

# APPELLATE UPDATE

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## ANNOUNCEMENTS

On October 30<sup>th</sup>, Supreme Court amended, effective immediately, Administrative Order Number 21.

## CRIMINAL

*Buckley v. State*, 2014 Ark. App. 516 [**Ark. R. Evid. 502**] The trial court erred by allowing appellant's former attorney to testify about a phone call between the two of them in which the attorney advised appellant of his scheduled court date. The attorney's testimony was used against appellant in his failure-to-appear trial. [**admission of testimony**] The trial court did not abuse its discretion when it admitted evidence regarding the fact that appellant took a portable breath test because appellant opened the door to the evidence through his cross-examination questions. (Storey, W.; CR-13-641; 10-1-14; Wynne, R.)

*Hale v. State*, 2014 Ark. 405 [**writ of habeas corpus**] The trial court lacked the statutory authority to sentence appellant to a term of life imprisonment with the possibility of parole. Therefore, the

sentencing orders entered in appellant's case were facially invalid. Thus, the trial court erred when it denied appellant's petition seeking a writ of habeas corpus. (Simes, L.T.; CV-13-499; 10-2-14; Hannah, J.)

*Klosky v. State*, 2014 Ark. 403 [**sufficiency of the evidence; distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child**] "Knowing receipt for the purpose of distribution" is not among the elements that the State must prove to sustain a charge of distributing, possessing, or viewing matter depicting sexually explicit conduct involving a child. (Clawson, C.; CR-13-698; 10-2-14; Hannah, J.)

*Perry v. State*, 2014 Ark. 406 [**mistrial**] The trial court did not abuse its discretion when it denied appellant's motions for mistrial, which were based upon allegations: (1) that his attorney was placed in a position of serving as a witness; and (2) that the judge, rather than the jury, was placed in a position of assessing the credibility of a witness. [**admission of evidence**] The trial court did not abuse its discretion when it admitted evidence of appellant's drug use because the testimony was relevant to "tell the entire story" of the crime and was therefore admissible under the *res gestae* exception to Ark. R. Evid. 404 (b). [**hearsay**] The trial court did not abuse its discretion when it admitted certain testimony pursuant to Ark. R. Evid. 801 (d)(2)(v) because the challenged statements were made by a co-conspirator during the course and in furtherance of a conspiracy. (Wright, H.; CR-14-4; 10-2-14; Goodson, C.)

*Gould v. State*, 2014 Ark. App. 543 [**sufficiency of the evidence; aggravated robbery**] Marijuana, although illegal to possess, falls within the definitions of "property" and "property of another person" as set forth in the theft statutes. [**jury instructions**] The trial court did not abuse its discretion when it refused to give two non-AMCI jury instructions, which did not accurately reflect the law. (Pearson, B.; CR-13-994; 10-8-14; Glover, D.)

*Moody v. State*, 2014 Ark. App. 538 [**sufficiency of the evidence; second-degree murder**] There was substantial evidence to support appellant's conviction. [**jury instruction; justification**] Because the location of appellant's crime was not within the curtilage of her home, the trial court did not abuse its discretion when it refused to include the optional language in AMI Crim. 2d 704 that discusses the curtilage. (Dennis, J.; CR-12-724; 10-8-14; Harrison, B.)

*Thompson v. State*, 2014 Ark. 413 [**sufficiency of the evidence; failure to appear**] The circuit court erred in denying appellant's motion for a directed verdict because appellant could not be convicted of the offense of felony failure-to-appear when he had not yet been charged with any criminal offense. (Phillips, G.; CR-13-1067; 10-9-14; Corbin, D.)

*Turner v. State*, 2014 Ark. 415 [**sufficiency of the evidence; aggravated robbery; theft of property**] There was substantial evidence to support appellant's convictions. (Clawson, C.; CR-14-59; 10-9-14; Hart, J.)

*McMiller v. State*, 2014 Ark. 416 [**Batson challenge**] Because the State was able to present race-neutral reasons for dismissing all challenged venire persons, the circuit court did not err when it denied appellant's *Batson* challenge. (Dennis, J.; CR-14-347; 10-9-14; Hart, J.)

*Johns v. State*, 2014 Ark. App. 560 [**waiver jury trial**] The written jury-waiver form that appellant signed was not defective because it did not specifically state that he was facing sentencing as a habitual-offender. (Griffen, W.; CR-14-11; 10-22-14; Whiteaker, P.)

