

# APPELLATE UPDATE

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## ANNOUNCEMENTS

On November 17<sup>th</sup>, the supreme court published for comment rules changes proposed by the criminal practice committee. The comment period expires on January 13, 2012, and a copy of the per curiam was included in the weekly mailout.

## CRIMINAL

*Jacobs v. State*, 2011 Ark. App. 650 [**illegal sentence**] The trial court lacked authority to place appellant, who was convicted of simultaneous possession of drugs and firearms, a Class Y felony, on probation. (Fogleman, J.; CACR 11-392; 11-2-11; Pittman, J.)

*Stewart v. State*, 2011 Ark. App. 658 [**404 (b)**] The trial court did not abuse its discretion when it admitted evidence pursuant to the pedophile exception to Rule 404 (b). [**Brady violation**] Appellant failed to establish that the failure of the State to provide certain information to him was a *Brady* violation. (Fitzhugh, M.; CACR 11-444; 11-2-11; Wynne, R.)

*Anthony v. State*, 2011 Ark. App. 660 [**chain of custody**] The trial court did not abuse its discretion when it determined that certain evidence had not been tampered with and denied appellant's motion to suppress admission of the evidence. [**prior convictions**] Where the information accompanying the "pen pack" from appellant's prior conviction mentioned a "public defender," it was not an abuse of discretion for the trial court to conclude that appellant received legal representation during his

previous conviction and to admit the evidence of the prior conviction. (Hill, V.; CACR 11-304; 11-2-11; Glover, D.)

*Glaze v. State*, 2011 Ark. 464 [**repeal by implication**] Arkansas Code Annotated § 16-90-201 was repealed by implication with the enactment of the Arkansas Criminal Code. (Reynolds, D.; CR 11-484; 11-3-11; Danielson, P.)

*Anderson v. State*, 2011 Ark. 461 [**sufficiency of the evidence; capital murder**] There was substantial evidence to support appellant's conviction. [**motion in limine**] The trial court did not abuse its discretion when it admitted evidence that the victim was pregnant at the time of her death because the evidence was admissible to establish appellant's motive and intent. [**admission of photographs**] The trial court did not abuse its discretion when it admitted certain photographs into evidence because the pictures enabled the jurors to better understand testimony about the crime scene. [**motion to suppress**] The trial court did not err when it denied appellant's motion to suppress a custodial statement, which the court concluded was spontaneously given. (Storey, W.; CR 11-331; 11-3-11; Hannah, J.)

*Montgomery v. State*, 2011 Ark. 462 [**Rule 37**] The record before the appellate court was insufficient to determine whether appellant's Rule 37 petition was properly denied. Thus, the Supreme Court remanded the matter to allow the circuit court to hold a hearing on appellant's petition. (Halsey, B.; CR 11-141; 11-3-11; Corbin, D.)

*Davis v. State*, 2011 Ark. App. 686 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**motion to suppress**] Appellant's question—"How soon can I talk to a lawyer"—was not an unambiguous and unequivocal request for an attorney. [**Rule 803(2) Ark. R. Evid.**] The trial court did not abuse its discretion when pursuant to the excited-utterance exception to the hearsay rule, it permitted the victim's mother to testify about statements made by the victim immediately after the rape. (Thyer, C.; CACR 11-245; 11-9-11; Martin, D.)

*Jones v. State*, 2011 Ark. App. 683 [**motion to suppress**] The trial court's denial of appellant's motion to suppress was not clearly against the preponderance of the evidence. [**Ark. Code Ann. § 12-12-313**] Arkansas Code Annotated § 12-12-313, which requires that a defendant provide 10 days' notice prior to a proceeding in which he requests the presence of the analyst who performed the analysis for the purposes of cross-examination, is consistent with the requirements outlined in *Melendez-Diaz v. Massachusetts*. The fact that the analyst was on the State's witness list did not excuse the defendant's obligation under Ark. Code Ann. § 12-12-313. (Fitzhugh, M.; CACR 11-19; 11-9-11; Abramson, R.)

*Williams v. State*, 2011 Ark. App. 675 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] The trial court's admission of evidence, which established that appellant refused to submit to giving a DNA sample, was not an abuse of discretion because it did not bolster the accuracy of the DNA evidence and it showed appellant's consciousness of guilt. (Wright, R.; CACR 11-291; 11-9-11; Gladwin, R.)

