CASELAW UPDATE
AUGUST 2016-MAY 2017

AUGUST-SEPTEMBER 2016

DOMESTIC RELATIONS

Emis v. Emis, 2016 Ark. App. 369 **[modification of child custody; attorneys' fees; recusal]** The Court of Appeals found that the appellant's failure to properly designate the August 27, 2015 final custody order in her initial notice of appeal divested the Court of jurisdiction to decide the issues she raised on the custody hearing or the trial court's custody determination. She designated a previous order, dated August 14, 2015, which the Court said was more akin to a letter opinion, which the Court previously has found is not a final order for purposes on appeal and, even if it were, it was superseded by the August 27 order. The other issues she raised also have procedural difficulties. On the issue of the circuit court's failure to recuse, the record indicates that she filed the motion to recuse after the final order was entered. She never requested that the custody award be vacated or set aside for bias, so any discussion of recusal would have no effect on the custody determination and would be an advisory opinion, which the Court does not render. On her issue concerning fees for opposing counsel and the attorney ad litem, the order striking her affidavit in support of the recusal motion, and the order denying her request to vacate the ad litem appointment, she cited no facts or authority to support her arguments, and made no independent argument in her brief. She attempted to incorporate her trial motions and briefs by reference, which the Supreme Court has specifically stated is not proper. The decision was affirmed. (Welch, M., No. CV-15-993; 8-31-16; Whiteaker, P.)

Gibson v. Keener, 2016 Ark. App. 363 **[paternity; child custody; visitation]** This case began as a paternity case initiated by the Office of Child Support Enforcement, which resulted in an agreed-order establishing the appellee as the father of the parties' child, granting a judgment for retroactive child support, and recognizing the appellant mother as the sole custodian. A subsequent order established the father's visitation rights. The parties, who were never married, subsequently moved in together and lived together as a family, and a later agreed order abated the father's obligation to pay child support. The parties then separated, abiding by the earlier visitation order for the father's every-other-weekend visitation. This appeal results from a later court order finding a material change in circumstances and an order for "joint legal custody" but not physical custody. The father's visitation was expanded and summer visitation was changed. On its de novo review, the Court of Appeals found there was a material change in circumstances and that the court did not err in awarding joint custody. The court also created a sensible visitation schedule given the facts presented to the court. The decision was affirmed. (Womack, S.; No. CV-15-879; 8-31-16; Harrison, B.)

Riddick v. Harris, 2016 Ark. App. 426 **[modification of custody; modification of child support]** The appellant father appeals from the trial court's denial of his motion to modify custody and the granting of the appellee mother's motion to modify child support. On cross-appeal, the appellee mother argued that the trial court erred in calculating the appellant's income for child-support purposes, finding her in contempt of the summer visitation schedule, modifying the father's visitation, denying her request to make the father's increased child support obligation retroactive, and denying her request for attorney's fees. The Court of Appeals affirmed the court's denial of the father's request to modify a change in custody from the mother, and the

granting of an increase in child support based upon an increase in the father's monthly net income. On cross-appeal, the court reversed and remanded in part and affirmed on part of the five issues the appellee raised. First, on the issue of the calculation of the appellant's income for child support purposes, the Court reversed and remanded for the circuit court to look at what "SIP" and "Other Benefits" were and whether they were "income" for child support purposes. Second, on the issue of contempt, the trial court had found the appellee's behavior with respect to visitation was a willful violation of the decree's summer-visitation schedule, and the appellate court affirmed, finding that not clearly against the preponderance of the evidence. Third, the trial court increased the appellant's visitation, and the appellate court held that it did not clearly err in doing so. Fourth, on whether the trial court abused its discretion in denying her request to make the increased child-support obligation retroactive, the Court of Appeals found the trial court did not abuse its discretion, that the trial court found the child was well supported during the months after the petition for modification was filed, and that no evidence was presented of a negative impact to the child. The trial court gave reasons for not applying the increase retroactively and its decision was affirmed. Finally, the Court of Appeals found no abuse of discretion in the trial court's denial of attorney's fees to the appellee. (Richardson, M.; No. CV-15-859; 9-21-16; Vaught, L.)

PROBATE

Navarrete v. Creech, 2016 Ark. App. 414 **[adoption]** The petitioner in this case is the biological, maternal grandmother of the five-year-old child who is the subject matter of the adoption. The adoption was granted on the consent of the petitioner's daughter who is the biological daughter of the petitioner. In affirming the adoption, the Court of Appeals dismissed both petitioner's contentions on appeal. The Court found no merit in petitioner's argument that the appellee adoptive mother was guilty of improper conduct in practicing counseling and social work without a license, which she said constituted criminal acts and ethical violations in Arkansas. The Court said no evidence supported that appellee committed any wrongdoing in the scope of her employment and that no convincing argument or citation to authority supported the argument. Her second argument, that since the circuit court allowed her to intervene in the adoption case because she had stood in loco parentis to the child in question, she should be considered the "mother" of the child whose consent was required for the adoption. The Court found the argument unpersuasive, and said the trial court correctly found that all the required consents had been provided. In this case, the only consent required was the consent of the mother, who had voluntarily terminated her rights to the child with a proper execution of relinquishment and termination documents, had entered her appearance, and had waived all notice of summons for the proceedings. (Brantley, E.; No. CV-16-72; 9-21-16; Abramson, R.)

Rodgers v. Rodgers, 2016 Ark. App. 447 **[adoption]** In this stepparent adoption case, the natural mother appealed from an adoption granted to the children's stepmother, based upon the circuit court's finding that the appellant's consent was not required because the petitioner proved that the mother had failed, for a period of at least one year and without justifiable cause, to communicate with her children or to provide for their care and support as required by law or court order. The natural mother of the children had a drug problem and, in an order placing custody with the father, the circuit court ordered that the mother would have no visitation with the children unless and until she could pass a drug screen and came back to court so the court could look at the situation again. On appeal, the appellant argued that she did not attempt to visit the children because she was following the court's order. The Court of Appeals held that the

trial court did not clearly err with regard to the failure to communicate, so it was not necessary to consider the issue of her failure to provide for the care and support of her children. The decision granting the adoption was affirmed. (Hearnsberger, M.; No. CV-15-906; 9-28-16; Hoofman, C.)

OCTOBER 2016

DOMESTIC RELATIONS

Vice v. Vice, 2016 Ark. App. 504 **[child support; attorney's fees and costs]** The circuit court dismissed the appellant father's claim for credit for the overpayment of child support for his twenty-five-year-old daughter, Julia, because he failed to plead it; but the court found that his child-support obligation for her terminated as a matter of law. The court also required him to pay $62.00 a week in child support for his thirty-one-year-old disabled daughter, Lisa, finding that, based on her disability, she needed the support, that her mother needed financial support to care for her, and that he had a duty to continue to support her. The amount was based upon the court's imputing income of full-time minimum wage to him, based upon Administrative Order No. 10. It found that his testimony that he was unable to work was not credible and that he was working below his capacity. In affirming, the Court of Appeals found that, based upon the record, the trial court did not abuse its discretion in finding that the credit for the overpayment was not properly pled or litigated. He did not file a pleading requesting a credit for overpayment of Julia's child support. His first request for a credit was in a brief filed the date of the hearing, but he never moved to amend the pleadings. Regarding the amount of child support for Lisa, the Court of Appeals found that the circuit court did not abuse its discretion in denying the appellant's request for credit against the child support he pays for Lisa's receipt of Social Security benefits on his record. He never argued or mentioned that Lisa's $553 monthly Social Security benefits should be included in calculations of his income, so the Court held he cannot now claim a credit for it against his child-support obligation. Finally, the court affirmed the trial court's assessment of attorney's fees and costs against the appellant, noting that the trial court has inherent power to award attorney's fees in domestic-relations proceedings. (Martin, D., No. CV-16-210; 10-26-16; Vaught, L.)