*Johnson v. State*, 2014 Ark. App. 567 [**sufficiency of the evidence; felon in possession of a firearm**] There was substantial evidence to support appellant's conviction. [**motion to suppress; reasonable suspicion**] The smell of marijuana emanating from a vehicle gives rise to reasonable suspicion to detain the occupant or occupants to determine the lawfulness of their conduct, to search the vehicle, and/or to arrest the occupants, depending on the circumstances. (Wright, H.; CR-14-64; 10-22-14; Hixson, K.)

*Holley v. State*, 2014 Ark. App. 557 [**motion to suppress; false promise of reward and leniency**] Because the law enforcement official did not offer a false promise or make a sufficiently ambiguous statement to appellant that led to his confession, the circuit court did not err when it denied appellant's motion to suppress. (Clawson, C.; CR-13-204; 10-22-14; Harrison, B.)

*King and McMurray v. State*, 2014 Ark. App. 554 [**forfeiture**] There was sufficient evidence to support the forfeiture of both vehicles that appellant used to facilitate the transportation and sale of various controlled substances even though appellant did not own both vehicles. (Piazza, C.; CV-13-1077; 10-22-14; Walmsley, B.)

*Collins v. State*, 2014 Ark. App. 551 [**sufficiency of the evidence; arson**] There was insufficient evidence to corroborate the testimony of appellant's accomplices or to connect appellant to the arson at Summit Bank. (Chandler, L.; CR-13-537; 10-22-14; Gladwin, R.)

*Lintz v. State*, 2014 Ark. App. 595 [**revocation; suspended sentence**] The circuit court's decision to revoke appellant's suspended sentence was not clearly against the preponderance of the evidence. [**judicial notice; sentencing order**] Because a circuit court may take judicial notice of its own records in the case file for the same case, and because the court's case file from which the circuit judge was working contained a copy of the relevant sentencing order, it was not necessary for the State to enter the original sentencing order into evidence at appellant's revocation hearing. (Cottrell, G.; CR-14-78; 10-29-14; Wood, R.)

*Davis v. State*, 2014 Ark. App. 589 [**continuance**] The trial court did not abuse its discretion when it denied appellant's last-minute request for a continuance, which was based upon appellant's desire to obtain information about other possible crimes that may have occurred at the same location where appellant's crime occurred. (Singleton, H.; CR-13-892; 10-29-14; Glover, D.)

*Ebel v. State*, 2014 Ark. App. 588 [**Ark. Code Ann. § 5-65-204 (e)**] The law enforcement officer complied with the requirements of Ark. Code Ann. § 5-65-204 (e) when he advised appellant he had a right to obtain an additional, independent blood test; advised appellant that he would be responsible for paying for the test; and transported appellant to a hospital for the second test. (Karren, B.; CR-14-109; 10-29-14; Gruber, R.)

*Collins v. State*, 2014 Ark. App. 574 [**motion to suppress**] The circuit court's denial of appellant's motion to suppress was not clearly erroneous because: (1) testimony could support the officers' theory that appellant was not under arrest during the investigation; (2) appellant voluntarily responded to the officers' questions and did not object to riding to the storage facility in the police car or seek alternative transportation; and (3) appellant's words and actions indicated that he consented to the search of his storage units. (Sims, B; CR-14-77; 10-29-14; Gladwin, R.)

*State v. Crane*, 2014 Ark. 443 [**motion to suppress**] The circuit court erred as a matter of law in finding that, absent exigent circumstances, a warrant was required to search the safe in appellant's vehicle. (Singleton, H.; CR-14-345; 10-30-14; Hannah, J.)

*Mister v. State*, 2014 Ark. 445 [**Rule 37**] The circuit court did not clearly err in denying appellant's petition for postconviction relief, which was based upon allegations that: (1) trial counsel failed to explain to appellant his maximum sentencing exposure; and (2) trial counsel misled appellant about the terms of a plea offer. (Tabor, S.; CR-13-294; 10-30-14; Hart, J.)

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

*Williams v. State*, 2014 Ark. App. 561 (aggravated robbery; theft of property) CR-14-89; 10-22-14; Whiteaker, P.

*Booth v. State*, 2014 Ark. App. 572 (arson) CR-13-978; 10-22-14; Brown, W.

*Ford v. State*, 2014 Ark. App. 576 (second-degree battery; aggravated assault) CR-14-176; 10-29-14; Pittman, J.

*Malvin v. State*, 2014 Ark. App. 584 (sexual indecency with a child) CR-13-1160; 10-29-14; Wynne, R.

*Malone v. State*, 2014 Ark. App. 585 (rape) CR-14-106; 10-29-14; Wynne, R.