*Whisenant v. State*, 2011 Ark. App. 703 [Ark. R. Evid. 502] Because there was no attorney-client relationship between the attorney witness and the appellant, the trial court did not abuse its discretion when it refused to exclude certain evidence pursuant to Rule 502 of the Arkansas Rules of Evidence. (Henry, D.; CACR 11-384; 11-16-11; Gruber, R.)

*Trotter v. State*, 2011 Ark. App. 696 [**forfeiture**] The evidence did not support the trial court's order of forfeiture of appellant's truck. However, the circuit court's finding that appellant's car was used to store marijuana was sufficient to support a forfeiture order for the car. (Wright, R.; CACR 11-382; 11-16-11; Hart, J.)

*Williams v. State*, 2011 Ark. 489 [**Rule 37**] The trial court did not clearly err in denying appellant's petition for Rule 37 relief. (Clawson, C.; CR 11-178; 11-17-11; Brown, R.)

*Anderson v. State*, 2011 Ark. 488 [**Rule 37**] Appellant did not demonstrate grounds for reversal of the circuit court's denial of his Rule 37.5 petition. (Hudson, J.; CR 08-1464; 11-17-11; Corbin, D.)

*Dotson v. State*, 2011 Ark. App. 731 [**continuance**] The trial court did not abuse its discretion when it continued appellant's revocation hearing to allow the State to procure the testimony of a witness. [**double jeopardy**] Double jeopardy does not apply to a revocation hearing. (Cottrell, G.; CACR 11-537; 11-30-11; Glover, D.)

*Jackson v. State*, 2011 Ark. App. 738 [**motion to suppress**] The circuit court did not clearly err in refusing to suppress appellant's custodial statements, which were not the result of coercion. Because appellant initiated contact with law enforcement officials, they were not required to honor appellant's earlier decision to remain silent. [**preservation of evidence**] Appellant failed to establish that the State acted in bad faith when a private production company, which covered the crime for which appellant was charged, destroyed film footage taken during the investigation. (Piazza, C.; CACR 11-14; 11-30-11; Brown, W.)

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

*Fitch v. State*, 2011 Ark. App. 663 (aggravated robbery; first-degree battery; theft of property) CACR 11-450; 11-2-11; Abramson, R.

*Trotter v. State*, 2011 Ark. App. 687 (rape) CACR 11-219; 11-9-11; Hoofman, C.

*McDaniel v. State*, 2011 Ark. App. 677 (possession of cocaine; maintaining a drug premises) CACR 11-480; 11-9-11; Robbins, J.

*Clayton v. State*, 2011 Ark. App. 692 (residential burglary) CACR 11-379; 11-16-11; Pittman, J.

*Russell v. State*, 2011 Ark. App. 698 (aggravated assault on an employee of a correctional facility) CACR 11-505; 11-16-11; Gladwin, R.

*Green v. State*, 2011 Ark. App. 700 (criminal attempt to commit capital murder; possession of a firearm by certain persons) CACR 11-599; 11-16-11; Robbins, J.

*Butler v. State*, 2011 Ark. App. 708 (aggravated robbery; felon in possession of a firearm; filing a false police report; fleeing) CACR 11-494; 11-16-11; Abramson, R.

*Scales v. State*, 2011 Ark. App. 712 (felony theft by receiving) CACR 11-479; 11-16-11; 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:

*Ellis v. State*, 2011 Ark. App. 654 (probation) CACR 11-386; 11-2-11; Gladwin, R.

*McDowell v. State*, 2011 Ark. App. 674 (probation) CACR 11-50; 11-9-11; Pittman, J.

*Johnson v. State*, 2011 Ark. App. 718 (suspended imposition of sentence) CACR 11-327; 11-30-11; Pittman, J.

## **CIVIL**

*Village Ventures Realty, Inc. v. Cross*, 2011 Ark. App. 655 [**civil contempt**] Contempt finding was proper because had party complied with court's orders to maintain the roads, he would have avoided the sanction. (Williams, L.; CA 11-260; 11-2-11; Gladwin, R.)

*Criner v. Reddell*, 2011 Ark. App. 661 [**set aside deed**] Court properly set aside a deed because at the time of its execution, grantor had just been informed of her husband's terminal medical condition. The basis of the court's order was unconscionability. The transaction had aspects of a constructive fraud. (Webb, G.; CA 10-1159; 11-2-11; Glover, D.)

