

APPELLATE UPDATE

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Appellate Update is a service provided by the Administrative Office of the Courts to assist in locating published decisions of the Arkansas Supreme Court and the Court of Appeals. It is not an official publication of the Supreme Court or the Court of Appeals. It is not intended to be a complete summary of each case; rather, it highlights some of the issues in the case. A case of interest can be found in its entirety by searching this website or by going to (Supreme Court - http://courts.arkansas.gov/opinions/sc_opinions_list.cfm or Court of Appeals - http://courts.arkansas.gov/opinions/coa_opinions_list.cfm).

ANNOUNCEMENTS

On February 2nd, the supreme court published for comment rules changes proposed by the Civil Practice Committee. The comment period runs through April 2, 2012. A copy of the per curiam was included in the weekly mailout.

On February 23rd, the supreme court issued per curiam orders:

- Amending the Attorney Oath of Admission;
- Adopting amendments to Rules of Criminal Procedure 5.3, 5.4, and 24.3, effective April 1, 2012;
- Adopting amendments to Rules of Civil Procedure 3 and 72, effective immediately; and
- Publishing for comment proposed revisions to Administrative Order Number 19, (comment period ends April 27th).

Copies of these four per curiam orders were included in weekly mailout.

CRIMINAL

Wilson v. State, 2012 Ark. App. 96 [**motion to suppress**] Because appellant consented to the search of his vehicle, the trial court did not err in denying appellant's motion to suppress the evidence obtained during the search. (Pope, S.; CACR 11-233; 2-1-12; Pittman, J.)

Cornett v. State, 2012 Ark. App. 106 [**discovery violation**] Because appellant failed to establish that he was prejudiced by the discovery violation that occurred in his case, the appellate court refused to reverse the trial court's order denying appellant's requests for a continuance and/or a mistrial. (Storey, W.; CACR 11-672; 2-1-12; Abramson, R.)

Menne v. State, 2012 Ark. 37 [**motion to suppress**] Law enforcement officials had reasonable suspicion to detain appellant pursuant to Rule 3.1 of the Arkansas Rules of Criminal Procedure. Thereafter, appellant gave consent to search her vehicle. Accordingly, the detention of appellant and the search of appellant's vehicle were lawful and the trial court properly denied appellant's motion to suppress. (Erwin, H.; CR 10-1304; 2-2-12; Brown, R.)

Jones v. State, 2012 Ark. 38 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon statements made by the prosecutor in closing arguments. [**jury instructions**] Based upon the evidence in appellant's case, there was no rational basis for the circuit court to instruct the jury on reckless manslaughter or negligent homicide. (Reynolds, D.; CR 11-576; 2-2-12; Baker, K.)

Smith v. State, 2012 Ark. App. 130 [**discovery violation**] Appellant failed to demonstrate that he was prejudiced by the State's failure to disclose to him a letter that he had previously written to the trial judge. (Humphrey, M.; CACR 11-412; 2-8-12; Martin, D.)

Ashley v. State, 2012 Ark. App. 131 [**sufficiency of the evidence; possession of drug paraphernalia with intent to manufacture methamphetamine**] There was substantial evidence to support appellant's conviction. [**motion to suppress**] The denial of appellant's motion to suppress was not clearly against the preponderance of the evidence. (Shirron, P.; CACR 11-613; 2-8-12; Hoofman, C.)

Crowder v. State, 2012 Ark. App. 114 [**motion to suppress**] Because the legitimate purpose of the traffic stop had not ended prior to the arrival of the drug dog and its alert on appellant's car, appellant was not unlawfully detained. Therefore, the trial court properly denied appellant's motion to suppress the evidence recovered during the search of appellant's vehicle. (Edwards, R.; CACR 11-914; 2-8-12; Vaught, L.)

James v. State, 2012 Ark. App. 118 [**motion to suppress**] The trial court erred when it denied appellant's motion to suppress statements that were made to a law enforcement official while appellant was in custody and before she was advised of her *Miranda* rights. (Henry, D.; CACR 11-721; 2-8-12; Gladwin, R.)

Elliott v. State, 2012 Ark. App. 126 [**continuance**] The trial court did not abuse its discretion when it denied appellant's motion for a continuance. [**admission of evidence**] The trial court did not err when it refused to allow the appellant to introduce certain evidence during his trial because the evidence had not been provided to the State prior to trial. (Elmore, B.; CACR 11-880; 2-8-12; Glover, D.)

Meadows v. State 2012 Ark. 57 [**sufficiency of the evidence; capital murder; residential burglary; theft of property**] There was substantial evidence to support appellant's convictions. (Singleton, H.; CR 11-602; 2-9-12; Goodson, C.)