*White v. State*, 2014 Ark. App. 587 (felon in possession of a firearm) CR-14-33; 10-29-14; Gruber, R.

*Van Winkle v. State*, 2014 Ark. App. 591 (kidnapping; aggravated residential burglary; first-degree stalking; third-degree battery) CR-14-161; 10-29-14; Whiteaker, P.

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:

*Cory v. State*, 2014 Ark. App. 556 (probation) CR-13-180; 10-22-14; Harrison, B.

*Williams v. State*, 2014 Ark. App. 563 (probation) CR-14-2; 10-22-14; Vaught, L.

*Rimmer v. State*, 2014 Ark. App. 583 (probation) CR-13-222; 10-29-14; Wynne, R.

*McCann Arms v. State*, 2014 Ark. App. 593 (probation) CR-14-338; 10-29-14; Hixson, K.

## CIVIL

*SMG 1054, Inc. v. Thompson*, 2014 Ark. App. 524 [**continuance**] Court abused its discretion in denying request for continuance in order for a corporation to obtain counsel in foreclosure action. The basis for the denial was because of an earlier continuance, but that was not at the party's request, but because trial judge had recused. (King, K.; CV 13-703; 10-1-4; Vaught, L.)

*United Systems of Ark. v. Beason and Nalley, Inc.*, 2014 Ark. App. 534 [**indemnity**] It is possible to contract to indemnify an indemnitee for the indemnitee's own negligence, but a high standard is generally required before a contract will be so interpreted. Given the requirement of unmistakable terms, and the absence of any language in the present contract specifically focusing attention on the indemnitor's assumption of liability for the indemnitee's own negligence, contract does not provide in the requisite "unmistakable terms" that United Systems agreed to indemnify Beason & Nalley for Beason & Nalley's own negligence. (Kilgore, C.; CV 13-1057; 10-8-4; Pittman, J.)

*MCSA, LLC v. Thurmon*, 2014 Ark. App. 540 [**default-damages**] The default-damages award of \$645,809.98 was over twenty times the only exhibit offered, which was proof of medical bills and related travel expenses. It lacked any supporting computation, analysis, objective proof, or expert opinion. Although counsel suggested separate figures for pain and suffering, mental anguish, loss of consortium, and future medicals, there was no foundation for these figures and no proof. These figures were based on speculation and conjecture. (Guthrie, D.; CV 14-220; 10-8-14; Gruber, R.)

*Ahmad v. Horizon Pain, Inc.*, 2014 Ark. App. 531 [**master/conflict/recusal**] There is not a sufficient relationship between attorney's drafting bylaws for Horizon and the issues that were before him as special master in these proceedings so as to constitute a disqualifying conflict of interest. His specific duties, as stated in the consent judgment, were to "consider all legitimate claims and set-offs of the parties or creditors, and to transfer assets or cash to creditors, claimants, or shareholders of the

corporation consistent with his findings by application of Arkansas law, rules of civil procedure, rules of evidence, and existing contracts between the parties.” **[derivative action]** Underlying merits of argument cannot be addressed because party waived the right to appeal this issue by virtue of the settlement contained in the consent judgment. Based upon the pretrial rulings by the circuit court, party agreed to the settlement contained in the consent judgment. (Harkey, A.; CV 14-165; 10-8-14; Gladwin, R.)

*Gafford v. Allstate Ins. Co.*, 2014 Ark. **[certified question accepted]** Whether the recovery of attorney’s fees to an insured in an insurance-contract action is exclusively available pursuant to Arkansas Code Annotated section 23-79- 208 (Repl. 2014), precluding an award of attorney’s fees pursuant to Arkansas Code Annotated section 16-22-308 (Repl. 1999)? (W. D. Ark., CV-14-786; 10-9-14)

*Martin v. Kohls*, 2014 Ark. 427 **[voter ID] [standing]** Appellees needed only to prove that their rights were affected by Act 595 in a declaratory-judgment action challenging the validity of Act 595. As registered voters, Appellees were only required to demonstrate that they were among the class of persons affected by the legislation, and as registered voters, they had standing. **[Act 595]** Act 595 imposes upon an Arkansas voter an additional qualification beyond those voter qualifications set forth in the Arkansas Constitution. (Fox, T; CV-14-462; 10-15-14; Corbin, D.)