*Hurst v. Southern Farm Bureau*, 2011 Ark. App. 657 [**insurance**] Because insured intentionally drove an automobile toward the pedestrian and struck him, the event fell under an exclusion in the policy. (Smith, K.; CA 11-162 11-2-11; Robbins, J.)

*Courier v. Woodruff*, 2011 Ark. App. 659 [**rule 11 sanctions**] Court did not abuse its discretion in awarding sanctions. (Burnett, D.; CA 11-205; 11-2-11; Wynne, R.)

*Clow v. Vickers Constr. Co.*, 2011 Ark. App. 662 [**contractors/ “no-sue” provision**] The no-sue provision of Ark. Code Ann. § 17-25-103, which bars an unlicensed contractor from suing for the value of its work under a contract or quantum meruit, applies to residential contractors. (Weaver, T.; CA 11-278; 11-2-11; Glover, D.)

*Locke v. Continental Casualty Co.*, 2011 Ark. 653 [**hospital records**] Records related to plaintiff falling in hospital parking lot did not constitute privileged hospital records and were discoverable. The records clearly did not meet the criteria set out in the statutory privilege. (Dennis, J.; CA 10-218; 11-2-11; Hart, J.)

*Davis v. City of Blytheville*, 2011 Ark. App. 651 [**claim/late fees**] Claim against city related to late fees for mosquito control stated a cause of action. (Laser, D.; CA 11-324 11-2-11; Pittman, J.)

*Timpani v. Lakeside School Dist.*, 2011 Ark. App. 668 [**fair teacher dismissal act**] School board’s decision to terminate teacher was properly affirmed on appeal to circuit court. (Williams, L.; CA 11-78; 11-2-11; Hoofman, C.)

*Douglas v. First Student, Inc.*, 2011 Ark. 463 [**certified question/limitations**] Limitations period for a private cause of action pursuant to Ark. Code Ann. § 11-4-218, which allows an employee to bring an action against an employer for minimum wages, is three years. (SC 11-361; 11-3-11; Gunter, J.)

*Brackelsberg v. Heflin*, 2011 Ark. App. 678 [**prevailing party**] Neither party prevailed for purposes of assessing attorney’s fees and costs. (Kilgore, C.; CA 11-591 11-9-11; Robbins, J.)

*Ross Systems, Inc. v. Advanced Environmental Recycling, Inc.*, 2011 Ark. 473 [**discovery sanctions**] Trial court did not abuse its discretion in striking defendant’s answer because of violations of discovery order. (Smith, K.; SC 11-430; 11-10-11; Hannah, J.)

*Carter v. Cline*, 2011 Ark. 474 [**rule 54 certificate**] Certificate was properly issued by trial court as contract claims had been resolved. Liability for breach of contract is independent of potential liability of opposing party for negligence and breach of fiduciary duty. [**contract condition**] Contract contained a condition precedent, requiring buyer to obtain financing, that was not met; therefore, there was no contract. (Moody, J.; SC 10-870; 11-10-11; Brown, R.)

*National Bank of Ark. v. Rivercrossing Partners, LLC*, 2011 Ark. 475 [**jury trial**] Loan amount, which was secured by a mortgage, was essential to the foreclosure proceeding and a traditional equitable claim; thus, it was not an issue to be submitted to a jury. Likewise, the claim regarding the nature of the collateral for the debt was equitable in nature. The fraudulent transfer claim is also equitable in nature. [**abuse of process**] Plaintiff failed to establish the elements of abuse of process because he did not establish an ulterior purpose or an improper act on the part of defendant. (Fox, T.; SC 10-1337; 11-10-11; Henry, C.)

*White-Phillips v. Ark. Children's Hosp.*, 2011 Ark. App. 699 [**limitations**] Medical negligence was properly dismissed as two-years limitations period had run. (Fox, T.; CA 11-54; 11-16-11; Gladwin, R.)

*Bloodman v. Jefferson Hospital Assoc.*, 2011 Ark. App. 694 [**dismissal**] Court properly dismissed suit with prejudice as case had been submitted to the court and its oral ruling had been announced even though attorney attempted to nonsuit before an order was entered. (Wyatt, R.; CA 10-1046; 11-16-11; Hart, J.)