Freeman v. State, 2012 Ark. App. 144 [**motion to suppress**] Appellant voluntarily consented to a search of his vehicle. Thus, the trial court did not err when it denied appellant's motion to suppress the contraband found during the search. (Pearson, W.; CACR 11-909; 2-15-12; Robbins, J.)

Turner v. State, 2012 Ark. App. 150 [**sufficiency of the evidence; theft by receiving; second-degree forgery**] There was substantial evidence to support appellant's convictions. [**sentencing**] Based upon appellant's criminal history, the trial court did not abuse its discretion when it chose to run appellant's sentences consecutively rather than concurrently. (Wright, J.; CACR 11-717; 2-15-12; Martin, D.)

Webb v. State, 2012 Ark. 64 [**jury instructions**] Second-degree sexual assault, as it might have been proven in appellant's case pursuant to Ark. Code Ann. § 5-14-125 (a)(3), contains two elements not included in rape, and thus it was not a lesser offense included in the rape offense for which appellant was charged. Accordingly, the trial court did not abuse its discretion when it refused to instruct the jury that second-degree sexual assault was a lesser-included offense of rape. The Supreme Court declined appellant's request to overrule *Joyner v. State*, 2009 Ark. 168, 303 S.W.3d 54 or to deviate from its use of the test outlined in Ark. Code Ann. § 5-1-110 for determining when one offense is included as a lesser offense of another. (Wright, H.; CR 11-818; 2-16-12; Corbin, D.)

Wedgeworth v. State, 2012 Ark. 63 [**hearsay**] Pursuant to Rule 803(3) of the Arkansas Rules of Evidence it was not an abuse of discretion for the trial court to admit testimony from the victim's father in which he stated that his daughter told him that she had received threats against her life. The trial court abused its discretion when it admitted into evidence thirteen dated, written recordings from a spiral-bound notebook, which was found in the victim's apartment after her death. However, because the evidence contained in the notebook was cumulative to other similar evidence properly admitted during appellant's trial, appellant failed to establish that he was prejudiced by the error. [**Wicks exception**] The circuit court did not commit a fundamental error by admitting crime-scene photographs into evidence during appellant's trial. (Capeheart, T.; CR 11-416; 2-16-12; Hannah, J.)

Ellis v. State, 2012 Ark. 65 [**sufficiency of the evidence; first-degree murder**] There was substantial evidence to support appellant's conviction. [**Rule 609 Ark. R. Evid.**] The trial court did not abuse its discretion when it allowed the prosecutor to ask appellant questions about his prior felony convictions pursuant to Rule 609 of the Arkansas Rules of Evidence. (Chandler, L.; CR 11-604; 2-16-12; Brown, R.)

Brown v. State, 2012 Ark. App. 163 [**sufficiency of the evidence; failure to register as a sex offender**] There was substantial evidence to support appellant's conviction. [**probation**] The circuit court's decision to revoke appellant's probation, which was based upon appellant receiving a new conviction, was not clearly against the preponderance of the evidence. (Sims, B.; CACR 11-892; 2-22-12; Hart, J.)

McCastle v. State, 2012 Ark. App. 162 [**sufficiency of the evidence; possession of cocaine with intent to deliver**] There was substantial evidence to support appellant's conviction. [**admission of evidence**] Law enforcement officials had a credible explanation for the discrepancy in the description of the materials purportedly sent to the crime lab and the materials that the crime lab's report identified as tested. Thus, the trial court did not abuse its discretion when it admitted the crime lab's report into evidence. (Henry, D.; CACR 09-933; 2-22-12; Hart, J.)

Johnson v. State, 2012 Ark. App. 167 [**motion to suppress**] The law enforcement official had reasonable suspicion to continue to detain appellant after the legitimate purpose of the traffic stop ended. Thus, the trial court did not err when it denied appellant's motion to suppress the evidence seized as a result of appellant's detention and the canine sniff of his vehicle. (Crow, G.; CACR 11-991; 2-22-12; Robbins, J.)

Sullivan v. State, 2012 Ark. 74 [**speedy trial**] The circuit court correctly concluded that appellant's right to a speedy trial was not violated. [**sufficiency of the evidence; permitting the abuse of a minor child; hindering apprehension or prosecution**] There was substantial evidence to support appellant's convictions. [**witness testimony**] The trial court did not abuse its discretion when it permitted an eleven-year-old witness to refresh her memory pursuant to Rule 612 of the Arkansas Rules of Evidence by looking at a transcript of her testimony from a previous trial. [**witness testimony**] The trial court did not abuse its discretion when it admitted relevant testimony from appellant's mother, appellant's neighbor, and an expert witness from Arkansas Children's Hospital. [**sex-offender registry**] 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.; CR 11-1026; 2-23-12; Corbin, D.)