*Richardson v. Martin*, 2014 Ark. 429 **[Issue 4/ alcohol beverage amendment]** In reviewing the plain language of the constitutional provision at issue, and the constitution as a whole, and reading it in the light of other provisions relating to the same subject matter, what “not less than four months” means pursuant to Amendment 7 may be determined by considering Amendment 51 and the statutes enacted to facilitate its operation, including Ark. Code Ann. § 1-5-101(a)(5), Ark. Code Ann. § 1-5-102(a), and Ark. Code Ann. § 7-1-108.1 It is clear that the election deadline at issue occurred on a legal holiday, July 4, 2014. Therefore, the election-law deadline must be the next day which is not a Saturday, Sunday, or legal holiday. Here, the deadline was July 7th, 2014. To compute otherwise would restrict Bowlin’s rights which is prohibited by our Constitution. The petition was timely filed on July 7, 2014. Ballot title is sufficient. (CV-14-753; 10-16-14; Baker, K.)

*Finch v. Carroll County*, 2014 Ark. App. 564 **[county immunity]** The trial court properly dismissed the negligence claim against the county because it is immune from liability and from suit for damages – “no tort action shall lie against any such political subdivision because of the acts of their agents or employees. **[inverse condemnation]** Although permanency is not a requirement to establish an inverse-condemnation claim, negligence sustained over a long period of time resulting in a continuing trespass or nuisance can ripen into inverse condemnation. Here, there was but a single act of negligence and only one flood, which coincided with a natural weather anomaly. Because there was no continuing, recurrent, or substantial trespass here, and no proof that the value of the property had substantially diminished in value, claim fails as a matter of law. **[contract]** Plaintiffs offered no proof to support their claim that there was a contract between them and the county. (Pierce, M.; CV-14-251; 10-22-14; Vaught, L.)

*Druyvestein v. Gean*, 2014 Ark. App. 559 [**summary judgment**] Complaint alleged fraudulent transfer and also requested the court to impose a constructive trust on certain funds held by defendant. Summary judgment was improper as there were genuine issues of material fact to be decided on both claims. (Cox, J.; CV-14-2701; 10-22-14; Gruber, R.)

*Ark. State Claims Comm. v. Duit Constr. Co.*, 2014 Ark. 432 [**sovereign immunity**] Taking only the facts alleged in Duit's first amended complaint for declaratory judgment as true and viewing them in the light most favorable to Duit, the complaint fails to state sufficient facts to support Duit's allegation that the claims-commission process treated resident and nonresident contractors differently in violation of the Fourteenth Amendment. Accordingly, the exception to the sovereign-immunity doctrine for unconstitutional acts is not applicable and the equal-protection claim is barred by sovereign immunity. (Fox, T.; CV-14-137; 10-23-14; Danielson, P.)

*Stephens v. Martin*, 2014 Ark. 442 [**ballot initiative/cure**] At the time of filing, petition contained on its face a sufficient number of signatures pursuant to the statewide and fifteen-county requirement, such that the Secretary of State's grant of the thirty-day cure period was proper. The proposed initiated act was facially valid to reach the signature threshold and entitled to a thirty-day cure period even though it was ultimately shown to contain forged notaries. (CV-14-806; 10-27-14; Danielson, P.)

*Our Community v. Bullock*, 2014 Ark. 457 [**local option petition**] County clerk certified that petition had signatures of 38% of registered voters. Once the 38% level was reached, the clerk did not review the remaining petitions that had been filed. Subsequently, the circuit court in reviewing the clerk's certification threw out signatures bringing the number below the 38% threshold, but the circuit court refused to consider the petitions that had been turned in but not reviewed by the county clerk. The circuit court erred in refusing to consider these signatures. If a sufficient number would be found acceptable, then the threshold level of required signatures may possibly be attained. Such a review shall be made by the circuit court rather than the county clerk. The local option petition did not require the inclusion of an enacting clause. (Phillips, G.; CV-14-827; 10-31-14; Goodson, C.)

## **DOMESTIC RELATIONS**

*Butler v. Butler*, 2014 Ark. App. 507 [**contempt; modification of alimony—change in circumstances; offset; unclean hands**] The circuit court granted the appellee former wife judgment for \$52,471.99, for arrearages in alimony, insurance, and child support; denied the appellant former husband's request for a reduction in alimony and his claim for an offset; and found appellant in contempt, ordering him to comply within six months or be incarcerated. Appellee claimed the contempt issue was not appealable because the appellant had not been jailed. The Court of Appeals held, because the circuit court issued the judgment and found appellant in contempt, sentencing him to jail if he did not satisfy the judgment within six months from the date of the order, that there was a postponement rather than a remission of the contempt and a final, appealable order resulted. The Court held that the circuit court's contempt finding was not clearly against the preponderance of the