NOVEMBER 2016

DOMESTIC RELATIONS

Langston v. Brown, 2016 Ark. App. 535 **[child support – income for purposes of child support]** In this child support case, the circuit court granted the appellee noncustodial father's motion to reduce child support and made the award retroactive, awarding child support of $542 per month based on an estimated income of $60,000 per year; it imputed $2,500 to the account balance in appellant custodial mother's bank account on the date the divorce decree was entered; it made half of the $700 the appellee's wife spent on insurance attributable to the child's health insurance; it ordered that the camera placed in the child's room was not required to be removed but that it must be non-operational when the child was in the appellee's care during his visitation; and it denied appellant's motion to have appellee's tax refunds considered income for child support purposes. On appeal, the Court of Appeals reversed the imputation of $2,500 to her bank account on the date the divorce decree was entered; the Court ordered division of the $177.71 that was in the account at the time of the entry of the decree. The Court said the evidence before the trial court was simply that the appellant took money from the account before the divorce degree, as was permitted, so the circuit court clearly erred on this point. On the issue

of error based upon the court's granting appellee's motion to reduce child support, the Court of Appeals pointed out the appellee's reason for requesting a reduction. He left his job as an employee at Walmart to purchase and run a guns and ammunition store. In this case, all facts regarding appellee's earning capacity came from appellee alone. The circuit court stated that it was accepting the amount it imputed to him as income, $60,000, based upon materials he submitted, as well as the amount an assistant manager at Walmart made as income. It also accepted his reason for leaving the job. These were credibility issues for the circuit court. The circuit court also found that getting his last couple of years of tax returns would not be useful (or reliable) because those would reflect his former job, not his new business, which meant his income basis for setting child support was particularly difficult. On the health insurance deduction, the Court of Appeals found no error in the circuit court's decision to attribute half or a third of the health insurance difference (for family coverage) to the parties' child. On the issue of the removal of a video camera from the child's room, the Court of Appeals said the appellant offered no authority or convincing argument to support allegations of error and that she never offered the circuit court any proof or assertion of harm to the child. Finally, on the issue of error in denying appellant's motion that appellee's tax refunds be considered income for child support purposes, the Courts of Appeals said that modification of child support requires a change in circumstances. The appellee had claimed zero dependents for tax purposes in all 28 years that he worked at Walmart. Therefore, the appellant showed no changed circumstances; he was doing what he had done throughout the parties' marriage. The Court reversed on the issue of imputing $2,500 to the appellant's account balance on the day the decree was entered and affirmed on all other issues. (Brantley, E.; No. CV-16-60; 11-2-16; Brown, W.)

Walden v. Jackson [Walden I], 2016 Ark. App. 578 **[paternity; name change; child support; Rule 60 of the Arkansas Rules of Civil Procedure]** The circuit court entered a paternity order on July 8, 2015, finding the appellee was the father of the child, based upon the results of a paternity test and changing the child's surname to his father's. The court also denied retroactive child support. On July 30, 2015, the appellant filed a notice of appeal from the paternity order. In the notice, she stated that she was filing as a precaution in the event that the July 8, 2015 order was deemed a final order subject to appeal. The appellant opined in the notice of appeal that it was not a final order because issues remained to be resolved concerning the court's decision to change the child's surname and to deny retroactive child support, as set forth in her "Motion to Alter or Amend Paternity Order and to Modify or Vacate Findings of Fact, and Brief in Support," which "are currently pending." She said that she did not abandon her pending issues or the pending motion, but that upon entry of a final order subject to appeal, she abandoned any pending but unresolved claims to the extent that she could as a party defendant. In its decision, the Court of Appeals noted that an order is final when it dismisses the parties from the court, discharges them from the action, or concludes their rights to the subject matter in controversy. The issues the appellant said were unresolved were expressly addressed by the circuit court when it changed the child's surname and denied retroactive child support. Those were not in issue until the appellant filed her motion to alter or amend the paternity order and to modify or vacate findings of fact and brief—which she filed one day after she filed her notice of appeal. The Court of Appeals said, "[a]ccordingly, contrary to appellant's assertion, the July 8, 2015 paternity order was a final order, and appellant's appeal was timely." Subsequently, on August 13, 2015, the appellee answered the appellant's motion she filed the day after she filed the appeal, then the appellee filed a motion to dismiss. Appellant filed an amended response on September 17, 2015, and a hearing was set on October 20, 2015. After the hearing, the circuit

court entered a letter opinion in which it outlined its application of the *Huffman* factors to its best interest findings for the name change. It vacated its previous denial of retroactive child support, which it awarded, and entered a new order to that effect on December 15, 2015. Under Rule 60(a) of the Rules of Civil Procedure, the court had 90 days of filing its final order to vacate a judgment, order or decree to correct errors or mistakes or to prevent a miscarriage. After that ninety-day period, the court loses jurisdiction to modify or vacate the decree. Here, the circuit court's December 15, 2015 order was entered 170 days after the entry of its July 8, 2015 paternity order, which exceeded the ninety-day limitation, so the court had no jurisdiction. The decision was reversed and dismissed. (Ryan, J.; No. CV-16-235; 11-30-16; Brown, W.)

Walden v. Jackson [Walden II], 2016 Ark. App. 573 **[name change; retroactive child support; mootness]** This case is a companion case to *Walden I*, 2016 Ark. App. 578, set out above, a paternity action in which the court found the appellee to be the father of the child, ordered future child support, and denied retroactive support. The appellant argued on appeal that this appeal is moot because of a subsequent order entered by the circuit court after this appeal was filed. The Court of Appeals found it is not moot because of the appellate court's holding in *Walden I* that the circuit court lacked jurisdiction to modify the order. In that appeal, the Court of Appeals reversed and dismissed. In this appeal, the court reversed and remanded the case on both the name change and the retroactive child support issues. On the issue of name change, the remand is for the court to provide an analysis of the name change under the *Huffman* factors and to determine whether the name change is in the child's best interest. On the issue of retroactive support, the Court reversed based upon what it said is the plain language of Ark. Code Ann. Section 9-10-111(a) (Repl. 2015), that an award of child support under the statute must begin on the date of the child's birth. The circuit court's finding that the appellee is not required to pay retroactive support because he lacked contact with the child violated the statute, which provides no exceptions. In addition, the Court said that case law is clear that a parent's child support obligation does not depend on his relationship or visitation with the child. The court also noted that the parties agreed that the child's mother had repeatedly offered the appellee opportunities to see the child, which he did not do. (Ryan, J., No. CV-15-878; 11-30-16; Vaught, L.)

Rice v. Rice, 2016 Ark. App. 575 **[modification of custody—changed circumstances]** The appellant mother appealed from the circuit court's granting a directed verdict on her motion to change the custody of the parties' two children from the appellee father to her based upon a material change in circumstances. In affirming, the Court of Appeals said the circuit court clearly acknowledged that there had been changes but had properly considered whether the changes had any detrimental impact on the children, finding that they did not. The Court said it reviewed the evidence in the light most favorable to the nonmoving party, giving the proof presented its highest probative value, and taking into account all reasonable inferences deducible therefrom, affirming because there was no substantial evidence introduced from which a reasonable fact-finder could find that the changes had a negative impact on the couple's children. The Court also noted that changes of circumstances in the noncustodial parent's circumstances are not sufficient, standing alone, to justify modifying custody, but may be considered in conjunction with changes in the custodial parent's circumstances. Here, however, the appellant's motion for change in custody applied only to changes in the appellee's circumstances, so the court could consider only those changes, not hers. She raised no objection to the court's reliance on only the appellee's circumstances, so she did not preserve the error for appeal, precluding the Court of Appeals from considering it. (Davis, B.; No. CV-16-457; 11-30-16; Vaught, L.)

