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CRIMINAL

Burton v. State, 2012 Ark. App. 452 [**illegal sentence**] The trial court lacked authority to place special conditions of confinement upon appellant while he was incarcerated in the Department of Correction. (Green, R.; CACR 11-266; 8-29-12; Hoofman, C.)

Henderson v. State, 2012 Ark. App. 485 [**sufficiency of the evidence; rape**] Appellant attempted to force his penis into his victim's mouth but was unable to enter her oral cavity because the victim clenched her teeth. Appellant was convicted of rape. On appeal, he argued that the evidence was insufficient to support the conviction. The appellate court determined that "slight penetration," such as that of the lips, is sufficient to constitute rape. [**Rule 901 Ark. R. Evid.**] The trial court did not abuse its discretion when it determined that a witness properly authenticated a drawing before it was admitted into evidence. (Griffin, J.; CACR 11-1258; 9-12-12; Brown, W.)

Johnson v. State, 2012 Ark. App. 476 [**motion to suppress**] The search that yielded the evidence that appellant attempted to suppress was a search authorized by the terms of appellant's parole. Thus, the trial court did not err in denying appellant's motion to suppress. (Hill, V.; CACR 11-917; 9-12-12; Wynne, R.)

Thomas v. State, 2012 Ark. App. 466 [**jury instructions**] There was no rational basis for giving the lesser-included jury instruction of attempt to commit aggravated robbery in appellant's case because the evidence established that appellant completed the greater offense of aggravated robbery. Accordingly, the trial court did not err in refusing to give the requested lesser-included instruction. [**admission of evidence; penalty phase**] The trial court did not abuse its discretion when during the penalty phase of appellant's trial, it admitted evidence regarding appellant's involvement in a crime for which he had been charged but not convicted because the evidence was relevant character evidence and was evidence of an aggravating circumstance. (Glover, D.; CACR 11-1119; 9-12-12; Vaught, L.)

Richard v. State, 2012 Ark. App. 468 [**right to counsel**] The trial court deprived appellant of his right to counsel by failing to assess appellant's ability to afford counsel and by failing to sufficiently inform appellant of the risks associated with representing himself. (Pope, S.; CACR 11-684; 9-12-12; Pittman, J.)

McClendon v. State, 2012 Ark. App. 476 [**Rule 613 Ark. R. Evid.**] The trial court abused its discretion when it refused to allow appellant to introduce extrinsic evidence of a witness's prior inconsistent statement. (Johnson, L.; CACR 11-1101; 9-12-12; Glover, D.)

Webb v. State, 2012 Ark. App. 495 [**pedophile exception**] Because the conduct was similar to the conduct for which appellant was charged, and because the victims in the various episodes were similar, the trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404 (b), it admitted evidence of appellant's prior bad acts. (Fitzhugh, M.; CACR 11-1147; 9-19-12; Hart, J.)

Cox v. State, 2012 Ark. App. 499 [**double jeopardy**] The prosecution in appellant's case did not intentionally provoke a mistrial. Thus, double jeopardy does not preclude the State from retrying appellant. (Huckabee, S.; CACR 12-48; 9-19-12; Robbins, J.)

Clark v. State, 2012 Ark. App. 496 [**arrest warrant**] A court's jurisdiction to try an accused does not depend upon the validity of the arrest warrant. (Simes, L.T., CACR 11-659; 9-19-12; Gladwin, R.)

Jackson v. State, 2012 Ark. App. 508 [**motion to suppress**] The trial court did not err in denying appellant's motion to suppress. (Elmore, B.; CACR 11-1110; 9-19-12; Abramson, R.)

Walton v. State, 2012 Ark. 336 [**right to counsel**] Appellant knowingly and intelligently waived his right to counsel. (Cox, J.; CR 11-884; 9-20-12; Goodson, C.)