evidence, given the appellant's willingness to enter into agreed orders, his failure to pay, and the circuit court's superior position to determine the credibility of witnesses and the weight to be given their testimony. On the change in circumstances for modification of alimony, the burden was on the party seeking the modification. The Court held there was no abuse of discretion in finding that appellant failed to meet his burden of proof and denying his request for modification. On the issue of offset for repairs made and to be made to the home he provided for continued use of the residence for the appellee and the parties' child, the Court held that, given the standard of review and the circuit court's evident evaluation of the witness's credibility, there was no clear error in the court's order denying an offset. Finally, on appellant's contention that the doctrine of unclean hands did not apply to him, the Court of Appeals held there was no clear error in the circuit court's order, giving due deference to the circuit court's judgment of the credibility of the witnesses. The decision was affirmed. (Hendricks, A.; No. CV-14-56; 10-1-14; Gladwin, R.)

*Deaton v. Morgan*, 2014 Ark. App. 521 [**child custody**] The parties are the unmarried parents of a child, M.D. The appellant father appeals from the circuit court's granting custody to the appellee mother. He argues that the trial court erred in considering the mother's evidence that was presented on any issue other than the father's fitness to have custody, and in placing custody of the child with her mother. The appellant had custody on an ex parte temporary order of custody granted when the child was four months old, and he followed up with a petition to establish paternity, which was granted. The procedural history of the case was, in the words of the circuit court, "a train wreck." The parties entered into an agreement giving the father temporary custody with the mother having supervised visitation, at a time when the father had counsel and the mother was pro se. After the mother obtained counsel, a visitation schedule was established for the mother, and the requirement for supervision was removed. After a subsequent, full hearing on the merits, the circuit court found that nothing supported the ex parte order and it was set aside and dismissed. The court said that once that order was vacated that custody should revert to the mother under Ark. Code Ann. 9-10-113, but because of procedural peculiarities and pleading deficiencies in the case, the court said it would also address the issue of best interest, and that it was in the best interest of the child to restore custody to the mother. The Court of Appeals found no merit in appellant's argument that the appellee was barred from presenting evidence for any purpose except to determine his fitness for custody of the child. The Court said, "There are two sides to a custody coin, and once Stuart put on his 'custody' case, Alyssa was entitled to put on her full 'custody' case, which rightly included evidence beyond Stuart's fitness." On the issue of the court's granting custody to the mother, the Court of Appeals found no error in the finding that it was in the child's best interest to award custody to the mother. The decision was affirmed. (Singleton, H.; No. CV-14-124; 10-1-14; Glover, D.)

*Robinson v. Miller*, 2014 Ark. App. 539 [**Rule 4-2 of the Rules of the Supreme Court and Court of Appeals**] When originally filed in the Court of Appeals, this case was returned for rebriefing. The appellant made only minimal changes to the original brief and failed to correct the deficiencies the Court noted in its opinion ordering rebriefing. Because of the failure to cure the deficiencies, the opinion was affirmed for noncompliance with Rule 4-2 of the Rules of the Supreme Court. (Benton, W.; No. CV-13-518; 10-8-14; Wynne, R.)

*Lundy v. Lundy*, 2014 Ark. App. 573 [**divorce—general indignities**] The Court of Appeals held that the evidence presented at the divorce hearing did not support the granting of a divorce on the ground of general indignities. Even if her testimony was recognized as sufficient to establish grounds, the appellee failed to provide any proof corroborating those grounds, even though corroborating evidence need be only slight. Here appellee’s sister’s testimony was based only upon information she derived from the appellee, not from any discord that she witnessed between the parties. The decision granting the divorce was reversed and dismissed. (Foster, H.G.; No. CV-14-188; 10-22-14; Brown, W.)

*White v. White*, 2014 Ark. App. 594 [**child custody**] The appellant mother appealed from the circuit court’s denial of her motion for reconsideration and from the circuit court’s award of custody of the parties’ child to the appellee father. The basis for her complaint was that she did not know that the appellee was seeking custody, so she had inadequate notice and was not able to present “large amounts of evidence” to the court. In her motion for reconsideration, she alleged that there had been a miscarriage of justice and she sought a hearing to present additional evidence. That motion was denied. On appeal, she said the court abused its discretion in denying her motion under Rule 60(a). In rejecting that argument, the Court of Appeals said that her posttrial motion was not actually a Rule 60 Motion, but was more in the nature of a Rule 59 Motion for a new trial. However, it was not filed within 10 days of the divorce decree and was therefore untimely. Even had it been timely, it would have come too late because the appellant failed to object and request a continuance for additional time to prepare at the divorce hearing. The appellant also argued that the circuit court erred in awarding custody to the appellee father. Arkansas law is well settled that the primary consideration in deciding custody is the best interest of the child. In this case, giving the circuit court’s judgment of credibility and the best interest of the child due deference, as is well-settled law, the Court held that the award of custody to the appellee father was not clearly erroneous. The decision was affirmed. (Chandler, L.; No. CV-14-172; 10-29-14; Hixson, K.)