Eagle v. State, 2012 Ark. App. 187 [**speedy trial**] Appellant was not tried within the speedy-trial time limits. Thus, the trial court erred when it denied appellant's motion to dismiss. (Wright, H.; CACR 11-819; 2-29-12; Glover, D.)

Feuget v. State, 2012 Ark. App. 182 [**sufficiency of the evidence; aggravated robbery**] There was substantial evidence to support appellant's conviction. [**new trial**] The trial court did not abuse its discretion when it denied appellant's request for a new trial, which was based upon admission of inaccurate testimony from an expert witness. (Johnson, L.; CACR 11-890; 2-29-12; Gladwin, R.)

Dorsey v. State, 2012 Ark. App. 183 [**guilty plea; revocation**] The State failed in its burden of showing that appellant voluntarily and intelligently entered a guilty plea to the charge of possession of a controlled substance with intent to deliver. Therefore, the ten-year suspended imposition of sentence that was imposed for that offense was invalid and the subsequent revocation of the suspended sentence was also erroneous. (Burnett, D.; CACR 09-345; 2-29-12; Robbins, J.)

Lewis v. State, 2012 Ark. App. 184 [**motion in limine**] The trial court did not err when it denied appellant's motion in limine regarding a surveillance video. [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motion for a mistrial, which was based upon questions that the prosecutor asked during the cross-examination of appellant's sister. (Wright, H.; CACR 11-341; 2-29-12; Wynne, R.)

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

Osuna v. State, 2012 Ark. App. 97 (delivery of a controlled substance) CACR 11-447; 2-1-12; Hart, J.

Montalvo v. State, 2012 Ark. App. 119 (aggravated assault) CACR 11-851; 2-8-12; Gladwin, R.

Porter v. State, 2012 Ark. App. 139 (manslaughter) CACR 11-648; 2-15-12; Pittman, J.

Green v. State, 2012 Ark. App. 158 (delivery of cocaine) CACR 11-254; 2-22-12; Vaught, L.

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:

Denson v. State, 2011 Ark. App. 105 (probation) CACR 11-420; 2-1-12; Glover, D.

Knotts v. State, 2012 Ark. App. 121 (suspended imposition of sentence) CACR 11-841; 2-8-12; Robbins, J.

CIVIL

Lance v. Scott, 2012 Ark. App. 101 [**replevin/law of case**] Court should have required that surviving cow and calf be returned. Court was correct in ordering value of deceased cows to be paid. (Capeheart, T.; CA 11-849; 2-1-12; Robbins, J.)

Walls v. Ark. Oil Gas Comm., 2012 Ark. App. 110 [**oil and gas commission**] Commission's decision as to the amount of compensation awarded for the forced integration or pooling of mineral interests in a natural gas drilling unit was supported by the evidence. (Maggio, M.; CA 11-620; 2-1-12; Martin, D.)

Spann v. Lovett Co., 2012 Ark. App. 107 [**covenant compete**] Covenant not to compete executed in connection with sale of accounting business was enforceable. Liability of signers of the agreement was joint. Prejudgment interest and attorney's fees awarded were affirmed. (Sanders, E.; CA 11-511; 2-1-12; Abramson, R.)

Yanmar Co. v. Slater, 2012 Ark. 36 [**personal jurisdiction**] Japanese company did not have sufficient contacts with state to establish personal jurisdiction. Nor was there such a symbiotic relationship between the Japanese company and an American corporation to establish jurisdiction. There was insufficient proof to show that the Japanese company dominated or controlled the American subsidiary such that personal jurisdiction can be predicated on the relationship between the two. [**negligence**] The American corporation owed no duty to the plaintiff. (Dennis, J.; SC 11-370; 2-2-12; Corbin, D.)

Ark. Dept. Human Services v. Civitan Center, Inc., 2012 Ark. 40 [**declaratory judgment**] Plaintiff failed to present a justiciable issue in its declaratory judgment action. It abased its request on hypothetical future events against an unknown party-provider in an unnamed county. (Phillips, G.; SC 11-574; 2-2-12; Goodson, C.)

Richardson v. Madden, 2012 Ark. App. 120 [**legal malpractice**] Claim is barred by three-year limitations period rather than the 5-year period applicable to contracts. (Huckabee, S.; CA 11-640; 2-8-12; Gladwin, R.)

Benefit Bank v. Rogers, 2012 Ark. App. 134 [**lien for alimony**] Court may not in its decree place lien to secure future alimony payments. (Tabor, S.; CA 11-459; 2-8-12; Brown, W.)