Mister v. State, 2012 Ark. App. 536 [**motion to suppress**] The trial court's ruling denying appellant's motion to suppress is not clearly against the preponderance of the evidence. (Fitzhugh, M.; CACR 11-1069; 9-26-12; Hoofman, C.)

Smith v. State, 2012 Ark. App. 534 [**sufficiency of the evidence; aggravated robbery**] There was substantial evidence to support appellant's conviction. [**motion for mistrial**] After appellant's prior criminal history was mentioned by a witness, the trial court instructed the jury to disregard the testimony and ordered that it be struck from the record. Thereafter, the trial court assessed the credibility of the witness and determined that his statements would not prejudice the appellant enough to warrant a mistrial. On appeal, the Court of Appeals concluded that the trial court had not abused its discretion when it refused to grant a mistrial. (Griffin, J.; CACR 11-1133; 9-26-12; Martin, D.)

Birts v. State, 2012 Ark. 348 [**admission of DNA evidence of unknown persons**] The trace-DNA evidence that appellant attempted to offer was too speculative because it related only to an unnamed third party or parties rather than to a particular third party and would have required the jury to engage in conjecture to make the inference that the unknown contributor of the DNA or fingerprints

committed the offenses for which appellant was charged. Thus, the trial court did not abuse its discretion when it excluded the evidence. (Griffen, W.; CR 12-74; 9-27-12; Corbin, D.)

Moore v. State, 2012 Ark. 350 [**restitution**] The circuit court did not err when it concluded that a release, which was entered into by appellant, his victim, and appellant's insurance company, did not excuse appellant from his court-ordered obligation to pay restitution to his victim. (Herzfeld, R.; CR 11-1010; 9-27-12; Danielson, P.)

Fields v. State, 2012 Ark. 353 [**sufficiency of the evidence; rape**] There was substantial evidence to support appellant's conviction. [**404(b)**] The trial court did not abuse its discretion when pursuant to the pedophile exception to Rule 404(b), it admitted testimony regarding other incidents of sexual abuse committed by appellant. (Fitzhugh, M.; CR 11-1267; 9-27-12; Goodson, C.)

Green v. State, 2012 Ark. 347 [**inconsistent theories of prosecution; judicial estoppel**] Because appellant's co-defendant's convictions were reversed and remanded by the appellate court before appellant's trial began, there were no inconsistent theories of prosecution or earlier proceedings by which to compare appellant's case at the time of his trial. Thus, the circuit court did not err when it denied appellant's motion to prohibit the prosecution from arguing contradictory theories of the case. [**motion to suppress**] Although Rule 2.3 of the Rules of Criminal Procedure may have been violated when law enforcement officials obtained appellant's statement, the trial court was not required to suppress the statement because the officers had given appellant his *Miranda* warnings before obtaining the statement. (Erwin, H.; CR 11-1269; 9-27-12; Hannah, J.)

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

Sims v. State, 2012 Ark. App. 472 (first-degree murder) CACR 11-813; 9-12-12; Gladwin, R.

Barrera v. State, 2012 Ark. App. 533 (possession of marijuana with intent to deliver) CACR 11-1105; Martin, D.

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:

Walchli v. State, 2012 Ark. App. 473 (suspended imposition of sentence) CACR 12-64; 9-12-12; Robbins, J.

Prigett v. State, 2012 Ark. App. 504 (probation) CACR 12-167; 9-19-12; Gruber, R.

Hill v. State, 2012 Ark. App. 493 (probation) CACR 12-116; 9-19-12; Pittman, J.

Jefferson v. State, 2012 Ark. App. 497 (suspended imposition of sentence) CACR 11-1254; 9-19-12; Gladwin, R.

Major v. State, 2012 Ark. App. 501 (probation) CACR 12-153; 9-19-12; Wynne, R.

Miller v. State, 2012 Ark. App. 523 (suspended imposition of sentence) CACR 11-1277; 9-26-12; Gladwin, R.