*Farm Bureau Ins. v. Guyer*, 2011 Ark. App. 710 [**insurance/interpleader**] Insurer had no right to interplead insurance funds and to name judgment creditors and second mortgagee when the policy made clear that these other parties had no claim on the proceeds. The insurer's failure to pay the insured within a reasonable time and instituting an unnecessary interpleader action warranted imposition of the statutory penalty and attorney's fees; however, the insured did not establish a claim for the tort of bad faith. (Laser, D.; CA 11-274; 11-16-11; Martin, D.)

*Peterhawk Properties, LP v. Heigle*, 2011 Ark. App. 709 [**leases**] Leases expired at the end of the primary term and were not extended by virtue of ongoing operations during the primary term. (Harkey, A.; CA 11-419; 11-16-11; Abramson, R.)

*City of Bryant v. Collins*, 2011 Ark. App. 713 [**contract/authority**] Contract with the city was not valid as Director of Public Works did not have authority to enter into it on city's behalf and the city council never ratified the contract after the fact. (Arnold, G.; CA 11-378; 11-16-11; Hoofman, C.)

*The Lamar Co. v. State Highway Dept.*, 2011 Ark. App. 695 [**billboards**] Department's decision to deny request to reenter billboard permits was correct as company failed to timely renew its permits. (Kilgore, C.; CA 10-1170; 11-16-11; Hart, J.)

*Delta Regional Airport Authority v. Gunn*, 2011 Ark. App. 701 [**eminent domain/leasehold**] Court did not err in admitting evidence of the value of the crops grown on the land, including profits, as the profits were derived from the use of the land itself and not merely a business conducted on the land. However, court erred in awarding attorney's fees because Ark. Code Ann. § 18-15-605 does not apply to municipal corporations. (Neal, O.; CA 11-180; 11-16-11; Robbins, J.)

*Kachigian v. Marion County Abstract Co.*, 2011 Ark. App. 704 [**escrow**] Summary judgment was not proper as there are unsettled facts as to the source of the funds deposited with the company and who was the principal in the transaction. (Putman, J.; CA 10-1053; 11-16-11; Gruber, R.)

*Lancaster v. Red Robin, Inc.*, 2011 Ark. App. 706 [**defamation**] Defamation suit arising out of termination of employee and employee's allegation that employer defamed her in statements to other employees – Employer was privileged in making statements when inquiring as to allegations that dismissed employee was slipping beers to customers and selling drugs. Sanctions were in order because of conduct of attorney, including the striking of the amended complaint. (Duncan, X.; CA 11-543; 11-16-11; Glover, D.)

*State v. Jernigan*, 2011 Ark.487 [**residency/mayor**] Person did reside within city limits under the language of the statute because he resided there at the time that he filed for office. (Wilson, R.; SC 11-513; 11-17-11; Hannah, J.)

*Nelson v. Ar. Rural Medical Practice Loan Board*, 2011 Ark.491 [**rural medical practice loan program**] Law governing the loan program to locate doctors in communities does not deprive recipients of such loans the ability to assert common-law claims and defenses when they are sued for violating terms of the program. (Fox, T.; SC 11-369; 11-17-11; Henry, C.)

*Southern Pioneer Life Ins. Co. v. Thomas*, 2011 Ark. 490 [**arbitration**] The state regulates the business of insurance and state regulation has not been preempted by the Federal Arbitration Act. State law does not compel enforcement of an arbitration provision in the insurance contract. (Fogleman, J.; SC 11-426; 11-17-11; Baker, K.)

*Carr v. Gillam*, 2011 Ark. App. 732 [**boundary**] Court erred in finding that party did not establish title to property on which driveway was built. (Maggio, M.; CA 11-451; 11-30-11; Glover, D.)

*Evans v. Seeco, Inc.*, 2011 Ark. App. 739 [**mineral rights**] Woman only had a dower interest in the property and that interest was conveyed in a deed; therefore, she no longer had any interest in the property. (Hughes, T.; CA 11-465; 11-30-11; Brown, W.)

*Jenkins v. Fogerty Trust*, 2011 Ark. App.720 [**boundary**] Court erred in dismissing nuisance claim in erection of a "spite fence." Court's location of boundary line based on competing surveyors was supported by the evidence. (Williams, L.; CA 11-276; 11-30-11; Hart, J.)