Mack v. Union Pacific RR, 2012 Ark. App. 115 [**dismissal/rule 41**] Rule 41 (a) is inapplicable where one of two dismissals is on the motion of the defendant and not the plaintiff. This subsection requires that both dismissals be made on the motion of the plaintiff. Under subsection (b), after a non suit at plaintiff's request, a second suit involuntarily dismissed because of failure to timely effectuate service operates as an adjudication on the merits and is with prejudice. (Wyatt, R.; CA 11-651 2-8-12; Vaught, L.)

Lynch v. Bates, 2012 Ark. App. 123 [**adverse possession**] Where initial use of property by owner's predecessor in title was amicable, possession of property would continue as it began – not adverse – absent an express disclaimer. (Clawson, C.; CA 11-77; 2-8-12; Wynne, R.)

Paulino v. QHG of Springdale, 2012 Ark.55 [**negligent credentialing**] Arkansas does not recognize a cause of action for negligent credentialing under the Medical Malpractice Act or at common law, and the supreme court will not recognize a new tort. (Lindsay, M.; SC 11-26; 2-9-12; Brown, R.)

J & J Excavating v. Doyne Constr. Co., 2012 Ark. App. 142 [**contractor**] Plaintiff was a “contractor” under section 17-25-13, and the statute required that it have a license in order to file suit to enforce a contract for construction work. (Piazza, C.; CA 11-264; 2-15-12; Gladwin, R.)

Baker v. Bolin, 2012 Ark. App. 141 [**prescriptive easement**] Evidence supported the existence of a prescriptive easement. (Gunn, M.; CA 11-663; 2-15-12; Pittman, J.)

Thomas v. Hall, 2012 Ark. 66 [**foia**] Use of force reports prepared by police officer are not exempt from disclosure under the Arkansas Freedom Of Information Act. They do not constitute employee-evaluation or job performance records. (Griffen, W.; SC 11-1199; 2-16-12; Brown, R.)

Peterson v. Davis, 2012 Ark. App. 166 [**findings of fact**] Rule 52 does not require findings of fact or conclusions of law on decisions on motions. (Putman, J.; CA 11-783; 2-22-12; Gladwin, R.)

Victory v. Smith, 2012 Ark. App.168 [**reform deed/fraud**] Court erred in finding fraud and setting aside deed. (Epley, A.; CA 11-928; 2-22-12; Robbins, J.)

Summers v. Byrd, 2012 Ark. App. 171 [**civil suit/arrest**] Since there was probable cause to support the arrest warrant, court's disposition of plaintiff's claims via summary judgment was not erroneous. (Phihours, R.; CA 11-847; 2-22-12; Gruber, R.)

Payton v. Coleman, 2012 Ark. App. 160 [**note/limitations/usury**] Limitations period was tolled by partial payment when distribution of insurance proceeds was applied to the note. Amount added to the note was not interest so as to increase interest rate. Amounts represented speculative capital that was at risk. (Laser, D.; CA 11-787; 2-22-12; Pittman, J.)

Bedell v. Williams, 2012 Ark. 75 [**nursing home litigation**] [**duty**] President of corporation owed no duty to nursing home resident, as he had no personal involvement in the events surrounding the incident giving rise to the claim, and no duty arose from either a federal regulation covering the obligations of governing bodies of nursing homes or from an internal policy of the corporation. [**evidence**] Court abused its discretion in excluding plaintiff's post-discharge medical evidence, that is, patient's medical records after she left the nursing home in which the incident occurred. Court erred in allowing expert to testify as to the meaning of

“dignity” in the Arkansas Resident’s Right Act (Ark. Code Ann. 16-114-207(3)) Furthermore, statute, barring an employee of a medical-care provider to give expert testimony against the provider, does apply to nurse employees. This statute is constitutional. **[Jury instruction]** Jury instruction on the Resident’s Right Act requires a causation element when damages are sought for a violation. **[spoliation]** Court erred in giving spoliation instruction when there was no finding that party had destroyed the documents at issue. (Kilgore, C.; SC 11-664; 2-23-12; Danielson, P.)

Baptist Hosp. -Forrest City v. Neblett, 2012 Ark. App. 191 **[Prejudgment interest/attorney’s fees]** Denial of prejudgment interest was correct because the time and amount of damages were not capable of exact determination. Since promissory note provided for payment of attorney’s fees, parties’ agreement must be enforced and court should make an award. (Proctor, R.; CA11-817; 2-29-12; Hoofman, C.)

