APPELLATE UPDATE

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 (http://courts.state.ar.us/opinions/opinions.html).

PUBLISHED BY THE ADMINISTRATIVE OFFICE OF THE COURTS
NOVEMBER, 2006 VOLUME 14, NO. 3

ANNOUNCEMENTS

PLANS. ADMINISTRATIVE ORDER NUMBER 14 provides:

a. The administrative plan for the judicial circuit shall be submitted by the administrative judge to the Supreme Court by July 1 of each year following the year in which the general election of circuit judges is held. The effective date of the plan will be the following January 1.

ADMINISTRATIVE JUDGE. ADMINISTRATIVE ORDER NUMBER 14 provides:

2. Administrative Judges**.** In each judicial circuit in which there are two or more circuit judges, there shall be an administrative judge.

a. Means of Selection. On or before the first day of February of each year following the year in which the general election is held, the circuit judges of a judicial circuit shall select one of their number by secret ballot to serve as the administrative judge for the judicial circuit. In circuits with fewer than ten judges the selection must be unanimous among the judges in the judicial circuit. In circuits with 10 or more judges the selection shall require the approval of at least 75% of the judges. The name of the administrative judge shall be submitted in writing to the Supreme Court. If the judges are unable to agree on a selection, they shall notify the Chief Justice of the Supreme Court in writing and furnish information detailing their efforts to select an administrative judge and the results of their balloting. The Supreme Court shall then select the administrative judge. An administrative judge shall be selected on the basis of his or her administrative skills.

b. Term of Office. The administrative judge shall serve a term of two years and may serve successive terms. ...

CRIMINAL

Ross v. State: **[evidence issues]** Defendant opened the door to inquiry of prior bad acts.

Defendant failed to show that communications to his pastor were in the pastor's role as a spiritual advisor or in confidence as opposed to merely encountering a friend at a bar. Marital privilege was waived by Defendant's voluntary disclosure of a significant part of any confidential matter. (Switzer, D.; CACR 05-1378; 11-1-06; Bird)

Anderson v. State : **[evidence in jury room/Davlin case]** A taped statement that was played at trial and admitted into evidence was sent to the jury room with other exhibits after the jury had requested another document. This did not constitute a violation of Ark. Code Ann. 16-89-125(e) because the jury received an admitted exhibit where there was no danger of additional evidence being introduced by giving the exhibit to the jury during deliberations. This incident under the circumstances did not constitute a critical stage requiring that the defendant and counsel be present. There was nothing in this case to indicate that the defendant would suffer any prejudice by the replaying of the tape. **[victim impact statements]** Defendant's challenges to the use of victim impact statements are without merit.
(Hudson, J.; CR06-29; 11-2-06; Hannah)

Russell v. State: **[theft/value]** In a theft by receiving case, the sales tax paid on an item is not included when determining the value of the item. (Sims, B.; SCCR 06-180; 11-2-06; Glaze)

Tate v. State: **[prior acts]** Evidence of Defendant's previous intentional discharge of the murder weapon in the manner presented was relevant to show a lack of mistake or accident in connection with the incident at trial. (Switzer, D.; SCCR06-84; 11-2-06; Dickey)

White v. State: **[rape-shield law/child victim]** Father was charged with rape of two daughters. Court properly excluded the evidence of acts of the two victims with other children. **[evidence]** Evidence that the defendant had an erection during a supervised visitation in which he was watching his daughters performing dance and cheerleading routines was admissible. Also, evidence of previous physical abuse of the two was admissible. (Clinger, D.; SCCR 05-1407; 11-2-06; Gunter)

Casey v. State: **[search]** Traffic stop was not pretextual and there was no improper inventory search of the vehicle. (Shirron, P.; CACR 06-120; 11-8-06; Hart)

Strong v. State: **[possession]** Evidence was sufficient to support a finding that defendant had the intent to possess and deliver the specified amount of cocaine. (Pope, S.; SCCR 05-1414; Gunter)

Noble v. Norris: **[habeas]** Trial court did not exceed its jurisdiction by conducting court and accepting a plea on a Sunday. (Jones, B.; SCCR 04-524; 11-16, 06; Corbin)

