 [**divorce—corroboration of grounds**] The Court of Appeals found that even if it the appellee's testimony was found sufficient to establish grounds for divorce, the appellee husband failed to provide any corroborating proof of those grounds. The divorce was reversed. The court also reversed orders concerning property division and whether property was marital or separate property, as these decisions were premature, only arising upon dissolution of a marriage. The case was remanded for consideration of appellant's counterclaim for separate maintenance. (Wright, R.; No. CA 11-149; 9-28-11; Hart, J.)

*Vela v. Ragnarsson*, 2011 Ark. App. 566 [**Hague Convention on the Civil Aspects of International Child Abduction**] The appellant mother is a U.S. resident and is a dual citizen of both the U.S. and Iceland. The appellee father is an Icelandic citizen and resident. Born in the U.S. in 2004, the child, G.V., lived with the mother in both the U.S. and Iceland, intermittently. In 2009, the mother and child left Iceland to reside in Killeen, Texas. The parties subsequently agreed that the child would return to Iceland to live with the father. They signed two documents in Texas, one giving the appellee permission to leave the country with G.V., and the second a joint-custody agreement. It provided that G.V. would legally reside with the appellee, that appellant would pay child support, and that the parties wanted the contract approved under Icelandic law. The appellee registered the agreement with an Icelandic District Commissioner. About six months later, the parties agreed for the child to come to the U.S. for a summer vacation. At the end of the agreed-upon three weeks, the appellant refused to return the child and she moved with him to Benton County, Arkansas. The appellee filed a petition in Benton County for the return of the child under the terms of the Hague Convention on the Civil Aspects of International Child Abduction ("the Hague"). The circuit court ordered the child to be returned to his father's residence in Iceland under the terms of the Hague. In affirming, the Court of Appeals set out the purpose and the rules of the Hague. Adopted in 1980, its purpose is to secure a child's prompt return to his State of habitual residence if he was wrongfully removed or is being wrongfully retained in another State. [Member countries under the Hague are referred to as "States" or "Contracting States."] The purpose of the Hague is to determine which country has the paramount interest in a child. Which parent has the greater interest goes to the matter of custody, which is

addressed only after the Hague issues are resolved. If a court finds the child was wrongfully removed or retained, it “shall order the return of the child forthwith.” Then the courts of the child’s habitual residence will decide any custody dispute. The Court of Appeals affirmed the trial court’s findings that the child’s habitual residence was Iceland and that the appellant’s retention of him was wrongful. The Court of Appeals found that the joint-custody agreement the parties signed was valid under the Hague, had been registered and confirmed by a district commissioner, and was effective under Icelandic law. The decision was affirmed. (Schrantz, D.; No. CA 11-351; 9-28-11; Gladwin, R.)

## **PROBATE**

*Light, et al. v. Duvall, et al.*, 2011 Ark. App. 535 [**guardianship of a child**] The Court of Appeals affirmed the trial court’s appointment of the appellees, maternal great aunt and great uncle of the parties’ minor child. The court found that the circuit court did not abuse its discretion in considering the factors that the child had lived with the appellees for nearly her entire life and that she was functioning well in that environment, and in concluding that it was in the child’s best interest to remain with the appellees under their guardianship. (McCormick, D.; No. CA10-1129; 9-14-11; Martin, D.)

## **JUVENILE**

*Mahone v. Arkansas Department of Human Servs.*, 2011 Ark. 370 [**permanency planning - custody**] Appellant argued that the court erred in awarding custody of the children with their maternal grandmother since he was a fit parent and should have received custody under statutory preference. The court held the first statutory preference applied to appellant. The Court of Appeals erred in its interpretation that it is a return to the parent from who the child had been taken. *Judkins v. Duvall*, 97 Ark. App. 260 (2007), was overruled to the extent it is inconsistent with this opinion. The Supreme Court also indicated that it was not convinced that the circuit court, in conducting the best interest analysis, applied the statutory preference to appellant and reversed and remanded the case. The court noted that appellant raised a constitutional argument that he had a protected liberty interest to raise his children without government intervention. However, appellant did not raise this issue with the circuit court, nor did he raise it in his brief on appeal. (Zimmerman, S.; 10-1283; 9-22-2011; Hannah, J.)

*Anderson v. Arkansas Department. of Human Servs.*, 2011 Ark. App. 522 [**permanency planning - custody**] Appellant argued that the court erred in granting custody to a relative without first considering reunification, and that there was insufficient evidence to support a finding that it was in the children’s best interest. The only time period under review for appeal was between the first permanency planning hearing and the fifteen month hearing. The issue was the children’s well-being and the appellant’s inability to benefit from the services. The children’s counselor testified that the children were not able to return to the parents and would need a minimum of six month to

address anxiety and anger issues resulting from visitation with parents. The appellate court noted that a custody order with parental visitation was a favorable ruling for the parents since it was a fifteen month review hearing which authorizes the court to terminate parental rights, except in limited circumstances. (Whiteaker, P.; 11-202; 9-14-2011; Gladwin, R.)