## PROBATE

*In Re Adoption of I.C.; Clark, et al. v. Hall*, 2014 Ark. App. 513 [**adoption**] The circuit court denied a petition for adoption, even though the mother withdrew her relinquishment beyond the five-day period set out in the statute. The court said it found some duress and intimidation factors based upon her having been kicked out of her house, being homeless, being without food, and having everyone telling her the adoption was the right thing to do. Also, the court said the mother did not understand what she was signing. The court also found that it was not in the child’s best interest to allow the adoption because the child had been with her mother for three months. The Court of Appeals found that it could not decide “the merits of what appears to be a novel case” because the appellants did not challenge the circuit court’s finding that the adoption was not in the child’s best interest. The Court said, “Even if a biological parent has validly consented to the adoption of a child, the circuit court may still deny the adoption petition if it finds that the adoption is not in the child’s best interest....So even if we expressed a concern about the circuit court’s decision to reject the relinquishment for the reasons stated, we still have an unchallenged basis for affirming the denial

of the adoption petition.” The decision was affirmed. (Smith, T.; No. CV-13-1159; 10-1-14; Harrison, B.)

*Grunwald, et al. v. McCall, et al.*, 2014 Ark. App. 596 **[trusts]** This case involves a dispute among ten siblings over a trust. The appellant is one of the ten and is the trustee; the other nine siblings are the appellees who petitioned to terminate the trust, to remove the appellant as trustee, to appoint a successor trustee, and to compel appellant to provide an accounting. The appellant petitioned for a declaratory judgment and asserted that her mother had executed a valid handwritten amendment to the trust. The circuit court granted the appellant summary judgment on her siblings’ petition, and directed a verdict in favor of the siblings on appellant’s complaint. They filed an appeal and a cross-appeal. On direct appeal, two issues were not considered because they were not objected to or not raised below. The Court of Appeals affirmed on the issue of whether the circuit court erred by granting the siblings’ motion for directed verdict. The Court said that the appellant never introduced the handwritten document purporting to be an amendment to the trust into evidence. On the cross-appeal, the Court reversed the circuit court’s decision granting the appellant summary judgment on the siblings’ claims because the court found it “difficult...to glean the precise reason for the court’s decision on summary judgment.” The Court reversed and remanded the summary judgment for further proceedings on the siblings’ petition. (Crow, G.; No. CV-14-104; 10-29-14; Wood, R.)

*Swenson v. Kane*, 2014 Ark. 444 **[guardianship–special proceedings–constitutionality]** The appellant is the adoptive mother of a child, T.S., and the appellee is the child’s aunt and guardian. On appeal, the appellant contends that the circuit court erred in finding that the guardianship appointment was a special proceeding. She also contends that Ark. Code Ann. § 28-65-203 infringes on the Supreme Court’s rule-making authority and is therefore unconstitutional. In affirming, the Court said that it has held for over a century that guardianship proceedings are “special proceedings” under Rule 81 and is excepted from traditional Rules of Civil Procedure. The Court concluded that the appellee’s appointed guardianship is a special proceeding and excepted from the Rules of Civil Procedure and governed by statute. The decision was affirmed. (Arnold, G.; No. CV-14-85; 10-30-14; Baker, K.)

## JUVENILE

*Goodson v. Ark. Dep’t of Human Services*, 2014 Ark. App. 599 **[DN Adjudication – sufficiency]** Appellant’s infant was taken into custody after hospital staff reported concern that the mom had lost custody of four other children, had a history of depression and her child was born weighing only one pound and seven ounces. Appellant’s own admission at the adjudication that she had her rights terminated to one child in another state; that other states had taken custody of her three children; she had unstable housing, no job and the only source of funds she had was food stamps was sufficient to support finding of a dependency-neglect adjudication. (Wilson, R.; CV-14-515; 10-29-14; Wood, R.)