CIVIL

Bird v. Shaffer, 2012 Ark. App. 457 **[foreign judgment]** Foreign judgment was properly authenticated under requirements of Rule 44, and it was timely revived. (Mason, C.; CA 12-58; 9-5-12; Brown, W.)

Fayetteville Real Estate LLC v. Norwood, 2012 Ark. App. 456 **[deed reformation]** Court properly reformed deed to include area on which the driveway for the residence was constructed. Appellant had notice of appellee's claim for the strip of property and was not a bona fide purchaser. (Bryan, B.; CA 12-44; 9-5-12; Vaught, L.)

Boeuf River Farms v. Browder, 2012 Ark. App. 482 **[default judgment]** Complaint stated a cause of action for breach of contract and defendant's failure to timely answer properly resulted in entry of default judgment. Defendant's counterclaim that was asserted in his untimely answer was properly struck because it constituted a compulsory counterclaim in the dispute disposed of in the default judgment. (Gibson, B.; CA 11-873; 9-12-12; Martin, D.)

Horton v. Taylor, 2012 Ark. App. 469 **[easement]** Court's findings against claims for adverse possession and easements by prescription, implication, and necessity were supported by the evidence. (Epley, A.; CA 11-1118; 9-12-12; Pittman, J.)

Fluker v. Helena-West Helena Public School Dist., 2012 Ark. 327 **[attorney's fees]** Party prevailed only on a statutory claim that does not provide for an award of attorney's fees. Although other claims were asserted, that if successful may have allowed an award, no violations were found on these grounds. (Story, B.; SC 11-793; 9-13-12; Danielson, P.)

Neal, Adm'x v. Sparks Regional Center, 2012 Ark. 328 **[medical malpractice]** Summary judgment for the defendant was in order because the plaintiff failed to submit proof of proximate causation (no expert opinion that the failure to administer a drug caused the clot to form or that nurse's failure to notify doctor was significant). **[amended complaint]** Court did not abuse discretion in denying amendment of complaint to add pre-death pain and suffering. (Cox, J.; SC 11-1196; 9-13-12; Goodson, C.)

Nicholson v. Upland Industrial Development Co., 2012 Ark. 326 **[mineral rights]** The deed of 1903 reserving mineral rights did include oil and gas under the *Strohacker* doctrine. When the deed was executed, oil and gas were commonly known and recognized to be included as "minerals." This was a quiet title action – not an ejectment action – and there is no constitutional right to a jury trial. (Hughes, T.; SC 11-1106; 9-13-12; Gunter, J.)

Glass, Admr v. Saline County Med. Center, 2012 Ark. App. 525 [**default judgment/common defense**] Answer of one defendant inured to the benefit of another defendant who had not timely responded. [**relation back**] Rule 15 (c) did not apply because plaintiff's initial failure to name a defendant subsequently added was not because of a mistake of identify as to the proper party but because of a misunderstanding of the law (ignorance of the direct action statute). (Arnold, G.; CA 12-17; 9-26-12; Robbins, J.)

Richardson v. Brown, 2012 Ark. App. 535 [**credibility**] Conflicts in the testimony are for the circuit court to resolve. (Woods, R.; CA 11-1189; 9-26-12; Martin, D.)

DOMESTIC RELATIONS

Casas-Cordero v. Mira, 2012 Ark. App. 457 [**PKPA; UCCJEA**] The Court of Appeals affirmed the trial court's declining to exercise jurisdiction in a child-custody case based upon a finding that it was in the child's best interest for the Superior Court in Los Angeles County, California to assume jurisdiction. The judge there was acquainted with the case, having made custody determinations in 2000 and 2005. In addition, the child's long-time therapist was there to testify to her extensive knowledge of the child and the case and to make recommendations to the court. The two courts had conferred on the jurisdictional issue, as set out in the UCCJEA, had agreed that Arkansas had jurisdiction under the UCCJEA, but then agreed that California was the more appropriate forum. (Webb, G.; No. CA 11-538; 9-5-12; Pittman, J.)