DOMESTIC RELATIONS

Bell, et al. v. Bank of America, N.A., 2012 Ark. App. 104 **[trust–accounting]** The pro se appeal was remanded to settle the record and for rebriefing. The record submitted was insufficient for the appellate court to review it. The court cautioned the pro se appellants that they are held to the same standard as attorneys filing an appeal and that a court’s record on appeal cannot be disfigured, marked upon, or otherwise tampered with. (Elmore, B.; No. CA 11-816; 2-1-12; Gruber, R.)

Loftis v. Nazario, 2012 Ark. App. 98 **[change in custody]** The Court of Appeals affirmed the circuit court’s findings that no material change in circumstances had occurred to justify a change in custody, and that the best interest of the child did not dictate a change in custody from the mother to the father. (Wright, J.; No. CA 11-153; 2-1-12; Hart, J.)

Delgado v. Delgado, 2012 Ark. App. 100 **[child custody; alimony; attorney’s fees]** In affirming the trial court’s award of custody to the appellee mother, the Court of Appeals said that the circuit court applied the best-interest standard even if not articulated. The court reached the right result on the issue of custody. The court also affirmed a \$1,000 per month award of alimony to the appellee mother. The trial court considered the factors necessary to a determination of alimony, and did not abuse its discretion in making the award. Finally, the trial court did not abuse its discretion in awarding \$2500 in attorney’s fees. The appellant was in a better financial position than the appellee, and the court presided over the proceedings and was familiar with the case and the services the attorney rendered. (Kilgore, C.; No. CA 11-779; 2-1-12; Gladwin, R.)

Daniel v. Spivey, 2012 Ark. 39 **[divorce–stepparent visitation]** The appellant mother appealed the trial court’s award of visitation to the appellee stepfather upon a finding that he stood in loco parentis to the child. In reversing, the Supreme Court said that the facts do not rise to the level necessary to establish an in loco parentis relationship, but rather of a caring stepparent, and falling

well short of establishing that appellee embraced the rights, duties, and responsibilities of a parent. (Bell, K.; No. SC 11-152; 2-2-12; Goodson, C.)

Dew v. Dew, 2012 Ark. App. 122 [**divorce–property; alimony**] The Court of Appeals affirmed the trial court’s decision on appeal and cross-appeal, including issues of the parties’ property and rehabilitative alimony awarded to the appellant wife. The court said that the evidence demonstrated that the trial court equitably distributed the marital estate, and that the overall distribution was not clearly erroneous. In addressing the argument on cross-appeal, the court said that the award of alimony was not unreasonable or erroneous, given the trial court’s broad discretion. Although she had a veterinary degree, she had not worked for years, she was receiving counseling for depression, she had no job or job offers, and she would require retraining for a good position. (Sutterfield, D.; CA 11-12; 2-8-12; Robbins, J.)

Dew v. Dew, 2012 Ark. App. 116 [**ARCivP. 60(c)(1)--motion for new trial**] In this second appeal of this case decided by the Court of Appeals on the same date, the appellant wife appealed from her motion for a new trial. She based her motion on newly discovered evidence concerning the appellee husband’s claim to all prepaid taxes for 2009. The court said that a party is not entitled to relief under Rule 60(c) if diligence has not been exercised in protecting her interests. She had more than sufficient opportunity to develop this issue at trial, and that the trial court did value and distribute the prepaid taxes as an asset of the appellee’s business in the decree. (Sutterfield, D.; No. CA11-265; 2-8-12; Pittman, J.)

Bendinelli v. Bendinelli, 2012 Ark. App. 127 [**child support**] The trial court reduced the appellee’s child-support obligation from \$1,008 per month to \$108 per week, based upon the loss of his previous job and his great reduction in earnings. The appellant alleged that his loss in employment was based solely upon voluntary conduct, his convictions for sex offenses that necessitated his being required to register as a sex offender. The trial court had explained its decision to reduce child support, based upon the evidence of the convictions and a medical condition the appellee had. The Court of Appeals said that, while his sexual offenses could be categorized as voluntary, there was no evidence that he committed them for the purpose of reducing his child-support obligation. The trial court credited his testimony that he was trying to find employment but had been unable to do so. There clearly was a change in circumstances. The Court found no abuse of discretion. (Johnson, K.; No. CA11-665; 2-8-12; Glover, D.)