*Welsh v. Mid-South Bulk Services*, Ark. App. [**guaranty**] Guaranty was valid and enforceable and was not to a particular obligation but extended to all business between the parties. (Weaver, T.; CA 11-461; 11-30-11; Wynne, R.)

*Nichols v. Culotches Bay Committee*, 2011 Ark. App. 730 [**navigable waterway**] Bay was regularly fished by a significant number of people for over 60 years and court's finding that it was navigable was supported by the evidence. Court erred in finding that party did not establish title to property on which driveway was built. (Hughes, T.; CA 11-467; 11-30-11; Gruber, R.)

*Smith v. Rebsamen Medical Center*, 2011 Ark. App. 722 [**nunc pro tunc**] Probate Division entered a nunc pro tunc order appointing administrators that had effect of administrators being appointed when they filed a wrongful death action when actually they had not been appointed at the time the suit was filed. Court hearing wrongful death action ruled that nunc pro tunc order was invalid. This ruling was an impermissible collateral attack on the probate order. (Fox, T.; CA 11-257; 11-30-11; Gladwin, R.)

*Sutton, Adminx. v. Gardner*, 2011 Ark. App. 737 [**adverse possession**] Party established that he began exclusively using the property with hostile intent that was thoroughly understood by his co-tenants more than seven years before 1995. The claim vested before the 1995 change in the law regarding color of title and payment of taxes. Party's claim was not premature or barred by res judicata (Clawson, C.; CA 11-388; 11-30-11; Hoofman, C.)

## DOMESTIC RELATIONS

*Grove v. Grove*, 2011 Ark. App. 648 [**change of custody; visitation**] The Court of Appeals said that the testimony of the appellant mother's efforts to alienate her children from their father and the effect her behavior had on her children supported the trial court's finding of a material change in circumstances, and that a change in custody from the mother to the father was in the best interests of the two children. The court affirmed the order changing custody and giving the mother supervised visitation. (Wright, J.; CA 11-173; 11-2-11; Vaught, L.)

*Szabo v. Womack*, 2011 Ark. App. 664 [**child support; attorney's fees**] The Court of Appeals reversed the award of child support for the trial court's failure to count the Social Security disability payments to the child based on the noncustodial parent's disability in determining his income for setting child support. The parent was also entitled to a credit against the amount of child support for the Social Security disability payments made to the child. Finally, the court reversed the award of attorney's fees. The case was remanded for a calculation of child support based upon the child support chart and the circumstances of the case, for a consideration of attorney's fees with reference to the *Chrisco* factors, and for a discussion of the basis for its award. (Duncan, X.; CA 11-339; 11-2-11; Abramson, R.)

*Casto (now Teague) v. Casto*, 2011 Ark. App. 684 [**property-settlement agreement; modification**] The Court of Appeals found that the trial court's decision, made more than ninety days after the decree was entered, was actually a modification of the parties' property-settlement agreement, not a mere clarification or interpretation of the decree. Under Rule 60, the trial court lacked jurisdiction to supplement its prior decree by deciding issues that were not previously before the court and upon which the parties had never agreed. Neither did the general reservation of jurisdiction, included in the divorce decree, give the court jurisdiction, because the parties had never contemplated the payments to the wife that were at issue. A general reservation of jurisdiction will permit modification of a decree after ninety days only for issues that were before the court in the original action. (McCain, M.; CA 11-333; 11-9-11; Abramson, R.)

*McClure v. Schollmier-McClure*, 2011 Ark. App. 681 [**divorce; marital property; debt**] Clear and convincing evidence is required to overcome the presumption that real property placed in the names of persons who are husband and wife, without any indication otherwise, is owned by the parties as tenants by the entirety. Clear and convincing evidence is also required to overcome the presumption that the spouse who furnished the consideration for the purchase made a gift to the other spouse. Here, the deed to the house was to the parties jointly, as husband and wife. The appellee/cross-appellant failed to overcome the presumption of a gift. With respect to the appellant/cross-appellee's credit card debt, the trial court did not clearly err in finding that \$35,000 of the \$53,000 credit card debt was marital debt and should be divided between the parties. The decision was affirmed. (Brantley, E.; CA 10-1016; 11-9-11; Gruber, R.)