*Callison v. Ark. Dep't of Human Services*, 2014 Ark. App. 592 [**DN Adjudication – aggravated circumstances**] Appellants did not challenge the adjudication, but argued that there was insufficient evidence to support the aggravated circumstances. There was a finding that the child experienced a life-threatening event and the child could have died or suffered permanent brain damage based on the doctor's testimony. There was testimony that appellant suffered from mental illness and that the child was not safe in her care. There was also evidence that appellant left harmful medication within in the child's reach and while in her care the child suffered this life threatening event caused by ingesting harmful drugs. The court's finding of aggravated circumstances was not clearly erroneous. (Cook, V.; CV-14-584; 10-29-14; Vaught, L.)

*Hines v. Ark. Dep't of Human Services*, 2014 Ark. App. 515 [**PPH - permanent custody**] Appellant has had a long history with mental illness and involvement with DHS beginning in 2007 with a protective services case because the mother threatened to kill herself. In December 2011, appellant presented to the local DHS office stating that she could not care for her children. She reported being diagnosed with schizophrenia and that voices tell her that the children are not safe and that someone is going to murder them. She reported that "it's just her and the children, all day, every day; and she can't take the pressure." When the juveniles were removed, one had "loop type" injuries to her mid-torso and thighs and another juvenile had burn marks on his thighs and a bruise around his eye. The Court of Appeals found that given the evidence presented and the history of the case, the circuit court did not clearly err in granting custody of the children to appellant's parents. At the PPH hearing, testimony included some periods of where the mother was making significant improvements and complying with the case plan. However, the therapist testified that the appellant had failed to schedule appointments and that she was still experiencing hallucinations and paranoia. The caseworker testified that additional time would not correct the mother's mental health issues and that DHS was recommending relative-placement based on the children's safety. (Hudson, A.; CV-14-343; 10-1-14; Harrison, B.)

*Schaible v. Ark. Dep't of Human Services*, 2014 Ark. App. 541 [**TPR – sufficiency**] (Smith, T.; CV-14-315; 10-8-14; Gruber, R.) [**best interest**] Appellant appears to challenge the potential harm finding that she smoked in front of her child because no one actually saw her smoke and that the foster parent's testimony that the child smelled of smoke and being dirty when she picked him up was biased because the foster parent wanted to adopt her child. The circuit court's finding was sufficient on potential harm and included a combination of appellant's lack of follow-up on her drug treatment, use of alcohol during the trial home placement, state of her child in her care, and higher stress that another child will present. In addition, there was an issue as to appellant's lack of judgment as evidenced by her failure to attend NA meetings or maintain support groups, recognize her child's developmental needs and pattern of dependence on others. [**subsequent factors**] Appellant did not explain her argument other than she had tested clean during the course of the case and was in compliance with the case plan. While the court acknowledged and commended appellant for remaining drug free, appellant still did not complete drug treatment or attend NA meetings and admitted that she still had urges with addiction. A significant finding by the court was also that appellant did not take her child to occupational therapy when in her custody and testified she did not think he needed it. [**recall witness**] Appellant argued that the court erred in denying her objection

to recall the occupational therapist. It is the duty of the court to exercise reasonable control over the mode of interrogating witnesses and presenting evidence. (Smith, T.; CV-14-315; 10-8-14; Gruber, R.)

*McMahan v. Ark. Dep't of Human Services*, 2014 Ark. App. 590 [TPR - service]

Appellant argued improper service as to his termination of parental rights petition. All the parties agree that service was required under Rule 4. Appellant argued that DHS failed to comply with Rule 4(d)(4) to send a copy of the summons and complaint to appellant by first-class mail and marked as "legal mail." The trial court found that service was proper because appellant was personally served at the Washington County jail and proper service to the warden at Tucker. Service of process is necessary for jurisdiction and service requirements are strictly construed. Actual process does not validate a defective process. Appellant testified that he did not receive service as required and DHS's own exhibit contradicts its testimony that it complied with the service requirements in Rule 4(d). DHS failed to strictly comply with the service requirements for incarcerated parents pursuant to Rule 4 and the court was in error in finding that it was proper. Termination reversed and dismissed. (Zimmerman; S.; CV-14-422; 10-29-14; Glover, D.)