Morris v. Dickerson, 2012 Ark. App. 129 [**grandparent visitation**] The appellant father and the appellee maternal grandmother of B.M. became involved in a dispute after the child’s mother died of a stroke. Both before and after the mother’s death, the grandmother helped care for the child, spending a “significant amount” of time with him. After the father began dating his current wife, he began limiting the grandmother’s visits. She filed a petition for grandparent visitation, requesting visitation comparable to a non-custodial parent. The father said there was no allegation that he was an unfit parent or that he had denied her visitation. The trial court granted the appellee visitation based upon the grandparent visitation statute, providing a detailed visitation schedule. In reversing, the Court of Appeals found that the appellee had failed to prove that her relationship with the child had been or would be lost because visitation had been limited, not

denied. Her petition for grandparent visitation was premature. (Looney, J.; No. CA11-806; 2-8-12; Abramson, R.)

Collier v. Collier, 2012 Ark. App. 146 [**child custody**] The Court of Appeals affirmed the trial court's finding of changed circumstances, which resulted in a change from joint custody to custody in the appellee father. The court said the circuit court's findings clearly demonstrate that the court accepted the parties' stipulation that a material change in circumstances had occurred, as well as ample evidence supporting that stipulation. The trial court did not clearly err in finding that joint custody could not continue and that it was in the children's best interests to award custody to the father. (Taylor, J.; No. CA11-578; 2-15-12; Gruber, R.)

Hartsell v. Weatherford, 2012 Ark. App. 164 [**relocation**] The Court of Appeals held that the trial court erroneously shifted the burden of proof to the custodial parent in this relocation case. The Court noted that under *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), the Supreme Court established a presumption in favor of relocation by a custodial parent with the child or children. The parent opposing the move has the burden to prove that relocation is not in the best interest of the child. The court set out five matters for the trial court to consider in determining the best interest of the child regarding relocation. The Supreme Court emphasized in *Hollandsworth* that the custodial parent no longer has an obligation to prove a real advantage to himself or herself and to the children in relocating, overruling previous cases requiring that. Here, the court said, the trial court had required the custodial mother to prove that her relocation to California offered some material advantage. (Williams, L.; No. CA11-722; 2-22-12; Hart, J.)

Pfeifer v. Deal, 2012 Ark. App. 190 [**custody**] This is an appeal from the circuit court's granting a motion to dismiss the appellant's petition for custody of his granddaughter. The child's mother, appellant's daughter, is deceased; the appellee is the child's father. The Court of Appeals held that "[t]he plain language of this statute [Ark. Code Ann. § 9-13-101], read as a whole, shows an intent to allow a grandparent to intervene, and even be awarded custody, when there is an existing custody suit. It does not allow the grandparent to create the custody dispute or initiate a custody action." Here, there was no circuit court case remaining in which to intervene, because the death of the appellant's daughter, a party to the divorce case out of which the custody case would arise, terminated the divorce proceeding. (Ramey, J.; No. CA11-1034; 2-29-12; Abramson, R.)

PROBATE

Courtney v. Ward, et al., 2012 Ark. App. 148 [**adoption—consent**] This is an appeal by a natural father from an adoption of his child by her step-father, the appellee, without the father's consent. After the adoption petition was filed, the appellant natural father, who had been in prison for fifteen months, filed a petition for visitation and began paying child support. After a hearing on the consolidated adoption and visitation petitions, the adoption was granted, based upon the trial court's finding that it was proven by clear and convincing evidence that appellant had not seen his daughter since he was released from prison; that he had never sought visitation in court until after

the adoption petition was filed; that he paid a total of \$200 in child support over the child's lifetime of two-and-one-half years; that before going to prison, he had no job and no excuse for not having one; that he did not support the child before going to prison or after his release until the adoption petition was filed; and that the appellee mother and her mother were more credible witnesses than appellant regarding his attempts to contact his daughter. The court found that appellant had failed significantly without justifiable cause to contact or support his child; that it was in the child's best interest to terminate the natural father's parental rights and to grant the adoption; that the father's consent was not necessary; and that his petition for visitation was moot (and was dismissed). The appellant based his appeal on procedural grounds, on an alleged erroneous evidentiary ruling, on alleged erroneous findings of fact, and on an alleged lack of jurisdiction. The Court of Appeals found all of the allegations without merit, and affirmed the granting of the adoption and the dismissal of the petition for visitation. (Lindsay, M.; No. CA11-580; 2-15-12; Glover, D.)

Maxwell, et al. v. Estate of Maxwell, 2012 Ark. App. 174 [**decedent's estate--notice of motion for removal of executrix and hearing on motion**] As both an intervener and as an "interested person" pursuant to Ark. Code Ann. § 28-1-102(11), the appellant was entitled to notice of pleadings filed in the original action, as well as notice of hearings. Here, although the appellant had notice of the petition to remove the executrix, he had no notice of the hearing because the court found and ordered specifically that he was not entitled to notice of the hearing. The Court of Appeals reversed and remanded with the direction that appellant be given notice of all pleadings and hearings. The court also addressed the appellant's second issue, that the trial court erred in appointing a successor administrator without considering the specific directions the decedent had set out in his will. The court noted that in the interpretation of wills, a paramount principle is that the intent of the testator, as gathered from the four corners of the instrument itself, governs. (Smith, V.; No. CA 11-987; 2-22-12; Martin, D.)