*Ward v. Arkansas Department of Human Servs.*, 2011 Ark. App. 550 [**d-n adjudication**]  
Appellant argued that there was insufficient evidence to support the adjudication based on her drug use. Appellant's child was placed into DHS custody because when she was born she tested positive for drugs. Appellant was placed on probation, continued to test positive for methamphetamine, and during a visit the infant was inappropriately dressed and in a soaking diaper.

The court did not err where it considered appellant's drug use could constitute parental unfitness or neglect of a newborn. This court has held that the definition of neglect does not require proof of actual harm. Substantial risk can be viewed in terms of future harm. Drug use can affect the ability to care for a child by exposing a parent to criminal liability, if incarcerated, and impairing a parent's ability to care for a child while under the influence. *Maynard v. Arkansas Department of Human Servs.*, 2011 Ark, App 82. The trial court also found that there were environmental concerns and appellant appeared unable to care for her child. (Elmore, B., 11-334; 9-21-2011; Gruber, R.)

*Philpott v. Arkansas Department of Human Servs.*, 2011 Ark. App. 572 [**TPR – ICWA**]  
Appellant argued that the caseworker who testified was not a qualified expert witness as required under the Indian Child Welfare Act (ICWA). Appellant failed to object to her testimony, nor did he voir dire her qualifications as an expert under ICWA. Arguments made the first time on appeal will not be considered. DHS meet its burden beyond a reasonable doubt that the child would suffer serious emotional or physical damage if returned to the parent. There was evidence of appellant's 17 year methamphetamine use and aggressive behavior, yet appellant waited until the month before the termination hearing to enter a treatment facility. (Hewett. M.; 11-474; 9-28-2011; Abramson, R.)

*Holderfield v. Arkansas Department of Human Servs.*, 2011 Ark. App. 534 [**TPR – best interest**]  
Appellants challenged the court's best interest finding that there was any potential harm in returning the children to them. The trial court did not err and there was evidence that the mother failed to seek dental care when needed, appellants failed to maintain stability needed by the children, and that the children regressed in their behavior upon reinstatement of visitation with the parents. (Carroll, G. 11-201; 9-14-2011; Abramson, R.)

*Anderson v. Arkansas Department of Human Servs.*, 2011 Ark. App. 526 [**TPR**]  
Appellant challenged the best interest and statutory grounds. This case began in 2008 and two prior terminations had been filed and denied prior to the judge granting this TPR petition. Appellant asks the court to reverse because DHS failed to assist her with applying for DDS when the case began and failed to make meaningful effort to rehabilitate her. She argues that her low IQ and poverty do not render her unfit. Appellant substantially completed the case plan, yet she made very little progress despite services offered. There was testimony that due to appellant's lack of

cognitive ability, inability to reason, and low functioning she was not capable of providing for her children's basic needs. The evidence supported the grounds for termination and the best interest finding by the trial court. (Hamilton, J.; 11-183; 9-14-2011; Wynne, R.)

*Chrihfield v. Arkansas Department of Human Servs.*, 2011 Ark. App. 516 [**TPR - continuance**] Appellant's sole point on appeal is that the trial court erred in denying her motion for a continuance. Counsel was appointed in June 2010 and the termination hearing was set in August 2010. Yet counsel waited until the afternoon before the hearing to seek a continuance based partly on lack of preparedness. Failure to exercise diligence is a factor for the trial court to consider in determining whether to grant a continuance. Appellant could not show prejudice in going forward with the termination hearing prior to a criminal status hearing to schedule appellant's criminal trial, nor did the trial court rely on the duration of appellant's incarceration as ground for termination. The trial court considered the merits of the continuance and denied it because appellant could not demonstrate an advantage to a one-month continuance. (Finch, J.; 11-301; 9-14-2011; Vaught, L.)

*McGaughey v. Arkansas Department of Human Servs.*, 2011 Ark. App. 536 [**TPR**] Appellant challenged the court's statutory authority to terminate his case on a fast track. Yet, appellant failed to raise this issue below and his attorney specifically waived any argument. Appellant also argued that court erred in finding that DHS made reasonable efforts to reunite the family and complained that the caseworker never attempted to contact him or provide services. Yet there were other grounds to terminate and appellant failed to attack the trial court's independent basis for termination. Proof of only one statutory ground is sufficient to terminate. (Carroll, G. 11-225; 9-14-2011; Martin, D.)

*Chafin v. Arkansas Department of Human Servs.*, 2011 Ark. App. 496 [**TPR - ICPC**] Appellant's sole argument on appeal is that the trial court erred in denying placement of his six children with relatives pursuant to the Interstate Compact Placement for Children (ICPC). He argued that once home studies were completed the court had to place his children with relatives. However, appellant failed to raise the issue of ICPC compliance with the trial court and waived his argument on appeal. (Sullivan, T. 10-1312; 8-31-2011; Brown, W.)