Stuart v. Stuart, 2012 Ark. App. 458 [**alimony; modification of divorce decree**] The Court of Appeals held that, in awarding alimony to the appellee wife, the trial court applied the correct legal standard, found facts that were supported by the evidence presented, and did not abuse its discretion in awarding alimony. A second issue was the judge's "modification" of the record more than ninety days from the entry of the decree. Alimony must be awarded at the time of the divorce decree, which it was in this case. Six months after the decree was entered, the trial court entered an order (1) providing that the alimony was effective on the date the decree was entered, rather than the date it was announced, reciting the applicable law in that order. The order also provided (2) that the alimony would be withheld from appellant's social security disability payments. The court said these were a clarification and recitation of the law, and correction of an oversight in the original decree. The order stated that it was to resolve "uncertainty" in the original order and was not improper under Rule 60 of the Arkansas Rules of Civil Procedure. (Smith, P.; No. CA 12-149; 9-5-12; Gladwin, R.)

Harrison v. Phillips, et al., 2012 Ark. App. 474 [**grandparent visitation**] The Court of Appeals found that the appellee grandparents failed to rebut the statutory presumption that the appellant mother's decision denying visitation to the grandparents was in the child's best interest. The trial court did not make written findings supporting its decision to award grandparent visitation, as the grandparent visitation statute requires. The appellees failed to establish the second prong of a three-step test, that the loss of the relationship between the grandparents and their grandson was likely to harm the child. Therefore, the trial court abused its discretion in awarding grandparent visitation. (Reynolds, D., No. CA 11-601; 9-12-12; Robbins, J.)

Tiner v. Tiner, 2012 Ark. App. 483 [**property settlement agreement; attorney fees**] The parties entered into a property settlement agreement that was incorporated into their divorce decree. The

appellee husband agreed to pay the appellant wife a lump sum of \$400,000 in exchange for her interest in the real property and assets belonging to the parties' business.

After a first appeal to the Court of Appeals and a remand, the trial court found the appellee in contempt for failing to abide by the terms of the agreement. The circuit court granted the wife judgment for the balance the husband owed her, and ordered the husband to pay the judgment in \$3,000 monthly payments until it was paid in full with interest. She argued that (1) the circuit court erred in modifying the parties' property settlement agreement, which provided for a lump-sum payment rather than monthly installments, and (2) the circuit court failed to consider and discuss all relevant factors in awarding her an attorney's fee. The Court of Appeals agreed and reversed on the first issue, noting that the parties had entered voluntarily into a property settlement agreement that was incorporated into the decree of divorce, and it therefore could not subsequently be modified by the court. The court held that the appellant is entitled to a money judgment for the unpaid balance the appellee originally agreed to pay, expressed in a sum certain. The issue was remanded for the circuit court to enter an amount for a sum certain, taking into account payments that had been made and interest that had accrued. On the issue of attorney fees, she had requested \$20,000; the trial court awarded \$5,500. In deciding the issue, the court overturned its decision in *Stout v. Stout*, 2011 Ark. App. 201, affirming the trial court's award. *Stout*, relying on three Supreme Court cases, reversed and remanded an award of attorney's fees awarded without any discussion and without any analysis of the *Chrisco* factors. The court said its decision in *Stout* "essentially makes specific findings, written or oral, mandatory when awarding attorney's fees in domestic-relations proceedings and requires that we summarily reverse and remand when an award lacks such findings." The court said that Arkansas Rule of Civil Procedure 52 (2011) provides for requesting specific findings, which the appellant in this case did not do. The court said the circuit court may consider factors such as those in *Chrisco*, but the court will not require such specific findings in domestic-relations cases. The test for setting aside a circuit court's award of attorney's fees is an abuse of discretion. (McCallister, B.; No. CA 11-1175; 9-12-12; Martin, D.)