DECEMBER 2016

DOMESTIC RELATIONS

Branch v. Branch, 2016 Ark. App. 613 **[divorce—premarital agreement; division of marital property]** The parties entered into a premarital agreement before their marriage, and they divorced after eleven years of marriage. The circuit court invalidated the premarital agreement under the Arkansas Premarital Agreement Act; found that the appellant husband breached the agreement which rendered it unenforceable; and equally divided the equity in the home the parties acquired during their marriage. In the decree, the circuit court found that the appellant husband "had 'wholly failed to disclose his assets' and that, generally, his testimony was 'extremely wanting.'" The Court of Appeals concluded that the court clearly erred, and that "[a] fair and reasonable disclosure of assets is not necessarily a full and complete disclosure." The Court of Appeals found that Exhibits A and B to the premarital agreement constituted a fair and reasonable disclosure of the appellant's assets, making it unnecessary to consider the other statutory requirements for finding a premarital agreement invalid. It reversed the circuit court's order finding the premarital agreement invalid and remanded to the circuit court for entry of an order consistent with the opinion. On the issue of whether the appellant husband breached the parties' agreement, the Court of Appeals concluded that his failure to make annual contributions to an account on the appellee wife's behalf was a breach of the agreement, but held that it was not material because it had no adverse effect on the appellee. By a stipulation between the parties, the appellee received the benefit she anticipated--$74,585.65. The Court of Appeals reversed the circuit court's order rescinding the premarital agreement and remanded the issue to the court for issuance of a decree consistent with its opinion. Finally, The Court of Appeals found the appellant's argument without merit that the circuit court had erred when it equally divided the equity in the house to the parties. The house clearly was acquired during the parties' marriage and, thus, was marital property. The court's decision that the funds appellant applied to the debt on the house were marital was not clearly erroneous. The Court of Appeals affirmed on this issue. The decision was affirmed in part, and reversed and remanded in part. (McCallister, B.; No. CV-16-330; 12-14-16; Whiteaker, P.)

Foster v. Foster, 2016 Ark. 456 **[rehabilitative alimony]** This case presents an issue of first impression on rehabilitative alimony, and was before the Supreme Court on a petition for review from the Arkansas Court of Appeals. The appellant husband raised three issues on appeal: (1) that the circuit court erred in interpreting the rehabilitative-alimony statute when it applied factors relevant to permanent alimony; (2) that it abused its discretion by deciding that the appellee wife's proffered plan of rehabilitation supported an award of $408,000 in alimony payable over ten years; and (3) that the court abused its discretion by awarding attorney's fees and costs in addition to rehabilitative alimony. The circuit court considered the alimony issue by applying the usual factors in an alimony cases, finding that there was an economic imbalance between the parties and that the appellant had been the main source of income for the family during the marriage. The court found that she had been the primary caregiver of the children, that the parties had enjoyed a good standard of living, and that the appellee wife had no other source of income, while the appellant husband had a large amount of income and a large amount of easily accessible funds. The court found that the appellee's proposed ten-year rehabilitative plan was reasonable in duration than that it allowed her to transition into working full time as the children became older and more independent. The court awarded her decreasing alimony over ten years, as her child support decreased and her income from work increased. She will be better

able to support herself and her household while she establishes sufficient income as the children grow older and require less immediate care. The court also awarded her attorney's fees and expenses, finding that she was not in a financial position to pay and that appellant had liquid funds to do so. The Supreme Court said that Ark. Code Ann. Section 9-12-312(b) does not indicate that the legislature intended that different factors apply to rehabilitative alimony than to any other type of alimony. The Court noted that similar factors have been used in other states. On the issue of her rehabilitative plan, the Supreme Court said that the statute does not require that a plan have specific goals or requirements regarding education or training for the payee. The payor may petition the court for a review if the requirements of a rehabilitative plan are not being met, but the statute does not mandate that a plan be submitted. It does not require that any plan submitted include specific, measurable requirements. On the issue of the amount of alimony, the Court noted that it is a matter within the discretion of the circuit court. The Supreme Court found no abuse of discretion regarding the amount or the duration of the rehabilitative-alimony award. Finally, on the award of attorney's fees and costs, the Court said that a circuit court has inherent authority to award attorney's fees and costs in domestic-relations cases, and that the award will not be reversed absent an abuse of discretion. Here, the court did not abuse its discretion. The Supreme Court affirmed the circuit court' decision and vacated the decision of the Court of Appeals. (Hearnsberger, M., No. CV-15-850; 12-15-16; Goodson, C.)

PROBATE

Reagan v. Dodson, et al., 2016 Ark. App. 598 **[guardianship]** The appellant mother of three minor children appealed the circuit court's granting guardianship of the children to the appellees, appellant's mother and stepfather. The appellant argued two issues on appeal: (1) that the original guardianship petition was unsigned; and (2) that the petitioner grandparents never served or gave notice to Jeremy Pumphrey, the biological father of the three children who is listed on the birth certificates. An emergency ex-parte guardianship petition was granted on the same day it was filed, November 26, 2014. The temporary guardianship was extended several times, twice by agreement of the parties. Both parties obtained new counsel. New counsel for the appellee guardians filed an amended petition for guardianship on September 10, 2015 and a hearing was conducted on September 29, 2015. Before testimony was taken, the appellant's new attorney called to the court's attention that the original emergency petition for guardianship had not been signed before filing, although it had been verified by the petitioners. The attorney orally moved to dismiss the proceedings because the original emergency petition, although verified by the appellee grandmother, had not been signed by appellant's then-attorney, which the current counsel claimed resulted in the court's being without jurisdiction. The Court of Appeals discussed the applicability of Rule 11 of the Arkansas Rules of Civil Procedure, which provides, in part, that "if a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant." The Court noted that a guardianship proceeding has been deemed a "Special Proceeding" within the meaning of Arkansas Rule of Civil Procedure 81. Therefore, the Rules of Civil Procedure do not apply when the statute governing the proceedings creates a different procedure. The appellant claims that the guardianship statutes do not have a provision excusing the signature of a litigant or his attorney from the original petition. The Court said that that Ark. Code Ann. Section 28-65-207 (Repl. 2012), likewise does not provide that an attorney must sign a petition, or what would happen if a pleading is not signed. It does not address signature requirements at all. The Court discussed additional built-in protections above and beyond Rule 11 signature

requirements. The Court noted that Rule 11 even provides steps to be taken if a party fails to sign a pleading, including giving an attorney the opportunity to sign the pleading once given notice of the omission. The Court of Appeals held that it was unnecessary for the trial court to follow the remedial procedure set out in Rule 11 in this case because, at the time of the hearing, the issues related to the facts pled in the unsigned pleading were properly before the trial court and were tried pursuant to the subsequently-signed amended petition. The second issue was based upon the appellees' failure to serve or to provide notice to the father of the children and the fact that the circuit court never found the children's father unfit. The Court of Appeals said that constitutional rights are personal in nature and may not be raised by a third party. Therefore, the Court declined to recognize standing by the appellant mother of the children on behalf of the father for the purposes of service, notice, or the fitness issue. The decision was affirmed. (Cooper, T.; No. CV-16-120; 12-14-16; Gladwin, R.)

Martini v. Price, 2016 Ark. 472 **[adoption]** The appellant appeals from a final decree granting adoption to his ex-wife's spouse of the appellant's daughter and former stepson without appellant's consent. According to the parties' divorce decree, the appellant stood in loco parentis to his stepson. The circuit court found the appellant's consent to the adoptions of both children unnecessary because he had failed for a period of at least one year without justifiable cause to communicate with the children. The appellant argued that the circuit court erred in finding that his consent was not necessary for the adoption of both children and by finding that it was in the best interest of his former stepson to be adopted by his ex-wife's current husband. The Supreme Court reviewed the facts of the case, including that the appellant was under an order of protection for one year that barred him from contact with his then-wife. A second order of protection barred him from contacting her for an additional period. Neither barred him from contact with the children. The Court noted that, in reality, the orders did prevent his contacting the children to avoid violating the order that he not have contact with his wife. After she divorced him, he continued to make attempts to have contact with the children, but his ex-wife obstructed those attempts. He had two supervised visits with the children pursuant to the divorce decree, and he attended three family-therapy sessions until the therapist reported that she did not believe them to be in the children's best interest because of the appellant's behavior. An email account was created for appellant's communication with the children. After three emails, the appellee mother had a heated exchange with appellant's probation office, which gave the appellant concerns that she was trying to set him up. She gave him an address to her at the Department of Human Services. Because he did not know that she worked there, he thought they were a go-between and he would not contact her there. He tried to set up visitation through Skype, but was told by both his attorney and his probation officer that he risked violating the no-contact order. The Supreme Court held that the circuit court's finding that appellant's consent was not required for the adoption of his daughter was clearly erroneous, and it reversed and dismissed the granting of that adoption. About the adoption of his stepson, the Supreme Court said that he is not that child's parent. The consent of one acting in loco parentis to a child is not required under section 9-9-207. Therefore, the appellant has no statutory right to withhold consent to the adoption of his stepson. Although he complains that the children will have two different fathers with parental rights and obligations, the Court said he could have adopted his stepson while the parties were married. He did not, so he cannot now be heard to complain that his ex-wife's current spouse wants to adopt him. The circuit court's finding that adoption by the stepfather is in that child's best interest is not clearly erroneous and is affirmed. The decision

was affirmed in part and reversed and dismissed in part. (Foster, H.G.; No. CV-15-1045; 12-22-16; Wynne, R.)