*T.D. v. State*, 2011 Ark. App. 486 [**delinquency adjudication**] Appellant's counsel filed a no-merit brief and motion to be relieved. The court denied and ordered rebriefing. The issue raised by the court was whether the juvenile had a legal duty to prevent the commission of an offense that would render him an accomplice pursuant to A.C.A. 5-2-403. (Wood, R. 10-1248; 8-31-2011; Pittman, J.)

Cases in which the Court of Appeals affirmed the following No-Merit TPR cases and motions to withdraw were granted:

*Stewart v. Arkansas Department of Human Servs.*, 2011 Ark. App. 577 (Chandler, L.; 11-534; 9-28-2011; Brown, W.)

*Williams v. Arkansas Department of Human Servs.*, 2011 Ark. App. 567 (Brown, E.; 11-302; 9-28-2011; Robbins, J.)

*Roseburow v. Arkansas Department of Human Servs.*, 2011 Ark. App. 570 (Clark, D.; 10-960; 9-28-2011; Glover, D.)

*Litchford v. Arkansas Department of Human Servs.*, 2011 Ark. App. 569 (Spears, J.; 11-504; 9-28-2011; Gruber, R.)

*Cariker v. Arkansas Department of Human Servs.*, 2011 Ark. App. 574 (Coker, K.; 11-529; 9-28-2011; Hoofman, C.)

*Williams v. Arkansas Department of Human Servs.*, 2011 Ark. App. 492 (Clark, D.; 11-267; 8-31-2011; Glover, D.)

*Smith v. Arkansas Department of Human Servs.*, 2011 Ark. App. 488 (Wilson, R.; 10-1305; 8-31-2011; Gladwin, R.)

## **EIGHTH CIRCUIT**

*Southern Wine and Spirits, etc v. Mountain Valley Spring Company*: **[contracts]** District court did not err in finding the distributorship contract between the parties contemplated the duration of the relationship and agreed to a term that ends only by mutual consent or specific acts of default; as such, the district court did not err in finding the agreement was for a perpetual term and not for an indefinite term. District court did not err in denying defendant's motion for judgment as a matter of law on plaintiff's claim for implied covenant of good faith and fair dealing; however, the evidence was sufficient to support defendant's counterclaim that plaintiff breached the implied covenant of good faith and fair dealing, and the district court erred in setting aside the jury verdict and granting plaintiff judgment as a matter of law. That portion of the case is remanded, with directions to reinstate the jury's verdict and award for defendant. (W.D. Ark.; # 10-2718; 7-19-11)

*Triple H Debris Removal v. Companion Property & Casualty*: **[insurance]** District court did not err in denying motion to take judicial notice of counsel's statements at the oral argument in the first appeal and in pretrial filings. Jury instructions on agent, agency and breach of contract were not erroneous; district court did not err in refusing jury instructions regarding ambiguous contract provisions. Evidence was sufficient to support the jury's verdict on the issues of cancellation of the policy and bona fide dispute. (W.D. Ark.; # 10-2903; 8-2-11)

*Pangaea, Inc. v. The Flying Burrito, LLC*: **[personal jurisdiction]** District court did not err in finding it did not have jurisdiction over Iowa defendants based on their single contact with the Arkansas forum, as plaintiff's trademark infringement action did not arise from or relate to the single meeting the parties conducted in Arkansas. (W.D. Ark.; # 09-3672; 8-1-11)

*Badger Capital, LLC v. Chambers Bank of North AR*: [**fraud**] In action alleging bank fraudulently concealed certain information regarding a real-estate development, the district court did not err in finding there was insufficient evidence of special circumstances that obligated the bank to make disclosures to the investors regarding their investment in the development. (W.D. Ark.; # 10-3067; 8-16-11)

*Erdman Company v. Phoenix Land & Acquisition*: [**arbitration**] District court did not err in finding plaintiffs' motion to compel arbitration on the ground that they had waived their right to arbitrate the dispute. They knew of the right and acted inconsistently with the right; further, the district court did not err in finding prejudice from assertion of the right. (W.D. Ark.; # 10-2854; 8-16-11)

*Stokes v. Southern States Cooperative*: [**malicious prosecution**] The district court erred in granting defendant's motion for summary judgment on plaintiff's claims for malicious prosecution as a jury could find defendant brought its state court action to enforce a guaranty without probable cause; it is for a jury to decide defendant's motive in bringing the state court action against plaintiff. (E.D. Ark.; # 10-3307; 8-25-11)

*Dupont v. Fred's Stores of Tennessee*: [**negligence**] Defendant's failure to plead contributory negligence did not make all evidence regarding plaintiff's conduct excludable, and the district court did not abuse its discretion by denying plaintiff's motion in limine. District court did not err in refusing to give plaintiff's res ipsa loquitur instruction as plaintiff failed to establish defendant had exclusive control of the items at the time the items fell and injured her. No error in giving an instruction based on Arkansas Model Jury Instructions 305B and 602. (W.D. Ark.; # 10-2977; 8-30-11)