Gaye v. State: **[evidence]** Substantial evidence supported verdict and jury did not resort to speculation and conjecture. (Langston, J.; SCCR 06-629; 11-16-06; Glaze)

Winston v. State: **[aggravated robbery]** Aggravated robbery requires evidence of the use or threatened use of physical force with the intent to commit a theft, but no actual transfer of

property needs to take place for the offense to be complete. (Langston, J.; SCCR 06-596; 11-16-06; Imber)

Buford v. State: **[credibility]** Court erred in failing to sustain objection when prosecutor elicited opinion testimony about the victim's credibility, but the error was harmless. (Thomas, J.; SCCR 05-1233; 11-16-06; Imber)

Loar v. State: **[felon in possession]** Defendant signed the ticket to pawn a gun. The ticket constitutes evidence that he constructively possessed the firearm. (Hanshaw, L.; SCCR 06-822; 11-30-06; Glaze)

Flanigan v. State: **[suppression of statement]** Defendant was "seized" within meaning of Fourth Amendment when she was told that she was not free to leave the remote crime scene, but the seizure was not unreasonable in light of the circumstances. Later, the defendant was interviewed at the police station, but the evidence does not support her contention that she was "detained." To the contrary, it appears that she was free to leave at any time. **[miranda]** At the time of the statement in question, Defendant was not in custody and Miranda warning was not required. At time of subsequent statement, she was not impaired and voluntarily waived her rights prior to the making of the statement. With respect to another statement, it was not rendered involuntary because of the period of time between the Miranda warning and the time the statement was made. Her alleged request for counsel was equivocal and the police did not violate a legitimate request. **[Witness]** Defendant wanted to call a witness who was also charged in the crime and the witness indicated that she would invoke her Fifth Amendment right. A witness invoking her constitutional right cannot be compelled to be a witness, and the state cannot be compelled to grant immunity to the witness. **[replay of taped statement in jury room]** Tape was admitted into evidence and its replaying did not create a danger of additional evidence being introduced by giving the exhibit to the jury during deliberations. Under these facts, the playing of the tape did not constitute a critical stage of the criminal proceedings. (Boling, L.; SCCR 06-88; 11-30-06; Hannah)

CIVIL

Aon Risk Services v. Mickles: **[deceit]** Elements of a cause of action for deceit were supported by the evidence. **[contribution]** Evidence does not support that defendants were joint tortfeasors in causing the same injury. One defendant was found liable for outrage and bad faith and the other for outrage and deceit. Thus a judgment was obtained against the appellee on a distinct tort for which no recovery was had against the other defendant. Court cannot determine whether the award was compensation for the same injury. **[punitive damages]** Appellate court reduced the amount of punitive damages because of the ratio to the compensatory damages. (Piazza, C.; CA 05-1397; 11-1-06; Robbins)

Estes v. Merritt: **[restrictive covenants]** Restrictions in plat are ambiguous. Since there are no restrictions clearly applicable to the property, they cannot be given effect. (Weaver, T.; CA 06-

288; 11-1-06; Bird)

Downen, Admin. v. Redd: **[spoliation]** Court refused to recognize a tort for intentional third-party spoliation. (Patterson, J.; SC 06-456; 11-2-06; Glaze)

Sanford v. Belle: **[rule 11]** Purpose of sanction is to deter litigation abuse -- not to make the other attorney whole. Court did not err in awarding sanctions in amount less than the motion requested. (Bogard, D.; SC 06-306; 11-2-06; Gunter)

Lamb v. Johnston: **[final order/property description]** There was not a final appealable order in this prescriptive easement case because of the lack of a property description**.** (Phillips, G.; CA 06-365; 11-8-06; Crabtree)

Carter v. Georgia Pacific: **[work. comp]** Circuit court lacked jurisdiction to determine whether employees' injuries were covered by Workers' Compensation Act. (Pope, S.; SC 05-1250; 11-9-06; Hannah)

Simes v. Crumbly: **[elections]** Phillips County – not Pulaski – was the proper forum to file post-election contest. (Gray, A.; SC 06-1121; 11-6-06; Hannah)

Willis v. Crumbly: **[elections]** The office of state senator is not a "state office." This suit involves post-election issues, such as fraud; not issues of eligibility. (Simes, L.; CS 06-1147; 11-6-06; Brown)