FEBRUARY 2017

DOMESTIC RELATIONS

Potts v. Potts, 2017 Ark. 33 **[divorce—property division, modification of custody, and modification of visitation without a hearing]** The appellee husband filed a complaint for divorce, for joint custody of the parties' only child, and for an equitable distribution of the parties' assets and liabilities. The appellant wife answered and filed a counterclaim for divorce, for sole custody of the child, and for child support. She also requested the court to determine property rights and the allocation of debts, unless otherwise agreed upon by the parties. In an amended complaint, the appellee sought sole custody of the child and claimed that a home he had acquired before marriage should be awarded to him as nonmarital property. The circuit court granted the appellant temporary custody of the child, set visitation for the appellee father, and ordered him to pay child support. At a final hearing, the parties announced that they had settled the custody issue and they stated their agreement into the record. Among other things, the agreement provided if either parent willfully created conflict to disrupt the parties' joint custody arrangement, the circuit court may deem such behavior a material change in circumstances that may result in an order of primary custody to the non-disruptive parent. With the court's permission, the parties reserved the property issues and agreed to work on a settlement. The husband offered testimony on residency and his grounds for divorce. The circuit court stated that it would sign a decree approved by the parties. Before a decree was entered, the appellee father filed a motion to modify the joint-custody arrangement, based upon her alleged non-cooperation, bad faith, and other transgressions. He claimed that he was entitled to sole custody pursuant to the agreement, and he submitted an affidavit in support of his accusations. In her response, the appellant denied the allegations and claimed that he was the one creating conflict because he was dissatisfied with the terms of the agreement because she had been keeping the child while he was at work.

The parties, through their respective counsel, and the circuit court exchanged at least seven letters back and forth between the three of them discussing the case. Along the way, the court entered an order granting the appellee father sole custody of the child, based upon the mother's repeated refusal to allow him to make up his missed time when she kept the child during periods of his custody. In the last letter described in the Supreme Court's opinion, the appellee's counsel attached two proposed decrees. The circuit court entered the decree that the appellee preferred. The appellant filed a motion for reconsideration and to modify the decree, which the court denied. The initial appeal of this case was heard by the Court of Appeals; the Supreme Court accepted the appellant's petition for review. The Supreme Court held that a circuit court may not resolve contested factual issues by dispensing with a hearing and accepting the position offered by one party over the other party's objection. It also held that the circuit court erred by rendering decisions regarding custody and visitation without a hearing. The Court reversed and remanded on the issues of the division of property, debts and custody. (Spears, J.; No. CV-16-10; 2-16-17; Goodson, C.)

Hortelano v. Hortelano, 2017 Ark. App. 98 **[divorce—child custody]** The issue in this case was which parent should be the primary custodial parent in a joint custody award. The Court of Appeals held that the circuit court did not clearly err in awarding the parties joint custody with

the mother being the primary custodial parent. Reviewing the testimony of the parties and the circuit court's superior position to judge the credibility of the witnesses, the Court said it was not left with a definite and firm conviction that a mistake had been made, and it affirmed the custody award. (Gray, A.; No. CV-15-193; 2-22-17; Abramson, R.)

Boyd v. Crocker, 2017 Ark. App. 108 **[child support]** The circuit court determined the appellant father's child support obligation by imputing income to him. He contends on appeal that the court erred as a matter of law in its application of the "net-worth method" of calculating income for a self-employed payor. The evidence showed that the appellant is a self-employed farmer. The appellee mother of the child alleged that the appellant lived an extravagant lifestyle, whereas he contended that his monthly income for child-support purposes was $3,500, based upon his affidavit of financial means. Evidence was presented of his bank records, tax returns, and lifestyle. Bank records from his family's farming business for nearly two years, bank records from his personal checking account indicating deposits and withdrawals, and tax returns were introduced, evidence was presented about his lifestyle: his building a house on land he owned and paying cash for it, purchase of a new truck, a camper and an ATV, the sale of a boat, a four-wheeler and a house in Paragould. He testified that he used his personal checking account to pay expenses for a housekeeper, truck accessories, boat insurance, lake visits and hotel rooms, payment on several vehicles, construction of his house, and, eventually, child support payments of $400 per month pursuant to a temporary order. Based upon the evidence, the circuit court imputed monthly income of $11,105 to him and set child support at $1,606 per month. In discussing whether the circuit court erred in the methodology in calculating his income, the Court gave an overview of pertinent provisions of Administrative Order No. 10 and *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007), which the Supreme Court references in Administrative Order No. 10. The Court of Appeals concluded that the best evidence the court had was the appellant's bank records, and that it considered two years' worth of information that they provided, as well as the factors set out in Administrative Order No. 10, to reach a realistic assessment of his income. Based upon the record, the Court did not find the circuit court's approach and conclusions to be clearly erroneous. The decision was affirmed. (Honeycutt, P.; No. CV-15-1058; 2-22-17; Whiteaker, P.)

Emis v. Emis, 2017 Ark. 52 **[jurisdiction--sufficiency of the notice of appeal]** The appellant mother of the child appealed the circuit court's changing custody from her to her former husband, the appellee. The case initially was filed in the Court of Appeals. That court affirmed without reaching the merits based upon its finding, among other things, that the notice of appeal was fatally deficient as to the custody issues for failure to designate the final custody order. The Supreme Court granted review and concluded "that the notice of appeal substantially complies with our rules and therefore does confer appellate jurisdiction…." The Court said that the notice of appeal was timely as to the final order and that the appellee suffered no prejudice from the failure to reference the final order. The Court held that the notice substantially complies with Rule 3(e) and is therefore not fatal to appellant jurisdiction. Having decided that threshold issue, the Supreme Court vacated the Court of Appeals opinion and remanded to the Court of Appeals for further consideration. (Welch, M.; No. CV-16-821; 2-23-17; Wynne, R.)

PROBATE

Pardew v. Arkansas Dept. of Human Services, 2017 Ark. App. 70 **[Adult Maltreatment Custody Act]** The circuit court awarded long-term protective custody of the appellant to DHS

pursuant to the Adult Maltreatment Custody Act, Ark. Code Ann. Sections 9-20-101, et seq. The appellant argued that the trial court erred in ordering custody to DHS because it was not established that she was an endangered adult requiring such placement. The Court of Appeals affirmed, outlining the evidence before the circuit court supporting its decision, including its specific finding that the petitioner was unable to provide for her own protection from maltreatment. See discussion below of Concurring Opinion in *Howard v. Arkansas Department of Human Services*, 2017 Ark. App. 68. (Herzfield, R.; No. CV-16-680; 2-1-17; Hixson, K.)

Howard v. Arkansas Dept. of Human Services, 2017 Ark. App. 68 **[Adult Maltreatment Custody Act]** The circuit court granted long-term protective custody of the appellant to DHS. On appeal, the Court of Appeals found that DHS attempted to contact appellant's known family through phone numbers that she had for both of them, and that neither called her back or attempted to assist in appellant's care. The evidence was that he had been left alone in his home and that he required 24-hour care. The Court also found that the testimony presented regarding the appellant's assets showed that appellant's placement in an institution was the least restrictive alternative that met his needs. He needs continuous care; his home was unsafe for his return; no willing family members offered him the necessary level of care. Although he testified that he had additional assets, the circuit court is in the best position to determine the credibility of witnesses. The appellant's due process argument cannot be considered because he never raised it below or got a ruling on it from the circuit court. The decision was affirmed.