*Putt v. Suttles*, 2011 Ark. App. 688 [**paternity testing; change in custody**] The appellant mother argued that the court erred in denying her post-decree request for paternity testing for one of the parties' two children born of the marriage. The Court of Appeals found that the court's denial of appellant's request for paternity testing was not erroneous. Appellant also alleged that the court erred in awarding custody to the appellee father. The parties agreed upon joint custody at the time of the divorce. The Court of Appeals said that sufficient evidence supported the trial court's modification based upon changed circumstances, particularly in light of the inability of the parties to cooperate in shared decisions about the welfare of the children. Here, discord between the parties prevented cooperation between them. Once the court decided that the children should be awarded to one of the parties, the court correctly considered best interests to decide which party should receive custody. (Hill, V.; CA 11-330; 11-9-11; Hoofman, C.)

*Davis v. Davis*, 2011 Ark. App. 693 [**child support; child custody**] The Court of Appeals found that the evidence of record did not support the amount of child support awarded, so the case was reversed and remanded for the trial court to enter an order supported by the evidence. On the issue of custody, the Court of Appeals affirmed, noting that the case turns on whether the appellee father's relative instability regarding matters of employment and residence was outweighed by the evidence of appellant's mental and emotional instability, largely a question of credibility. (Keaton, E.; CA 11-308; 11-16-11; Pittman, M.)

*Browning v. Browning*, 2011 Ark. App. 714 [**child support; jurisdiction—Rule 60**] Under Rule 60 of the Arkansas Rules of Civil Procedure, a court may modify or vacate an order or judgment within ninety days of its being filed with the clerk to correct errors or mistakes or to prevent the miscarriage of justice. A court may modify or set aside an order beyond ninety days if one of the conditions set out in Rule 60(c) exists. If none exists, the court has no power to modify or set aside its order. Although a court has continuing jurisdiction to modify child support and custody orders, the movant must show a change in circumstances requiring modification. Here, the new child support order was entered after ninety days had elapsed, so the court lacked jurisdiction to enter it. Furthermore, the court's continuing jurisdiction over child-support cases was not invoked by allegations of changed circumstances. Therefore, the case was reversed and remanded. (Reynolds, D.; CA 11-340; 11-16-11; Brown, W.)

## PROBATE

*Havard, et al. v. Clark*, 2011 Ark. App. 734 [**adoption**] In the first appeal of the trial court's denial of a step-parent adoption, the Court of Appeals reversed and remanded the finding that the birth father did not fail to make child-support payments for one year while under a court order and did not reach the issue of the court's best-interest determination, as it was not ripe. Upon remand, the trial court found that the birth father had failed to pay child support for the child for only nine months and that his consent was required for the adoption. The Court of Appeals said that the determination of what is significant and what constitutes justifiable cause are fact intensive and that it could not say the trial court erred. Because the consent finding was affirmed, the Court of Appeals did not reach the issue of best interest. (Elmore, B.; CA 11-516; 11-30-11; Abramson, R.)

*Lowrance, et al. v. Smith*, 2011 Ark. App. 725 [**guardianship; visitation—change in circumstances**] The appellants, maternal uncle and his wife, were appointed guardians of three children after their mother died and their father was imprisoned for her death. Appellee, the maternal grandmother, also sought guardianship. She was granted reasonable visitation, including specific days and dates. Appellants subsequently sought to terminate all visitation between the children and their grandmother. After mediation, they entered into an agreement for visitation, which the court approved. The agreement worked for three years, when the appellants began to permit only supervised, with no overnight, visitation. On appellant's contempt motion, the trial court ordered specific visitation, requiring the appellee to accommodate the children's schedules, and allowing modification only if the parties agreed. The appellants thereafter moved to suspend or modify visitation. The Court of Appeals affirmed the trial court's order and said the parties' diametrically opposed positions constitute material change in circumstances with regard to visitation. The court's order for specific visitation achieved the best interests of the children by fostering continued relationships, by eliminating continued litigation, and by crafting visits to accommodate the children's busy schedules. (McCallister, B.; CA 11-477; 11-30-11; Robbins, J.)

## JUVENILE

*Fass v. Arkansas Department of Human Servs.*, 2011 Ark. 666 [**TPR- Consent**] Appeal dismissed where appellant failed to appeal from an earlier termination based on her consent that was valid. The statutory requirements for consent under the juvenile code are separate and distinct from consent from the adoption code. There was no need for DHS to seek to set aside the first termination order. The circuit court lacked jurisdiction to set aside the order six months later and the second termination was invalid. (McCallum, R.; 11-656; 11-2-11; Martin, D.)