Downing v. Lawrence Hall Nursing Center: **[final order]** The order dismissing the action was silent as to the John Doe defendants; therefore it was not an appealable order. (Erwin, H.; SC 06-176; 11-16-06; Corbin)

Perry v. Baptist Health: **[attorney fees]** Defendant's assertion of an unsuccessful counterclaim does not necessarily preclude its classification as a prevailing party on the plaintiff's claim. (Moody, J.; SC 06-599; 11-16-06; Dickey)

McGhee v. State Board of Collection Agencies: **[illegal exaction]** Based upon dueling summary judgment motions, the Board presented unrefuted evidence that funds generated from tax dollars or otherwise arising from taxation are not used to fund the Board in any manner. **[exhaustion of remedies]** Trial court should have heard plaintiff's declaratory judgment claim; claim did not have to first be raised before the Board. (Sims, B.; SC 06-381; 11-16-06; Corbin)

Williams v. Wayne Farms: **[Arkansas employment security law]** Statute permitted the transfer of a predecessor employing unit's experience rating to a successor employing unit. (Sullivan, T.; SC 06-571; 11-16-06; Imber)

Great Lakes Chemical v. Bruner: **[oil and gas commission]** Commission had subject matter

jurisdiction to decide the cost-assessment issue. The court's review of the Commission's decision was properly limited to the record created before the Commission and new evidence was not admissible before the circuit court. (Anthony, C.; SC 06-73; 11-16-06; Brown)

Sims v. Fletcher: **[appealable order]** An order that fails to address a counterclaim is not a final order. (Fox, T.; SC 06-463; 11-30-06; Corbin)

Parker v. Johnson: **[homestead exemption]** Party abandoned his homestead; therefore, homestead exemption was not applicable and judgment liens attached to the property. (Guthrie, D.; SC 06-606; 1-30-06; Dickey)

Williams v. Brushy Island Water Authority: **[receivership]** There is no authority requiring the court to hold an evidentiary hearing in order to appoint a receiver. The court did not abuse its discretion in appointing a receiver nor in the receiver that it chose to appoint. (Moody, J.; SC 06-126; 11-30-06; Gunter)

DOMESTIC RELATIONS

Luanne K. Bobo Uttley v. Christopher Allen Bobo: **[child custody; UCCJEA; child support]** The trial court had sufficient bases to retain jurisdiction of the custody case under the UCCJEA, even though the mother and children had not lived in Arkansas for over five years and had not lived in the United States for over four years. The children's father remains in Arkansas and the children are here during visitation. The trial court has exclusive, continuing jurisdiction under the Act, so the trial court exercised sound discussion in assuming jurisdiction. On the issue of whether Arkansas is an inconvenient forum under the UCCJEA, the Court found no abuse of discretion, noting the father's presence in the state, the children's visitation in the state, and that the Arkansas court is familiar with the case, as the parties have been before it since before the divorce decree was entered in June, 2000. The Court also affirmed the trial court's decision regarding child support. (Thomas, J.; No. CA06-443; 11-15-06; Gladwin)

Tammy Cranston v. Timothy Carroll: **[child custody–change of custody]** The Court of Appeals affirmed the trial court's order changing custody of the parties' daughter from the mother to the father. The Court outlined the mother's actions that provided a basis for the trial court's finding of changed circumstances and its finding that the appellant mother lacked credibility. The Court noted that it was troubled by the appellee father's apparent drug usage, but said that, considering all the evidence, it did not find the trial court's findings clearly erroneous. The Court said it had recognized in a previous opinion that a trial court's best-interest determination may not always provide a flawless solution where placement with either parent may not be ideal. (Keaton, E.; No. CA06-209; 11-15-06; Crabtree)

*Bruce Kuchmas v. Deborah Kuchmas***: [divorce; alimony]** The Supreme Court affirmed the trial court's award of $100/month alimony to the appellee wife, finding that the court did not abuse its discretion in making the award. (Spears, J.; No. SC06-92; 11-16-06; Glaze)