In a concurring opinion, one Court of Appeals' judge agreed with the results reached in four similar cases, both on their facts and their legal challenges. The concurrence noted, however, that because of failures of attorneys and courts below, the Court of Appeals was unable to reach legal issues of concern and, thus, "meaningful due process may have been effectively denied to these four appellants, and due to our limited standard of review, we are unable to address the issues." The bench and bar was put on notice that simple due process requires that cases have a meaningful hearing with notice to family, a zealous representation of the impaired adult, and the opportunity to present all relevant evidence, including the preservation of the right to appellate review. (Hendricks, A., No. CV-16-595; 2-1-17; Hixson, K.)

Brown v. Arkansas Department of Human Services, 2017 Ark. App. 67 **[Adult Maltreatment Custody Act]** The appellant appeals a circuit court order placing her in the long-term protective custody of DHS. She argues on appeal that her family was not provided notice of the proceedings and that her lawyer was erroneously prevented from cross-examining a witness about her assets. Because neither issue was preserved for appeal, the Court of Appeals affirmed. The issue of no notice to the family was not made to the trial court. The second issue was a challenge to the trial court's ruling that she could not cross-examine the nurse-witness about any additional assets the appellant may have beyond those discussed during her testimony on direct examination. First, the Court said the issue was not preserved because the appellant's counsel objected, she provided no argument as to why the testimony should be presented, such as the arguments she made on appeal: that the court misinterpreted the statute and, alternatively, that the statute as interpreted is unconstitutional. Second, the Court will not reverse a ruling on the admission of evidence without a showing of prejudice, and appellant cannot demonstrate prejudice here from the exclusion of the testimony. See discussion above of Concurring Opinion in *Howard v. Arkansas Department of Human Services*, 2017 Ark. App. 68. (Hendricks, A.; No. CV-16-591; 2-1-17; Vaught, L.)

Foster v. Estate of Collins, 2017 Ark. App. 65 **[guardianship; fraud; constructive trust; laches]** The appellant was injured in an automobile accident in 1957, after which her father was appointed her guardian. He entered into a settlement on her behalf. She contends that her father used the proceeds of the settlement to pay off the family farm and, when it was sold years later, those proceeds were used to purchase two certificates of deposit that were placed in the name of appellant's mother, Deleta Collins. She claimed that after her father died in 1990, two of the appellees, her siblings, obtained the CDs by fraud, duress, undue influence, and breach of fiduciary duty. She requested that the court impose a constructive trust. The circuit court, after numerous proceedings, dismissed her action based upon laches, finding that any claim arising from the alleged misappropriation of funds in the 1950s was barred. The Court of Appeals noted that the issue of laches is one of fact, which will not be reversed unless clearly erroneous. The Court set out what it called appellant's "lengthy and somewhat confusing" arguments from her brief and found that the circuit court's decision must be affirmed. The appellant did not preserve her issues for review, or did not analyze how her authority applied to her case, or did not present cogent legal argument for her allegations that the circuit court's decision regarding laches was erroneous. The Court said that it will not make a party's argument for him or her. The Court also declined to consider her final "points that are incomprehensible and lacking in convincing authority or argument." (Smith, P.; No. CV-15-755; 2-1-17; Whiteaker, P.)

Nicholson v. Arkansas Department of Human Services, 2017 Ark. App. 52 **[Adult Maltreatment Custody Act]** This appeal is from a decision by the circuit court placing the appellant in the long-term protective custody of DHS. The appellant raised issues on appeal that were raised in previous cases above based upon the Adult Maltreatment Custody Act. In this decision, the Court of Appeals set out the statutory basis for DHS's authority to take maltreated adults into custody, both on an emergency and a long-term basis. The appellant raised the issue on appeal of no notification of her family and no proof presented by DHS that no caregiver was willing and able to provide her with the care she required. Her alternative argument was that there was no indication that her family members had been unable to assist in collecting entitlements to provide the care she required. However, these points were not raised below and were not preserved for review on appeal. The appellant also raised the issue on appeal that the trial court erred in limiting counsel's inquiry into the assets or available benefits and to prohibit additional questions on the subject on cross-examination. Although she contends on appeal that section 9-20-108 provides that the Public Defender Commission shall be appointed for an indigent maltreated adult to represent the maltreated adult "as to the issue of deprivation of liberty, but not with respect to issues involving property, money, investments, or other fiscal issues," she did not argue the statutory interpretation for the trial court to have an opportunity to rule on it, so that argument is not preserved for appellate review. The Court found that the circuit court had not clearly erred in placing the appellant in the long-term protective custody of DHS. See discussion above of Concurring Opinion in *Howard v. Arkansas Department of Human Services*, 2017 Ark. App. 68. (Hendricks, A.; No. CV-16-594; 2-1-17; Virden, B.)

Johnston v. Arkansas Department of Human Services, 2017 Ark. App. 51 **[Adult Maltreatment Custody Act]** The appellant in this case, after the circuit court ordered him into the long-term protective custody by DHS, raised the same issues as in other cases set out above: (1) that DHS failed to present evidence that his family was notified as required by section 9-20-111, and (2) that the circuit court erred in limiting counsel's cross-examination regarding appellant's assets and finances. The appellant came to the attention of DHS through a hotline call and an

investigation ensued, resulting in his being taken into custody. On the issue that no evidence was presented that the appellant's family members had received notice, the issue is not preserved for appeal. His alternative argument, that no evidence was presented concerning his children's ability to collect entitlements or income available to him, was not raised below and is therefore not considered on appeal. On the issue of limiting cross-examination of the nurse regarding his assets or available benefits, the Court of Appeals interpreted section 9-20-108(f)(1) and said that because his liberty interest relates directly to his financial assets, questioning should have been allowed on that matter. However, based upon the court's ruling and the response of the nurse who was testifying, the Court said the appellant cannot demonstrate prejudice. Because the circuit court made the requisite findings, the Court of Appeals could not say that the court clearly erred in entering an order placing the appellant in the long-term custody of DHS. (Hendricks, A.; No. CV-16-592; 2-1-17; Virden, B.)

MARCH 2017

DOMESTIC RELATIONS

Westin v. Hays, 2017 Ark. App. 128 **[change in custody]** This case originated as an agreed order of paternity in 2010 following the birth of the parties' child, in which the appellant mother was awarded sole custody. In 2015, the appellee father sought custody based upon changed circumstances. The appellant raised two points on appeal. The first was that the court erred in allowing evidence based upon facts not pleaded, but the appellant did not raise her due-process argument below, and thus, did not preserve it for appeal. The second point on appeal was that the court clearly erred in finding that change in custody to the appellee father was in the best interest of the child. However, the court stated in general the factors that should be considered and ruled that, considering all the evidence, the change was in the best interest of the child, and the Court of Appeals did not find clear error in that ruling. The decision was affirmed. (Fowler, T.; No. CV-16-410; 3-1-17; Murphy, M.)

Medeiros v. Medeiros, 2017 Ark. App. 122 **[spousal support; UIFSA]** This is the second time this case has been before the Arkansas Court of Appeals. *Medeiros v. Medeiros (Medeiros I)*, 2016 Ark. App. 522. In this appeal, the appellant ex-wife appeals from a circuit court order barring enforcement of her claim of spousal support from the defendant that was ordered in the parties' 1991 California divorce decree, which she registered in Arkansas in 2014 pursuant to UIFSA. She first argues that the trial court erred in allowing the appellee to challenge the registration and then in applying laches to bar her enforcement of the decree. The Court of Appeals noted that UIFSA provides for the proper registration of a decree and for enforcement of a decree from another state. Here, the Court of Appeals found no record that the appellee was ever served with notice setting forth the very specific UIFSA requirements. In *Medeiros I*, the Court had noted that while the record indicated that appellee was served with a "Notice," no copy of the document was in the record, nor did the parties settle and supplement the record with documents served on him when the case was initiated. The record still does not include the missing "Notice." The Court held that he was never served with notice required under UIFSA specifying correct time limitations or procedures for contesting the registration. Because he was not properly notified, the Court held the California support order was not confirmed by operation of law. Therefore, the trial court's finding that his response would be treated as timely and he would be allowed to present his defenses was correct. Arkansas Code Annotated section 9-17-607. Under the same statute, the trial court was also correct in applying the Arkansas law of

laches as a defense to the support order. The appellant waited twenty-five years to initiate a proceeding to collect spousal support. There was also evidence that the appellee never claimed child support from her in those twenty-five years, even though that was a remedy available to him, which is now barred. For twenty-five years, there was no evidence that she ever intended to assert her alimony claim, although the parties interacted throughout that time. The trial court did not err in finding that he successfully established the defense of laches. The decision was affirmed. (Webb, G.; No. CV-16-168; 3-1-17; Whiteaker, P.)