Favano v. Elliott, 2012 Ark. App. 484 [**grandparent visitation**] The appellant mother appealed the trial court's granting grandparent visitation to the appellee paternal grandmother of the child. In reversing, the Court of Appeals set out the three separate elements a grandparent petitioner must prove to establish that court-ordered visitation is in the best interest of the child. The appellee grandmother failed meet her burden to prove the second, that the loss of the relationship between the grandparent and the child is likely to harm the child. The court said that the trial court failed to address the required element of harm that the child would suffer from a loss of her relationship with her grandmother, and the court said it found insufficient evidence in the record to satisfy her burden of this statutory element. (Duncan, X.; No. CA 11-1173; 9-12-12; Hoofman, C.)

Browning v. Jones, 2012 Ark. App. 505 [**contempt; visitation**] The trial court's denial of the parties' requests for contempt findings against each other and the denial of the appellant's motion for modification of visitation, based upon the court's finding no material change of circumstances, were affirmed. The Court of Appeals found that the trial court's findings were not clearly erroneous or clearly against the preponderance of the evidence. (Pierce, M.; No. CA 12-170; 9-19-12; Gruber, R.)

Burns v. Burns, 2012 Ark. App. 522 [**child custody; property–military retirement; debt–student loans**] The Court of Appeals affirmed the trial court's award of custody to the appellee father, which the court said was based upon the best interests of the children. The court

also affirmed the trial court's refusal to grant the appellant a portion of the appellee's military retirement because there was no evidence that he had a vested right in a military retirement, and nonvested military retirement is not a marital asset subject to division upon divorce. Finally, the court affirmed the trial court's decision that she be required to pay all of her student loan debt incurred during the marriage. Here she relied upon a case in which the court affirmed an apportionment of student loans as marital debt. However, in that case, the trial court had found that eighty-five percent of the student loans was used to pay for family expenses, which made it equally divisible marital debt. Here, the appellant did not avail herself of the opportunity the trial judge offered to keep the record open so that she could present proof regarding what portion of the student loans was used to support the family. (McCallister, B.; No. CA 12-134; 9-26-12; Hart, J.)

Cole (Madden) v. Cole, 2012 Ark. App. 528 [**child custody**] The Court of Appeals held that the trial court did not clearly err in finding that it was in the best interest of J.C. that primary custody be changed from the appellant mother to the appellee father, based upon a material change in circumstances. (Spears, J.; No. CA 11-1231; 9-26-12; Gruber, R.)

PROBATE

Bell, et al. v. Bank of America, N.A., 2012 Ark. 445 [**trust-final accounting**] The Court of Appeals affirmed the circuit court's approval of a final accounting of the appellee bank upon its resignation as trustee of the Shull Family Revocable Trust. The pro se appellants, beneficiaries of the trust, argued on appeal that they were entitled to the detailed billing records of a law firm that represented the bank while it was trustee. The court found that the appellants' request for the billing statements fell squarely within the circumstances of *Salem v. Lane Processing Trust*, 72 Ark. App. 340, 37 S.W.3d 664 (2001), in which the court affirmed the denial of unlimited access to all records of a trust by the beneficiary because the beneficiary failed to articulate a need for the documents other than a vague need to prevent or redress a breach of trust. In that case, the court also agreed with the trial court's statement that the beneficiary was "'not particularly interested in vindicating his own rights under the trust,' but was interested in continuing a pattern of 'vexatious lawsuits' derived from 'second-guessing everything that [the trustees] have done.'" The appellants also had raised other arguments, but had changed the basis for their objection on appeal or raised them for the first time on appeal. Finally, they argued that the trial court was biased against them, but they did not request that the court recuse, except that after the decision was announced, the appellant told the trial court she wanted another judge, but the court said even if that could be considered a proper motion, it came too late. (Elmore, B.; No. CA 11-816; 8-29-12; Gruber, R.)