Gregory Harris v. Stacey Harris Grice: **[child custody–change of custody]** The Court of Appeals found that the trial court had clearly erred in denying a change in custody from the appellee mother to the appellee father, particularly in light of the trial court's statement that the appellant had raised important matters that the court expressly found to be true. The Court said that it found a change in custody to be clearly warranted by changed circumstances and to be manifestly in the child's best interest. (Kilgore, R.; No. CA06-160; 11-29-06; Pittman)

Andrea Dawn Henley v. Mark B. Medlock: **[child custody–change of custody]** The trial court changed custody of the children from the appellant mother to the appellee father based solely on the stated preferences of the two children, despite the court's finding that no material change in circumstances had occurred. The Court of Appeals noted in reversing that, although the statute permits a court to consider the preferences of a child when making a determination regarding a child's best interest, the court must first determine the threshold issue of whether a material change in circumstances has occurred since the last order of custody. Here, that threshold requirement was not met. (Spears, J.; No. CA06-418; 11-29-06; Crabtree)

Michelle Kelly Hill v. James Edward Kelly, III: **[child support]** Supreme Court affirmed the trial court's modification of child support with one change. The trial court had credited the appellee father for all orthodontic expenses against a child-support arrearage. The Supreme Court said the offset should have been one-half the amount, since all medical, dental, and orthodontic expenses are to be equally divided between the parents. The Court discussed Administrative Order No. 10 in some detail. (Hewett, M.; No. SC06-83; 11-30-06-Gunter)

PROBATE

In the Matter of the Estate of Harold E. Keathley, Deceased, et al. v. Harold K. Keathley, et al.: **[estates; illegitimates; pretermitted child; summary judgment]** An illegitimate, pretermitted child can inherit only as he would under the law of descent and distribution, as set out in Ark. Code Ann. 28-9-209(d). Under that provision, Appellant Robert Shelton's claim was time barred. Because the statute had run, the trial court granted summary judgment to Kelton Keathley, the named executor under the will. Because Shelton was never recognized as the decedent's legitimate son, no genuine issues of material fact existed. Also, because Shelton was not an heir, Kelton Keathley had no duty to inform him of the decedent's death or to give him any notice. As the named executor in the will, Kelton had no duty to deliver the will to the court because he had statutory authority to have the will in his possession. Shelton was not an "interested party" within the Probate Code because he has never been declared a legitimate heir. The Supreme Court affirmed. (Mills, W.; No. SC06-633; 11-2-06; Corbin)

Paula Jane Stewart v. Paula Sue Combs, Executrix: **[postnuptial agreement]** Case of first impression in Arkansas involving the validity of a postnuptial agreement, which the parties entered into about two years after they married. The decedent husband's attorney prepared the document; appellant wife did not consult a separate attorney. After the husband's death, the appellant was denied any interest in his estate. She testified that she thought that the agreement meant that if both she and her husband died, or if they were divorced, their respective family

lands would revert back to their families. The trial court found the postnuptial agreement valid and denied the appellant any interest in the estate of her husband. Appellant claimed on appeal that the postnuptial agreement was invalid and unenforceable to deprive her of any interest in the estate of her deceased husband. One issue she raised was whether the decedent's attorney was required by law to inform her that she should consult her own attorney before entering into the agreement, a requirement of the Arkansas prenuptial statute, Ark. Code Ann. § 9-11-206 (Repl. 2002). The Supreme Court affirmed, finding that the Code provision in question concerns only prenuptial, not postnuptial, agreements. The Court found that principles of contract law should be applied to determine the validity of a postnuptial agreement, and that no evidence was shown of fraud or misconduct in the formation of the agreement. The Court found mutual the parties' waiver and release of dower, curtesy, homestead, and statutory allowance. The agreement clearly set out what each party was relinquishing. Had the appellant wife died first, the husband would have had no claims against her estate. In addition, no evidence indicated that the husband failed to make a full disclosure of his assets. The Court found that the parties' mutual release was adequate consideration to support the postnuptial agreement. Therefore, the trial court did not clearly err in concluding that the agreement was fair, equitable, and supported by consideration. The decision was affirmed. (Guthrie, D.; No. SC06-41; 11-16-06; Dickey)