Johnson v. Young, 2017 Ark. App. 132 **[child support; material change in circumstances]** The parties divorced in 2005. Under their settlement agreement, the appellant mother was given primary custody of the two children and the appellee father was ordered to pay $800 child support a month, with the parties to divide equally the children's tuition and daycare expenses. In 2014, the appellant filed a motion to change venue and for contempt and modification of the previous child-support order. The Court of Appeals said that the Arkansas child support scheme is governed by Supreme Court Administrative Order No. 10, with its accompanying family support chart. The trial court's order must recite the amount of support required by the chart and recite whether the court deviated from that amount. Here, the circuit court did not use the correct method to calculate the appellee's income. The circuit court did not follow the approach mandated by Administrative Order No. 10 and *Tucker v. Office of Child Support Enforcement*, 368 Ark. 481, 247 S.W.3d 485 (2007). The court found a "true income of $3,300 a month. His tax returns, his own testimony, and the testimony of his father reflected an amount considerably more than that. In fact, he paid more in federal income taxes alone than his purported annual salary. He provided no proof of his true income and admitted that he signed his tax returns. His own affidavit of financial means reflects a monthly income of $6,000. The Court of Appeals reversed and remanded for findings consistent with its opinion. On the second point, that the circuit court clearly erred in not modifying the appellee's child-support payments, the Court noted that the question whether a material change in circumstances has occurred is governed by Arkansas Code Annotated section 9-14-107(a)(1) (Repl. 2015). The Court said that even if the payor's income has not changed that much, there are other factors that may lead to a material change in circumstances, such as passage of time, remarriage, the children's ages, income changes, the parties' finances, debts, ability to meet current and future obligations, and the child-support chart. Because it is not clear from the record whether the trial court found a material change of circumstances, the Court remanded to the circuit court to make a finding. (Morledge, C.; No. CV-16-478; 3-8-17; Abramson, R.)

Harley v. Dempster, Sr., 2017 Ark. App. 159 **[standing; child support]** This opinion was substituted on the grant of a rehearing in the Court of Appeals. The action was originally filed as a complaint against the appellee for the support of his two minor children with the appellant. The plaintiff in the action was the Office of Child Support Enforcement, and the appellant mother of the children was listed as the assignor. He was served with the petition, but did not answer or appear at the hearing. The circuit court ordered him to pay child support through the Child Support Clearinghouse. He did not pay his child support, and in March 2015, the OCSE filed for modification of the amount due and sought a judgment for arrears, over $26,000. The appellee was served, but failed to file an answer again. The court issued an order of modification and found that he would receive credit toward the arrears of $6,000, an amount paid by his parents voluntarily for private-school tuition for the children. The appellee herein filed an appeal was filed and a decision issued by the Court of Appeals on December 7, 2016 by a nine-judge

panel dismissing the appeal upon finding that the appellee did not have standing to appeal the lower court's decision. Three dissents were filed with the majority opinion. That opinion is vacated and this opinion is substituted as the majority opinion. Neither party raised the issue of standing on this appeal. However, the Court of Appeals noted that the Arkansas Supreme Court has raised the issue of standing on its own, citing *Swindle v. Benton County Cir. Ct.*, 363 Ark. 118, 211 W.W.3d 522 (2005). The Court of Appeals said that, in light of its previous decision and its grant of rehearing, it must be discussed. The Court looked at whether the appellant mother was a party, and second, whether she had a pecuniary interest in the litigation to give her standing to bring the appeal. Noting that throughout the case brought by OCSE, she was listed as "OCSE Assignor" in the case style, along with OCSE as the plaintiff and the appellee Dempster as the defendant. The Court noted that many cases have more parties than just one plaintiff and one defendant. Setting out its reasons, the Court concluded that she was a party. Therefore, if she had a pecuniary interest in the income, she also would have standing to bring this appeal. The Court said the custodial parent of children owed child support has a pecuniary interest in the amount of child support. After deciding those preliminary issues, the Court of Appeals considered the issue of the reduction in arrears for the credit given for the paternal grandparents' payment of the children's Montessori School tuition. The appellant alleged that the trial court erred in reducing the amount of delinquent support by that amount. The Court said her arguments may have been persuasive but the Court was not able to address them. A setoff is an affirmative defense that must be raised in a responsive pleading or it is waived. Appellee did not file a responsive pleading at all, but neither the appellant nor OCSE objected on that ground. Therefore, the argument is not preserved for the Court's review. The same applies to her second point, that the trial court abused its discretion by allowing a setoff because it did not conform to Arkansas Code Annotated section 9-14-236. She did not raise the applicability of the statute below, nor did she obtain a ruling from the trial court that would allow the appellate court to review the decision. She also raised the issue that the trial court's decision was clearly erroneous. The evidence was that the appellee's parents paid the $6,000 tuition as volunteers because they wanted their grandchildren to attend the school. There was some evidence that the appellee, who paid no child support, was unaware of his parents' generosity. When taken to court two times, he did not answer the summons either time. The appellant relied on government assistance to care for her children. The tuition was not child support. There is evidence that the grandparents did not even know their son did not support his children. The tuition payments were not made by the appellee and were not made to the appellant or the OCSE. The Court found the trial court's credit of $6,000 was clearly in error and an abuse of discretion, and the Court reversed and remanded to the trial court for entry of an order consistent with its opinion that complies with Arkansas Code Annotated section 9-14-233, which governs arrearages. (Smith, V.; No. DV-15-918; 3-8-18; Virden, B.)

Smith v. Murphy, 2017 Ark. App. 188 **[order of protection—corporal punishment]** The State District Court Judge, who heard this case on referral from the Administrative Judge in the Circuit, entered an order of protection for five years against a noncustodial father for one instance of corporal punishment of his four-year-old with a leather belt, which occurred when the child visited his father in Texas. The issue on appeal was whether the evidence was sufficient to support the entry of the order. The Court of Appeals held that it was and set out evidence that described the injury "that spanned from the child's upper-back to his knees and caused some bruising and mental anxiety." The mental anxiety included the child's saying that he wanted to kill himself and his being placed in a facility for inpatient mental-health treatment. The case has

a good discussion of Arkansas case law on what has and has not been found to be domestic abuse under the Domestic Abuse Act. The Court of Appeals preliminarily discussed the jurisdiction of a State District Court Judge when hearing a case on referral from the Administrative Judge in the circuit under Arkansas Supreme Court Administrative Order No. 18. The decision was affirmed. (Casady, S.; No. CV-16-784; 3-29-17; Harrison, B.)

Cooper v. Kalkwarf, 2017 Ark. App. 200 **[child custody--relocation]** The appellant father appeals the order granting the appellee mother's request to relocate to Texas with the parties' minor son. For reversal, the appellant contends the trial court erroneously applied the presumption in favor of relocation as set out in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003). The Court of Appeals agreed and reversed the decree. When the parties divorced, they entered into an agreement for custody, incorporated but not merged into the decree. In interpreting the agreement, the circuit court noted that, under the agreement, the appellee wife would have primary physical custody and that the parties would share joint, legal custody, and that the father would have reasonable and liberal visitation as set out in the agreement. The circuit court considered whether *Hollandsworth* or *Singletary v. Singletary*, 2013 Ark. 506, 431 S.W.3d 234 applied. The court said it looked to the contract between the parties, the testimony of the parties about their intent, and the conduct of the parties in reaching its conclusion, finding that the parties did not share true joint custody, that the appellee mother was the primary custodian, and that it used the *Hollandsworth* factors to decide the issue of relocation, presuming that it is in the child's best interest to relocate with the primary custodian. The Court of Appeals held that the court erred in relying on *Hollandsworth* and that the trial court's result was not correct for the wrong reason. The Court said that under *Singletary*, a parent wishing to relocate in a joint-custody situation must first show a material change in circumstances, and that appellant did not plead or show such a change. Because she failed to show such a material change in circumstances, the decision was reversed. (Smith, V.; No. CV-16-897; 3-29-17; Brown, W.)