JUVENILE

Young v. Sexton, 2012 Ark. 334 [**Jurisdiction – Visitation/Custody**] Appellees mistakenly filed their petition to change visitation under the case name and number of a closed dependency-neglect case and appellant counterclaimed for custody. The permanency planning order placing the child with the Sextons resolved the dependency-neglect issue under the juvenile code and there was no jurisdiction to reopen the dependency-neglect case to modify visitation. The juvenile division court had jurisdiction to hear the matter under general custody law. Although the circuit court decided the issue as a permanency placement, the court considered and made findings that comport with the standards under general custody law. The goal is to maintain stability and continuity for the child and not to change custody unless there is evidence of some material change in circumstances that shows that such a change is in the child's best interest. The petition

modifying visitation and denying custody is affirmed. **[Expert testimony]** Appellant also argued that the circuit court erred in not permitting her expert to testify regarding her child's alienation of affection. The trial court exercised its discretion and did so based on the fact that the expert had not interviewed the child or appellees. (Zimmerman, S.; 12-248; 9-20-2012; Hannah, J.).

Churchill v. Arkansas Dept. of Human Services, 2012 Ark. App. 530 **[D-N Adjudication – sufficiency of the evidence]** The trial court was affirmed in finding appellant's child dependent-neglected as a result of medical neglect and lack of supervision. A doctor admitted E.C. when he was two months old due to vomiting, weight loss, a head injury and other possible injuries. The trial court relied on Dr. Farst's testimony that the injuries were the result of high-force trauma and that the caregivers should have known what caused the injuries. The doctor also testified that since appellants were the only care givers they were not adequately supervising their infant who suffered multiple injuries, including multiple rib fractures, a skull fracture, bruises, and retinal hemorrhaging. (King, K.; CA12-310; 9-26-2012; Glover, D).

Gaer v. Arkansas Dept. of Human Services, 2012 Ark. App. 516 **[D-N Adjudication –sufficiency of the evidence]** The trial court was affirmed in finding the children neglected by placing them at substantial risk of harm. Appellant's children were in her care when she was arrested and tested positive for methamphetamine. Appellant's drug use exposed her to criminal liability which would affect her children's well-being if she were incarcerated and her ability to care for her children due to the influence of the drugs. (Hewett, M.; CA12-387; 9-19-2012; Brown, W.).

Eason v. Arkansas Dept. of Human Services, 2012 Ark. App. 507 **[D-N Adjudication –sibling adjudication]** The trial court was affirmed in finding appellant's child neglected as a result of the abuse of appellant's other child in the same case. It is the risk of harm that is created by the sibling's abuse that makes a finding of dependency-neglect as to other sibling appropriate. The court conducted a full hearing and reviewed the medical evidence including at three months of age fractured ribs and at nine months a spiral fracture to the left tibia, multiple corner fractures of the distal femur and tibia and multiple rib fractures. (Wilson, R.; CA12-348; 9-19-2012; Glover, D).

Payne v. Arkansas Dept. of Human Services, 2012 Ark. App. 500 **[D-N Adjudication]** The trial court was affirmed in finding appellant's child dependent-neglected as a result of a sibling's death while in appellant's care. Appellant concedes the adjudication, but argued that the goal for termination was in error. The disposition is appealable only upon a final order and appropriate 54(b) findings. (Keaton, E.; CA12-248; 9-19-2012; Robbins, J).

Cooper v. Arkansas Dept. of Human Services, 2012 Ark. App. 513 **[D-N Permanent Custody/Visitation]** The circuit court awarded permanent custody of appellant's children to their aunt and denied appellant visitation. Evidence was presented at the Permanency Planning Hearing indicating visitation was not in the children's best interest and appellant's argument that denying visitation was a punishment was without merit. (Shirron, P.; CA12-290; 9-19-2012; Hoofman, C.).