*Rhine v. Arkansas Department of Human Servs.*, 2011 Ark. App. 649 [**TPR – best interest**] The trial court's finding that termination of parental rights was in the children's best interest was clearly erroneous. Evidence showed appellant worked hard upon release from jail by maintaining a stable job and housing, staying off drugs, and demonstrating his commitment to his children, and complying with court orders, except for an occasional moderate consumption of alcohol and three unexcused missed visitations. There was no evidence of any harm or real risk of harm by

appellant's slight lapse of judgment when the quantum of evidence favored reunification. (Zimmerman, S.; 11-548; 11-2-11; Vaught, L.)

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

*Landis-Maynard v. Arkansas Department of Human Servs.*, 2011 Ark. App. 673, Physical abuse by stepfather and mother remained financially unstable, failed to complete parenting without violence classes and maintain relationship with abusive parent despite his propensity for extreme violence and knew her continued contact with him with affect her ability to regain custody of her child (Spears, L.; 11-727; 11-9-11; Vaught, L.)

*Weaver v. Arkansas Department of Human Servs.*, 2011 Ark. App. 680, Sex abuse and aggravated circumstances by appellant father. (Medlock, M. E.; 11-724; 11-9-11; Wynne, R.)

*Lewis v. State*, 2011 Ark. 691 [**Juvenile Transfer**] The criminal division denied appellant's motion to transfer his case from criminal division to juvenile division. Appellant at age 16 was charged with sexual assault in the second degree and rape. Appellant challenged the court's findings. The appellate court noted that the trial court made the required statutory findings and placed great weight on evidence that appellant in less than one month, in two separate incidents, invited two girls into his truck for a ride home and sexually assaulted one and raped another in a premeditated, serious, and violent manner. The trial court also took into consideration that he acted alone, knew his conduct was wrong, and had no deficits in his family life that would excuse his conduct. The court also considered that he was now 17 and his chances for rehabilitation in the juvenile system. (Wyrick, K. 11-279; 11-16-11; Vaught, L.)

## **DISTRICT COURT**

*Brody v. State*, 2011 Ark. App. 667 [**speedy trial**]. Appellant was denied his motion to dismiss the charge against him based on violation of his speedy-trial rights. He argued that the trial court erred in charging a continuance to him. Appellant was convicted of various offenses in district court and appealed to circuit court. In a motion to dismiss, appellant disputed 147 days charged to him as a result of a continuance, which he claimed he did not request. The district court clerk testified and identified a certified copy of the court docket that showed an oral motion for continuance made by the defense. The clerk said she made handwritten notations on the docket at the time of the motion. Appellant's attorney testified that he did not ask for the continuance, much less one for six months. Also, a court slip received by the appellant did not state the continuance was granted upon request of the defense. The State conceded that appellant made a prima facie showing of a speedy-trial violation. Upon de novo appeal, it was held that periods excluded in computing the time for trial include periods of delay resulting from a continuance granted at the request of the defendant or his counsel. It was held that because the continuance granted at the request of the defendant was reflected both in a docket entry and in records made at the time it occurred, the time period was properly excluded. The circuit court was correct in concluding that appellant's speedy trial rights were not violated. (Whiteaker, P.; CACR11-443; 11/2/11; Hoofman, C.)

*Gurien v. Access Credit, Inc.*, 2011 Ark. App. 711 [**district court appeal**] Circuit court erred in dismissing appeal from district court. The appeal was from an order denying a request to set aside a default judgment and was timely filed. (Davis, B.; CA 11-475; 11-16-11; Martin, D.)

## **EIGHTH CIRCUIT**

*Linn Farms and Timber Limited v. Union Pacific Railroad Co.*: [**due process**] When notices to the Missouri Pacific Railroad were returned " Not Deliverable," the Arkansas Commissioner of State Lands should have taken reasonable additional steps to notify Union Pacific, with whom Missouri Pacific had merged, of an impending forfeiture of mineral lease rights. A number of reasonable additional steps to provide notice were available to the Commissioner, and the notice provided was therefore inadequate. As a result of the inadequate notice, the forfeiture of Union Pacific's rights and the sale of those mineral rights to plaintiff were done in violation of Union Pacific's due process rights and were invalid. (E. D. Ark.; 11/15/2011)