APRIL 2017

DOMESTIC RELATIONS

Fudge v. Dorman, 2017 Ark. App. 181 **[change in custody—material change in circumstances; best interest]** The circuit court found a change in circumstances to justify a change in custody from the appellant father to the appellee mother, who the circuit court found had changed her circumstances positively to remedy the reasons the father was awarded custody in the first place. The Court of Appeals found that the circuit court failed to make specific findings of a material change in circumstances. Further, the Court said, a change in circumstances of the noncustodial parent is not alone sufficient to justify a change of custody. In addition, the court put the interests of the mother before the best interest of the children. The decision was reversed and remanded. (Guthrie, D.; No. CV-16-651; 3-51-17; Murphy, M.)

Poland v. Poland, 2017 Ark. App. 178 **[mootness; order of protection—sufficiency of the evidence]** The appellant appealed from an order of protection that prohibited him from contacting his wife and limited his contact from his ten-year-old daughter for one year, contending that insufficient evidence supported the order that he committed domestic abuse against either of them. The Court of Appeals decided, on its own motion as a threshold matter, the issue of mootness. By the time the case was presented to the appellate court, the order of protection had expired. The Court held that the appeal is not moot "because of the collateral

consequences that attend a finding of domestic abuse," quoting the Court in a previous opinion that "although the issuance of an order of protection is not a criminal matter, 'criminal or not, there is and should be a degree of opprobrium attached to a finding that a person has committed acts of domestic abuse.'" The Court said that a case generally becomes moot when a controversy ceases to exist between the parties at any time in the case, including on appeal. Two recognized exceptions to the mootness doctrine involve issues capable of repetition that evade review and issues that raise consideration of substantial public interest which, if addressed, would prevent future litigation. In this case, the court introduced a third exception, collateral consequences, which had been adopted in a previous criminal felony case in which the sentence was served before the appeal was submitted. The plurality noted that expired orders of protection may have ongoing collateral legal consequences, such as the requirement to disclose in a future petition any prior filings for an order of protection. It can also have consequences in a child-custody dispute. The Court also found that the evidence was sufficient and affirmed the order of protection. There was a vigorous dissent to this 5-4 decision. (Reif, M., No. CV-16-414; 3-15-17; Hixson, K.)

Wornkey v. Deane, 2017 Ark. Ark 176 **[order of protection—sufficiency of the evidence]** The Court of Appeals found that the victim's testimony, to which the circuit court gave greater weight, is sufficient evidence from which the circuit court could reasonably find that the appellant committed domestic abuse by physically harming and assaulting the appellee and inflicting fear of imminent physical harm, bodily injury or assault on her. The Court held the circuit court's decision to enter a final order of protection was not clearly erroneous, and it affirmed. (Cottrell, G.; No. CV-16-481; 3-15-17; Vaught, L.)

Baker v. Office of Child Support Enforcement, 2017 Ark. App. 173 **[modification of child support--abatement]** The appellant attempted to get an abatement of his child support obligation and child-support arrearages based upon a material change in circumstances. The appellant asserted that he had been incarcerated since November 2013 with no means to pay child support, and that one child had reached majority and graduated from high school. Citing *Reid v. Reid*, 57 Ark. App. 289, 944 S.W.2d 559 (1997), a case in which the payor also requested abatement during his period of incarceration, and in which the Court had relied upon the clean-hands doctrine, the Court noted that the *Reid* Court found that the incarceration was the appellant's own fault and thus that he had come to court with unclean hands. The Court said that although a finding of inability to earn can support a reduction in child support, the circuit court is not required to reduce those obligations, particularly where the obligor is deemed at fault for causing his own inability to work. Also, the appellant did not argue the issue of his child's turning eighteen and graduating from high school in the argument section of his opening appellate brief, the Court did not consider it because it was raised for the first time in a reply brief. An appellee must have an opportunity to respond to an appellant's arguments for reversal. The decision was affirmed. (Cooper, T.; No. CV-16-613; 3-15-17; Klappenbach, M.)

McCrillis v. Hicks, 2017 Ark. App. 221 **[joint custody; visitation; in loco parentis]** The parties were formerly domestic partners, now engaged in a custody, visitation, and child-support dispute over the appellant's biological child. The circuit court granted the appellee visitation and joint custody pursuant to a finding that she stood in loco parentis to the child; found that appellant was equitably estopped from denying the appellee's visitation with the child; and ordered that child-support payments from appellee be placed in an educational trust. On appeal, the appellant contended the court erred in those findings and orders. The Court of Appeals affirmed the circuit

court's finding that the appellee stood in loco parentis to the child, reversed the court's award of joint custody, and affirmed on the issue of visitation. The Court affirmed that appellant is equitably estopped from denying appellee visitation, reversed the order that child support be paid into an educational trust, and remanded the issue of child support be determined consistent with its opinion. On the constitutional issue of custody, the Court of Appeals cited *Troxel v. Granville*, 530 U.S. 57 (2000), for the point that the Due Process Clause of the Fourteenth Amendment protects the rights of parents to direct and govern the care, custody, and control of their children. There was no finding of parental unfitness on the part of the appellant. In fact, the appellee made no finding that the appellant was unfit and praised her capability as a mother. The circuit court found her to be fit. Therefore, in accordance with caselaw, the Court of Appeals held that the circuit court's decision to award custody to the appellee was in error, prompting the reversal on that point. The issue of visitation, however, was another matter. The Court based its decision on the circuit court's finding that the appellee stood in loco parentis to the child and determined that visitation was appropriate, citing *Bethany v. Jones*, 2011 Ark. 67, 378 S.W.3d 731. The Court noted that the appellant urged it to reverse *Bethany*, but noted that the Court of Appeals "is not at liberty to overturn a decision of the Arkansas Supreme Court." (Compton, C.; No. CV-16-612; 4-12-17; Virden, B.)

Montez v. Trujillo, 2017 Ark. App. 220 **[change of custody—material change in circumstances; modification of child support]** The circuit court denied the appellant father's motion to change custody of his children and granted the appellee mother's motion to modify child support. Both parties filed motions to modify custody. At the time of the divorce, the parties entered into a property-settlement and child-custody agreement, agreeing to joint custody of their two children. At the hearing on the motions, both parties testified in detail, recounting, among other things, their inability to communicate with each other or to get along. They testified about difficulties with the daughter's behavior when living with her mother and about the fragility of their son, whose demeanor had changed since the divorce. Both children were in counseling. After the hearing, the circuit court found that neither party had established a material change in circumstances warranting a change in custody and that it was in the children's best interests for joint custody to remain in place. On the issue of child support, the court imputed income to the appellant and, considering the appellee's income, found that the appellant father should pay the mother $6,279 per month. The Court of Appeals said that when parties have fallen into such discord that they are unable to cooperate in sharing physical care of their children, this constitutes a material change in circumstances affecting the children's best interests. The Court held the circuit court clearly erred in finding that the appellant failed to establish a material change in circumstances warranting a change in custody. The Court reversed the award of joint custody and remanded to the circuit court for a custody award consistent with its opinion. The Court did not consider the appellant's argument concerning modification of child support, remanding that issue, also, to the circuit court. (Taylor, J.; No. CV-16-818; 4-12-17; Abramson, R.)

Li v. Ding, 2017 Ark. App. 244 **[child custody; child support]** The appellant appealed from appellant's petition to modify custody. The circuit court awarded joint custody and the appellant alleged error. He also alleged error in the amount of child support he was ordered to pay. The Court of Appeals said that an award of joint custody was improper. Even though joint custody is favored in Arkansas under Arkansas Code Annotated sec. 9-13-101, the Court said "our law remains that the mutual ability of the parties to cooperate in reaching shared decisions in matters

affecting the child's welfare is a crucial factor bearing on the propriety of an award of joint custody, and such an award is reversible error when cooperation between the parties is lacking." The circuit court found disagreements between the parties on school choice, different parenting skills, poor communication, and rigid thinking in both. The Court held that the finding that joint custody was in the children's best interest was clearly erroneous and reversed the custody award, making the appellant's child support argument moot. (Bryan, B.; No. CV-16-922; 4-19-17; Brown, W.)