JUVENILE

Harwell-Williams v. Arkansas Dep't of Human Servs. **[Adjudication/Permanency Planning]** The Court of Appeals certified this case to determine if the trial court had jurisdiction to hold an additional hearing subsequent to the filing of a notice of appeal and the lodging of the a trial transcript. The court removed custody of two of appellant's children in a FINS case and placed them in DHHS custody in April 2004. Due to appellant non-compliance, DHHS requested a change of the goal of reunification to termination and filed a petition for dependency-neglect in April 2005. In May 2005, the trial court entered an adjudication and permanency planning order finding the children dependent-neglected. One of the children was placed with her father and her case was closed. The other child's (CH) goal was changed to termination with a goal of adoption and the court retained jurisdiction.

In August 2005, appellant filed a notice of appeal of the May order and in December 2005 the trial court entered a termination of parental rights order as to CH. Appellant did not appeal the TPR order. Rule 2(c)(3) of the Arkansas Civil Rule of Appellate Procedure details what orders are final appealable orders in out-of-home placements. There was not a final order for CH at the permanency planning hearing. Ark. Code Ann. §9-27-343(c)(Supp. 2005) provides that "pending any appeal from an out-of-home placement the juvenile division of circuit court retains jurisdiction to conduct further hearings."

Appellant also argues that the d-n petition was untimely since the children had been out of her home for more than one year before the d-n petition was filed. The Court found that to hold that a court must find that a child is at substantial risk of harm on the day of adjudication would mandate that no child could be found dependent-neglected after being placed in DHHS custody and that would be an absurd result that defies common sense.

Finally, appellant argues that the trial court did not follow the proper procedure. Appellant failed to make an argument at the trial level regarding the "fast track." She waived her argument that the adjudication and permanency planning hearing were held on the same day, and she did not request a specific ruling by the court on the issue of a simultaneous hearing. (Collier, L.; CA 05-960; 11-30-2006; Dickey)

Sparkman v. Arkansas Dep't of Human Servs. **[TPR]** May 2005 TPR order affirmed where father was found to have sexually abused his child and the mother failed to protect her child. When the mother at the TPR hearing was asked if she could keep the father away from the child she answered, " It's just hard. I don't know. Put it this way, right now the decision would probably be no."

Appellant argued that DHHS did not provide the mother reasonable efforts to enable her to remove the perpetrator or keep him out of the home. However, the Court stated that appellant did not appeal the reasonable efforts finding from the permanency planning hearing (*not an appealable order*) and she was employed when her husband left the home for a period of time only to welcome him back. The father was found to have subjected the child to aggravated circumstances and DHHS was relived of providing reunification services. Finally, appellants argued that the court erred in taking judicial notice of a counselor's prior testimony at the adjudication hearing since they were not allowed to cross examine her at the TPR. (*Note: Rule 6-9 now provides that: The record for appeal shall be limited to the transcript of the hearing from which the order on appeal arose, any petitions, pleadings, and orders relevant to that hearing, and all exhibits entered into evidence at that hearing. Effective July 1, 2006*) Further, the appellants had the opportunity to subpoena the therapist and they did not, nor did they ask for a continuance. (Choate, S.; CA 05-1011; 11-1-2006; Hart)

Benedict v. Arkansas Dep't of Human Servs. **[TPR]** May 2005 TPR order reversed finding that the circuit court clearly erred in finding that the TPR was in the child's best interest. Appellant's children came into care as result of postpartum psychotic depression in March 2004. DHHS and the AAL filed a joint motion to terminate parental rights in February 2005. The hearing was held in April 2005 and DHHS moved to dismiss; however, the AAL wanted to go forward.

The trial court found that the children were highly adoptable, appellant had not remedied the conditions that caused removal, and that she manifested an incapacity to meet the needs of the children. Further findings included that appellant could not put into daily practice what she learned from parenting classes and counseling. She could not make proper choices in dealing with interpersonal relationships, social skills, and parenting to keep her children safe.

The Court found that appellant was initially incapable of caring for her children and they were at risk. Yet, she showed marked progress in her ability to provide a stable home and the record demonstrates that she cooperated with court orders, benefitted from services, and showed improvement to the benefit of the children. (Zimmerman, S.; CA 05-1373; 11-1-2006; Griffin)