Shafer, Jr. v. Estate of Shafer, Sr., 2012 Ark. App. 177 [**decedent's estate**] This is the third appeal in a contentious probate of an estate. At the time the opinion in this case was written, it had been nearly five years since the decedent's death. In this appeal, the appellant, one of decedent's three children and heirs of his estate, contended the court erred in finding him in contempt, in imposing sanctions against him, in awarding fees to the personal representative and the estate's attorney, and in awarding reimbursement of expenses to one of the other children and heirs, appellant's sister, for her travel costs in attending a hearing from her home out of state. The opinion details the circuit court's findings and the discord among the family members that was caused primarily by the appellant. The Court of Appeals found that the trial court did not abuse its discretion in finding the appellant in contempt, in assessing him for a portion of the fees of the personal representative and the estate's attorney, or in ordering him to pay his sister's travel expenses, in light of the appellant's obstinate behavior. (Hannah, C.; No. CA11-810; 2-22-12; Brown, W.)

JUVENILE

Arkansas Dept. of Human Services v. Thomas, 2012 Ark. App. 54 [**Writ of Certiorari**] Writ denied. In this d-n case, when the court found that no case plan had been developed at the permanency planning hearing, the trial court ordered DHS to fix it in five days. The Supreme Court held that the circuit court lacked the authority to tell DHS how to correct the problem, but found that the court had not intended to micromanage DHS. It was proper to order that DHS had five days to fix the problem. The court was within its jurisdiction to act to protect the integrity of the proceedings and to safeguard the rights of the litigants before the court when it ordered DHS to correct the problems that were preventing work and services. (Brown, E.; 11-946; 2-9-2012; Hannah, J.).

T.D. v. State, 2012 Ark. App. 140 [**Delinquency - sufficiency of the evidence**] Appellant argued there was insufficient evidence to find him an accomplice to misdemeanor theft of property. The appellate court noted that the appellant did not argue that the court erred in finding he had a legal duty to prevent or report the theft. As a result, the court only addressed the issue of whether there was substantial evidence to support the finding that appellant assisted in the theft. A surveillance video showed the appellant with another juvenile, who admitted that he had a cell phone that was stolen. Appellant's proximity to the crime and his action in looking down the hall prior to entering the locker room where the cell phone was stolen was evidence suggestive of joint participation. (Wood, R.; CA10-1248; 2-15-2012; Pittman, J.).

Lowe v. Arkansas Dept. of Human Services, 2012 Ark. App. 155 [**D-N Adjudication - sufficiency of the evidence**] The trial court's finding that appellant's 16 year old daughter was dependent-neglected as a result of inadequate supervision was upheld. Evidence revealed that appellant had no knowledge of her daughter's criminal charges or pending case. As a result, the daughter attended the hearing alone. A background check revealed that the daughter was a runaway from Illinois and appellant did not know if she was attending school, due to her work schedule. (Hudson, A.; CA11-1088; 2-15-2012; Brown, W).

Wells v. Arkansas Dept. of Human Services, 2012 Ark. App. 176 [**D-N Adjudication – burden of proof**] Appellant argued that the court erred in finding that his daughter was dependent-neglected due to sexual abuse by him. He argued that DHS failed to prove his daughter's allegations by a preponderance of the evidence. The trial court found the testimonies of the daughter and the nurse who examined her to be credible and consistent with each other. The trial court's finding was not clearly erroneous. (Fryauf, M.; CA11-1125; 2-22-2012; Hoofman, C.).

Lynch v. Arkansas Dept. of Human Services, 2012 Ark. App. 149 [**D-N Adjudication – sufficiency of the evidence**] There was sufficient evidence to support the trial court's finding that the children were dependent-neglected, specifically that appellant subjected V.L. to physical abuse by interfering with her breathing when appellant grabbed her by the neck and choked her and that he subjected J.L. to emotional abuse by making J.L. hold V.L. down while appellant choked V.L. Appellant's insufficiency claim goes to the credibility of the children's allegations

and is within the court's discretion. **[Admissibility of Motive Evidence]** Appellant also argued that the trial court erred in preventing evidence that the children's mother had a motive to have the children fabricate the allegations to put her in a better position in their divorce proceedings. Admissibility of evidence is left to the sound discretion of the trial court and will not be reversed absent the court's abuse of discretion. (Cook, V; CA11-1066; 2-15-2012; Abramson, R.).