Johnson v. Arkansas Dept. of Human Services, 2012 Ark. App. 537 **[TPR – Putative Parent]** Appellant argued that the termination order should be reversed because he was not the legal father to his putative daughter and he had no parental rights to terminate. Appellant failed to raise this

argument with the circuit court and it cannot be raised now on appeal. (Halsey, B.; CA12-438; 9-26-2012; Hoofman, C.).

B.H. v. Arkansas Dept. of Human Services, 2012 Ark. App. 533 [**TPR – AAL Appointment and Best Interest**] Appellant is a minor mother in foster care who had her parental rights terminated. She argued that the court failed to provide her an attorney ad litem. The appellate court noted the statutory right for the court to appoint an attorney ad litem, but this issue was not raised below and the court noted that in the case before the circuit court the daughter, not appellant was entitled to an attorney ad litem. Appellant challenged the best interest finding as to potential harm. There was evidence that appellant's aggressive and oppositional behavior could potentially harm the health and safety of her daughter. (Hewett, M.; CA12-388; 9-26-2012; Abramson, R.).

Wittig v. Arkansas Dept. of Human Services, 2012 Ark. App. 502 [**TPR- Sufficiency**] This is an appeal of the sufficiency of a termination of parental rights as to three appellants, Wittig mother of all four children, Millsap, father to three children and Davis father of one child. As to the mother there was sufficient evidence that children had been out of the home for more than a year and she failed to remedy the conditions which caused their removal. Evidence demonstrated that she did not have adequate housing to meet the children's basic needs, her employment was inconsistent and insufficient, her visitation with her children was sporadic and her failure to visit was disruptive. Millsap was incarcerated for manufacture of methamphetamine. The appellate court stated that the appropriate inquiry is whether an incarcerated parent who has been ordered to comply with the court's reunification orders has utilized those resources available to maintain a close relationship with the children. However appellant only saw his children four times in the four months prior to his arrest and in the following months he only wrote two letters. The court's finding that he failed to maintain meaningful contact with his children was not clearly erroneous. Davis argued that the court erred in finding that he would subject his child to potential harm. However, there was evidence that although he had visited his child he never progressed to the point of an overnight visit or trial placement and never requested such visitation. His child was very bonded to her foster parents and it is reasonable to conclude that removing her from that environment to live with someone who had the bare minimum of contact would subject her to harm. (Halsey, B.; CA12-294; 9-19-2012; Wynne, R.).

Bryant v. Arkansas Dept. of Human Services, 2012 Ark. App. 491 [**TPR – Sufficiency of the evidence**] There was sufficient evidence to terminate where appellant's continued instability and drug and alcohol abuse failed to remedy the situation that led to the removal of her daughter and return was hazardous to her well-being. (Sullivan, T.; CA12-373; 9-19-2012; Vaught, L.).

Sanderson v. Arkansas Dept. of Human Services, 2012 Ark. App. 481 [**TPR – Continuance**] Appellant argued that the trial court abused its discretion in denying her continuance. There was no abuse where the trial court considered appellant's arguments and determined the information sought would not impact its decision in the termination hearing. The appellant failed to show prejudice. The court allowed appellant to testify to the information she was attempting to enter at the termination hearing concerning her anticipated release date and that she was attempting to enter a drug rehabilitation program and the court considered this in its decision. The information that appellant sought to obtain corroborated her evidence and did not add to the testimony. (Branton, W.; CA12-291; 0-12-2012; Abramson, R.).

Apelu v. Arkansas Dept. of Human Services, 2012 Ark. App. 480 [**TPR – Best Interest**] Appellant argued that the trial court erred in finding that she would subject her children to potential harm if they were returned by failing to separate her from the acts of the father of her children. She argued that her therapist's testimony supported her claim. The trial court was not required to believe the testimony of the appellant or her therapist. The trial court from the beginning of the case stressed the importance of knowing how appellant's young child was physically abused and there was evidence to support the court not finding appellant credible. The lack of credibility was related to her ability to protect her children from further harm. [**Sufficiency of the evidence**] Appellant's argument that she did not fail to remedy the issues that caused removal was not persuasive because it was based on the same premise for her best interest argument. Further, there were two other termination grounds that were not argued and the court only needed one. (Branton, W.; CA12-282; 9-12-2012; Glover, L.).