Fitzgerald v. Calhoun, 2017 Ark. App. 235 **[child custody]** When the parties divorced, they were awarded Joint Legal Custody with the appellant mother being the "primary custodial parent." On appeal, her sole argument on appeal is that the circuit court, which ordered that the minor child should continue to attend the Monticello public schools, had divested her of her "educational decision-making authority." Her arguments were based upon the fact that she had moved from Monticello to Crossett with her new husband. She must drive the child about 45 minutes to school in Monticello each day and then drive farther to her job in McGehee, a total of three hours on the road each day. If he could attend school in Crossett, her husband and her family who lived there could help get him to and from school. Also, she was looking for a job in Crossett. The attorney ad litem recommended that the child remain in Monticello School. He is quiet and socially awkward. She was concerned that he had not made friends in Crossett. She was worried about a school change. She recommended that he spend equal time with both parents. "Because of the parents' deadlock, the circuit court resolved the impasse and decided that C.C. should remain in the Monticello public schools." The Court of Appeals said that, although inconvenient for the appellant mother, the decision is not clearly erroneous, especially given the fact that the child was quiet, socially awkward, and had difficulty making friends. The circuit court had the benefit of viewing the child's testimony about which school he preferred, and the Court of Appeals deferred to the circuit court's consideration of his best interest. It found no reversible error and affirmed the court's decision that he should remain in the Monticello Public Schools. (Johnson, K.; No. CV-16-913; 4-19-17; Harrison, B.)

Troutman v. Troutman, 2017 Ark. 139 **[child support]** This case was heard by the Supreme Court on a petition for review from the Arkansas Court of Appeals. The Supreme Court said that the calculations of the Court of Appeals conflicted with prior decisions of that court, granted the petition and considered the appeal as though it had been originally filed in the Supreme Court. The circuit court had reduced the appellee father's monthly child support, finding a material change in circumstances, based upon the appellant's business's treatment of retained earnings of a closely held Subchapter S corporation. The appellant is a general contractor, has a business in which he owns all the stock, and he testified that he used "completed projects" for his accounting method. Under Administrative Order No. 10, the appellant was a "self-employed payor" for purposes of determining his income. Both parties' accountants testified in the circuit court hearing about the appellant's income for the years in question. The Supreme Court held that the circuit court erred in finding a material change in circumstances and reversed and dismissed the "circuit court's…order changing…[appellant's]…monthly child supports payments retroactive to the filing of his petition." (Lindsay, M.; No. CV-16-144; 4-20-17; Hart, J.)

Acre v. Tullis, 2017 Ark. App. 249 **[relocation]** After a post-decree custody dispute in which each filed a motion to change custody, the parties entered into an agreed order that once their child entered kindergarten, the appellee mother would be the primary residential custodian during the school year and the appellant father would be the primary residential custodian during

the summer. Another section addressed the child's school district, and if the child should no longer attend school in the city or school district indicated, custody would be changed. The appellant moved for change of custody after learning that the appellee intended to move to Mississippi; she filed a petition to relocate a month later. The appellant also moved for contempt alleging that she owed child support. The circuit court entered a temporary order enforcing the agreed order and denied the parties' respective petitions for relief. In a final order, the court allowed the relocation to Mississippi and did not alter the custodial arrangement set out in the agreement. The court denied the motion for contempt, finding that no child support was owed. The appellant raised four points on appeal, each decided by the Court of Appeals as follows: (1) The circuit court failed to uphold the terms of the agreed order that contemplated a change of custody if the child did not attend certain school districts. The Court of Appeals said that the circuit court did not uphold the terms of the agreed order because the court found such an agreement unenforceable. The circuit court cited *Stills v. Stills*, 2010 Ark. 132, in its order. This is within the circuit court's authority. The Court agreed that the *Stills* case and its analysis applied to the instant case. (2) The circuit court incorrectly applied *Stills*, using the *Hollandsworth* presumption, instead of *Lewellyn v. Lewellyn*, 351 Ark. 346 (2002) and *Singletary v. Singletary*, 2013 Ark. 506, since the parties had joint custody. The Court of Appeals said the parties did not have joint custody. The testimony showed that the appellee was the primary custodian for 41 to 42 weeks per year. The circuit court clearly had the authority to review an agreement to ensure that it does not violate Arkansas law. (3) If the parties did not exercise joint custody, the appellee waived the presumption based upon her actions and the language of the agreed order, and that it was not in the best interest of the child to permit the relocation. The Court of Appeals said that when a contract is ambiguous on its face, the ambiguity may be resolved by looking at other parts of the contract and the parties' intent, as well as their conduct. Initially the parties agreed upon joint custody until their son began kindergarten. Then the mother would be primary residential custodian during the school year and the father the primary residential custodian during the summer. During the school year, the father would have visitation. The Court held that *Lewellyn* and *Singletary* are not applicable to this case. (4) Finally, the circuit court improperly denied the motion for contempt based upon the appellee's failure to pay child support. The Court agreed with the circuit court's finding that the appellant's interpretation and argument were contrary to the agreement, and that the appellee mother paid child support until she became primary custodian for three-quarters of the year when the child began kindergarten. The decision was affirmed. (Foster, H.; No. CV-16-986; 4-26-17; Abramson, R.)

Mossholder v. Coker, et al., 2017 Ark. App. 279 **[guardianship of a child]** The appellant mother appealed the order entered by the circuit court awarding guardianship of her two children to their paternal grandmother. She alleged three errors on appeal: (1) the guardian did not properly intervene; (2) she was unsuitable to be guardian; and (3) she failed to prove that the mother was unfit. On the first issue, the court, the Court of Appeals said that the guardian did not file a written motion to intervene, as provided in Rule 24(c) in the Arkansas Rules of Civil Procedure. However, she orally requested custody of the children in a temporary hearing on custody in the child's parents' domestic relations case. The circuit court allowed the pleadings to conform to the proof, stated on the record that she was permitted to intervene in the case, and awarded her custody. She subsequently filed for guardianship as an intervenor. The Court said the circuit court did not abuse its discretion in allowing the pleadings to conform to the proof presented at that hearing, the court subsequently confirmed that she had moved orally to intervene, and no

one complained. On the second point, whether the guardian was "unsuitable," the Court noted that this case had a long history. There were at least twelve DHS and two Faulkner County Sheriff's Office investigations instigated by the appellant alleging that the children's father had sexually abused them. All were found to be unsubstantiated. The children denied the abuse and revealed that their mother told them to lie about it. A psychologist who performed forensic evaluations of both parents and the children concluded that the father did not sexually abuse the children and that he did not have "pedophile tendencies." He also provided results of the appellant mother's personality test results which "were very elevated, which demonstrated psychopathic, paranoid, and 'hype-mania' tendencies." His diagnosis was "borderline personality disorder" and his opinion was that the test results "undermine[d] her allegations . . . almost completely." The children's therapist testified that much of the treatment she provided the children addressed their sadness and guilt about making false statements about their father at the request of their mother. She said the mother was a source of anxiety and distress for the children and that they were doing well in their grandmother's care, that they had a good relationship with her, and that it was in their best interest to remain in her care. The Court of Appeals said that the appellant's entire argument that the children's guardian is unsuitable is without merit and that the circuit court did not err in finding that she is a suitable guardian. The Court said there "wan an even larger mountain of evidence" that the mother was unsuitable. Finally, on the challenge that the guardian did not meet her burden of proving that the mother is unfit, the Court of Appeals said the guardian had no such burden. There is no requirement in the Probate Code that a parent be unfit before a guardianship can be entered. Under Arkansas Code Annotated, section 28-65-204(a), a parent of an unmarried minor, "if qualified and suitable," is preferred over all others for appointment as guardian of the person. In *Fletcher v. Scorza,* 2010 Ark. 64, the Supreme Court held that "the sole considerations in determining guardianship" under the statute are "whether the natural parent is qualified and suitable and what is in the child's best interests" and that "prior cases [that]suggest a standard of fitness or unfitness in guardianship proceedings involving the statutory natural-parent preference" were overruled. The Court affirmed the circuit court decision awarding guardianship of the children to the paternal grandmother. (Foster, H.; No. CV-16-29; 5-3-17; Murphy, M.)