Lewis v. Arkansas Dept. of Human Services, 2012 Ark. App. 154 **[TPR – sufficiency of the evidence]** Appellant argued insufficient evidence because the court relied on a ground that did not apply to him since the children were not removed from him and he was not responsible for the conditions that caused removal. Evidence showed the children could not be placed with him due to his own issues with drug use, stable housing, and employment. The appellate court reversed because the ground alleged in the petition was not applicable to appellant. (Hewett, M.; CA11-1064; 2-23-2012; Hoofman, C.)

Thompson v. Arkansas Dept. of Human Services, 2012 Ark. App. 124 **[TPR – sufficiency of the evidence]** Appellant's argument that there was no evidence that the children were adoptable is without merit. The case worker testified that appellant's children were adoptable and the court considered that in making its best interest determination. (Crow, G.; CA11-734; 2-8-2012; Wynne, R.).

Tankersley v Arkansas Dept. of Human Services, 2012 Ark. App. 109 **[TPR – sufficiency of the evidence]** Appellants argued that all of the issues that led to the children's removal were a result of appellants' drug abuse that had been remedied by sobriety during their incarceration. Appellants failed to comply with the case plan or show they had the ability to care for their children the first nine months. Although appellants made progress while in prison they still had not shown the capacity to remain drug-free outside of prison or to be able to provide for their children. (Spears, J.; CA11-910; 2-1-2012; Abramson, R.).

Hill v Arkansas Dept. of Human Services, 2012 Ark. App. 108 **[TPR – Jurisdiction]** Failure to hold the termination hearing within 90 days of the filing of the petition does not deprive the trial court of jurisdiction. Reversal would not be appropriate absent a showing of prejudice resulting from the time delay. **[sufficiency of the evidence]** The trial court found that appellant had been sentenced for a substantial period of her child's life given the child's young age at the time of removal and her need for permanency. Appellant argued she could have a meaningful relationship in the context that three years of T.H.'s entire juvenile life was not substantial. The appellate court held that three years based on the facts of the case was substantial when at the time T.H. was removed she was only two. At the time of the termination hearing T.H. was three and a half years old and had already spent 18 months in foster care. If appellant is released as projected, T.H. would have spent more than half of her life in foster care with no guarantee that she would be able to return to appellant's custody. (Hewett, M.; CA11-896; 2-1-2012; Abramson, R.).

Draper v. Arkansas Dept. of Human Services, 2012 Ark. App. 154 **[TPR – failure to provide services]** Appellant argued that the court erred in terminating their parental rights because DHS

failed to offer meaningful services, specifically more individual and family counseling. Evidence showed that there was lack of progress after more than a year of services and that family counseling would only be appropriate at some future date based on the child's best interest. In addition, appellants failed to challenge the aggravated circumstance finding based on sexual abuse which does not require DHS to provide meaningful services. (Hewett, M.; CA11-1064; 2-23-2012; Hoofman, C.)

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

Fetters v. Arkansas Dept. of Human Services, 2012 Ark. App. 152 (Edwards, R.; CA 11-10-39; 2-15-2012; Martin, D.).

Lewis v. Arkansas Dept. of Human Services, 2012 Ark. App. 154 (Hewett, M.; CA11-1064; 2-23-2012; Hoofman, C.) Affirmed as to appellant mother. As to appellant father see case summary.

DISTRICT COURT

Kennedy v. State, 2012 Ark. App. 102 [**A.R.Cr.P. 36 district court appeal**]. The filing requirement of this rule must be strictly enforced and is jurisdictional in nature. Appellant failed to file his appeal with the circuit court within 30 days of the district court judgment. The circuit court lacked jurisdiction to hear the appeal, and properly dismissed the case. (Fergus, J.; CACR11-745; 2/01/12; Wynne, R.)

Mitchell v. State, 2012 Ark. App. 128 [**district court appeal**] [**motion to suppress**]. Appellant entered a conditional plea of guilty to DWI, third offense in district court. After an appeal to circuit court, appellant filed a motion to suppress and now contends that the trial court erred in denying the motion because he had not committed a traffic violation and therefore the arresting officer did not have probable cause to stop him. Whether an officer has probable cause to make a traffic stop does not depend on whether the driver was actually guilty of the violation which the officer believed to have occurred. The issue is whether there were facts or circumstances known to the officer that were sufficient to permit a person of reasonable caution to believe appellant committed a violation of the code section. Trial court's denial of the motion to suppress was not clearly against the preponderance of the evidence. (Hearnsberger, J.; CACR11-969; 2/08/12; Abramson, R.)