*Willingham v. Ark. Dep't of Human Services*, 2014 Ark. App. 568 [TPR - sufficiency]

Appellant appeals her termination to her five children and argued there was insufficient evidence. Appellant has had a history with DHS and the court consisting of a case in 2012 that resulted in the children being returned home and then being removed again because the appellant abandoned her children in a domestic violence shelter and the children were returned home again. That case closed in June 2013. The present case resulted in a removal in October 2013 due to domestic violence and drug abuse in the home. [best interest] Appellant argued TPR is not in her children's best interest and that she had removed herself from her abusive relationship and just needed more time. The court has held that a child's need for permanency and stability may override a parent's request for more time. Extensive services have been provided to appellant and appellant has failed to benefit from those services and has relapsed into behavior that puts her children in risk of harm. [aggravated circumstances] At the adjudication the court found aggravated circumstances by clear and convincing evidence that there is little likelihood that services to the family will result in successful reunification. Appellant did not challenge this ruling nor was an appeal taken of the adjudication order. In termination cases a challenge to a finding of aggravated circumstance must be made, if at all, in an appeal from the adjudication order. (Cook, V.; CV-14-567; 10-22-14; Hixon, K.)

*Jung v. Ark. Dep't of Human Services*, 2014 Ark. App. 523 [TPR sufficiency]

[best interest] While appellant concedes her child is adoptable, she argued there was insufficient evidence to support the termination because she never abused her child and there was no evidence that she posed a threat of harm to her child either physically or emotionally. Evidence of appellant's unemployment and housing instability, continued drug use throughout the case, lack of financial resources was sufficient to find potential harm to the child. [statutory grounds] Although DHS plead four statutory grounds, the appellate court only addressed the failure to remedy ground. The child had been adjudicated dependent-neglected and outside of the care of appellant for more than 12

months due to the appellant's drug usage (methamphetamine while caring for her child). Appellant continued to use drugs during the course of the case and only recently had finished a drug treatment program. Even after completion of the program she attempted to falsify a drug test, two days prior to the TPR hearing. (Crow, G.; CV-14-174; 10-1-14; Whiteaker, P.)

*Samuels v. Ark. Dep't of Human Services*, 2014 Ark. App. 527 [TPR]

The juvenile was removed from her mother's custody following the death of a sibling. The goal of the case was permanent custody with appellant (father). Thirty-one days after being placed in appellant's temporary custody the juvenile was removed due to the father's arrest for third-degree battery of his girlfriend while the juvenile was present. After another sixteen months in care, the juvenile was once again placed in the father's temporary custody. A month later he was arrested again and the juvenile was placed in DHS custody. [**best interest**] There was evidence that the child was adoptable, including testimony from her current foster family who had adopted her half-siblings. As to potential harm appellant had custody removed two times along with his failure to take medication, unstable housing and missing forty percent of his counseling sessions. [**statutory grounds**] The circuit court terminated Appellant's parental rights on two grounds: (1) other factors subsequent to the original filing and (2) aggravated circumstances. The subsequent factors ground was not clearly erroneous based on the evidence that after the initial filing of the petition and appellant got custody of his child, appellant was arrested twice and his child was removed twice and he failed to comply with the court orders to take his medication and attend counseling. As to aggravated circumstances appellant failed to raise a specific argument at the trial court and it is not preserved for appeal. [**ADA - ineffective assistance of counsel** All other arguments made by appellant were raised for the first time on appeal and were not considered by the Court of Appeals. (Keaton, E.; CV-14-471; 10-1-14; Wood, R.)

*M.D. v. State*, 2014 Ark App. 549 [**Delinquency- DYS Commitment**] Appellant appealed his DYS commitment as a result of delinquency adjudication for robbery and aftercare violation. While there was conflicting testimony, the victim identified the defendant and testified that he was tripped by the defendant who then broke his finger and took his cash. It is the duty of the trier of fact to resolve contradictions, conflicts, and inconsistencies in a witness's testimony and to determine the credibility of witnesses. The victim's testimony was sufficient to support the court's finding. (Fergus, L.; CV 14-120; 10-8-2014; Brown, W.)

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

*Frisby v. Ark. Dep't of Human Services*, 2014 Ark. App. 556 (Chandler, L.; CV-14-538; 10-22-14; Vaught, L.)

*Nguyen v. Ark. Dep't of Human Services*, 2014 Ark. App. 565 (Spears, J.; CV-14-469; 10-22-14; Vaught, L.)

*Knerr v. Ark. Dep't of Human Services*, 2014 Ark. App. 550 (Elmore, B.; CV-14-491; 10-8-14; Pittman, J.)

*Avant v. Ark. Dep't of Human Services*, 2014 Ark. App. 510 (Branton, W.; CV-14-428; 10-1-14; Pittman, J.)

*Chapman v. Ark. Dep't of Human Services*, 2014 Ark. App. 525 (Medlock, M.; CV-14-212; 10-1-14; Wood, R.)

*Singleton v. Ark. Dep't of Human Services*, 2014 Ark. App. 511 (Sullivan, T.; CV-14-458; 10-1-14; Pittman, J.)