Lowry v. Arkansas Dept. of Human Services, 2012 Ark. App. 478 [**TPR – Best Interest**] Appellant argued there was insufficient evidence of adoptability because the adoption specialist admitted that DHS might have to recruit a family and she had not placed a child with all of the behavior problems that one of her children had. Testimony from a caseworker or adoption specialist that children are adoptable is sufficient and the adoption specialist testified that there had already been an inquiry about adoption of appellant's children. [**Sufficiency of the evidence**] Appellant argued that DHS failed to make a meaningful effort to rehabilitate her and to correct the condition that caused removal. Her children were removed for extreme environmental neglect and despite the court's orders for appellant to clean her home to make it appropriate for her children to live she failed to comply despite efforts by DHS to purchase cleaning products and offer her the skills to do so. Further, appellant did not challenge the two other grounds on which the termination order was based and only one ground is necessary to terminate parental rights. (McCallum, R.; CA12-281; 9-12-2012; Gruber, R.).

S.M.C. v. State, 2012 Ark. App. 521 [**Delinquency Adjudication**] The Arkansas Rules of Criminal Procedure apply to delinquency proceeding and pursuant to Rule 33.1, failure to challenge the sufficiency of the evidence in a bench trial by a motion to dismiss waives a sufficiency appeal. (Williams, C.; CA11-460; 9-26-2012; Pittman, J.).

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

Bowman v. Arkansas Dept. of Human Services, 2012 Ark. App. 477 (Coker, K.; CA12-292; 9-12-2012; Wynne, R.).

Cammack v. Arkansas Dept. of Human Services, 2012 Ark. App. 467 (Thyer, C.; CA12-317; 9-12-2012; Vaught, L.).

Cotton v. Arkansas Dept. of Human Services, 2012 Ark. App. 455 (Branton, W.; CA12-250; 8-29-2012; Brown, W.).

Weaver v. Arkansas Dept. of Human Services, 2012 Ark. App. 437 (Thyer, C.; CA12-249; 8-29-2012; Pittman, J.).

DISTRICT

Daugherty v. State: [district court appeal] [jury trial] [sufficiency of evidence]. This appeal is from a conviction for speeding in excess of fifteen miles per hour over the speed limit. Appellant was cited for driving 16 mph over the speed limit (51 mph in a 35 mph zone). After being fined in district court, an appeal was filed in circuit court and a jury trial was held. At the conclusion of all the evidence, appellant renewed a motion for directed verdict based on insufficiency of the evidence due to the officer's visual estimate of speed and testimony that the radar gun had a one mph plus or minus differential. The motion was denied and the jury found appellant guilty. The Court of Appeals found that here, the radar gun measured appellant's speed at 51 mph, but the evidence showed that even a properly calibrated radar gun could measure speed only within plus or minus one mph. The jury was presented with equally reasonable conclusions that appellant was driving 50 mph, 51 mph, or 52 mph. Thus, the jury was forced to speculate that appellant was driving in excess of 15 mph over the speed limit. There was insufficient evidence to support a conviction. (Sims, J.; CACR 11-1137; 9/19/12)

EIGHTH CIRCUIT

Frisby v. Milbank Manufacturing Co. [limitations] Under Arkansas law, the filing of a workers' compensation claim did not toll the statute of limitations for a tort claim against the employer for the same injury, and the district court did not err in finding the tort claim was time barred. One year "savings statute" did not save the claim. (W.D. Ark.; # 11-1858; 7-31-12)