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# CHILD SUPPORT ARREARAGES: WHAT STATUTE OF LIMITATIONS (IF ANY) APPLIES?

*Harry Truman Moore\**

## I. INTRODUCTION

“All agree that some statute of limitations must apply. The sole question is, ‘Which statute?’” *Brun v. Rembert*, 227 Ark. 241, 243, 297 S.W.2d 940, 942 (1957) (Harris, J.).

The May, 1994, issue of the *Family Law Section Newsletter*<sup>1</sup> contained the following boldface caveat at the end of the section concerning child support in the appellate court update: WHEN DETERMINING THE AMOUNT OF CHILD SUPPORT ARREARAGES OWED, CAREFULLY REVIEW THE CASE LAW ON THE STATUTE OF LIMITATIONS.

Never was such a warning more needed.

The warning is necessary because of the Arkansas Legislature’s response to federal directives concerning child support enforcement and establishment of paternity, and the Arkansas courts’ interpretation of those acts complicated what were once simple statutes of limitation. The language of the resulting enactments is duplicative, as it is replicated in the sections of the Arkansas Code governing divorce, paternity, and child support enforcement. In addition, these statute of limitation sections are impacted by the general lien revivor statute.<sup>2</sup>

This article reviews the statutes of limitation for child support established through divorce actions, paternity actions, or independent actions for support. The goal of the article is to provide a review of the applicable legislative acts and current statutory references as well as the cases interpreting both; the article concludes with some helpful suggestions for practioners.

## II. BACKGROUND: LEGISLATION AND APPLICABLE CODE SECTIONS

Prior to 1989, the statute of limitations for the collection of arrearages under divorce decrees was five years.<sup>3</sup> In the 1957 decision of *Brun v. Rembert*,<sup>4</sup> the Supreme Court of Arkansas struggled with the applicable statute of limitations in a child support collection case. Eventually, the court

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1. Family Law Section Newsletter, vol. IV, No. 1 (May 1994).
2. ARK. CODE ANN. § 16-65-501 (Michie 1987).
3. *Brun v. Rempert*, 227 Ark. 241, 243, 297 S.W.2d 940, 942 (1957).
4. *Id.* at 245, 297 S.W.2d at 943.

concluded that the "catch-all" five year statute of limitations applied, "since the order for child support is not a final decree as contemplated by the statute," but only "the right to a judgment."<sup>5</sup> This case did not address the question as to a "father's liability for support payments more than five years delinquent *but while the child is still a minor.*"<sup>6</sup>

In 1989, the General Assembly enacted Act 525 of 1989, which established a ten-year statute of limitations in all cases where the support of children is involved.<sup>7</sup> Substantial litigation followed as attorneys and courts attempted to determine the application of this act. Act 525 was repealed in its entirety in 1995.<sup>8</sup>

In 1991, the General Assembly established an equitable cause of action for the support of children and made the collection of existing orders of child support easier.<sup>9</sup> This section, as originally enacted, listed the persons entitled to bring an action for payment of child support. Act 870 of 1991 amended title 9, chapter 14, section 105 of the Arkansas Code adding a provision stating that actions filed under that chapter fourteen could be brought at any time *up to and including* five years from the date the child reaches the age of eighteen.<sup>10</sup> The section was drafted to apply retroactively to all child support orders in existence at the time, to all actions pending as of March 29, 1991, and to all those filed thereafter.<sup>11</sup>

A similar provision is found in title 9, chapter 10, section 109(a)(2) of the Arkansas Code with regard to paternity actions.<sup>12</sup> In paternity cases, the section allows the court to order the payment of support beyond the child's eighteenth birthday to address the educational needs of a child whose eighteenth birthday occurs before he or she graduates from high school, as long as the support is conditioned on the child's remaining in school.<sup>13</sup>

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5. *Id.*

6. *Id.*

7. 1989 Ark. Acts 525 (codified at ARK. CODE ANN. § 16-56-129 (Michie 1987) (repealed 1995).

8. *See* 1995 Ark. 1184, § 30.

9. *See* ARK. CODE ANN. § 9-14-105 (Supp. 1995).

10. ARK. CODE ANN. § 9-14-105 (Supp. 1995) (emphasis added).

11. *Id.*

12. ARK. CODE ANN. § 9-10-109(a)(2) (Supp. 1995).

13. *Id.*

### III. APPLICATION OF CHILD SUPPORT STATUTES TO RECENT ARKANSAS CASES

Arkansas courts have addressed the thorny issue of statutes of limitation in child support cases on multiple occasions. Due to a failure of the parties to properly raise the issue at the trial court level or a failure to provide a proper abstract of the record on appeal, however, the Supreme Court of Arkansas has refused to rule on the issue on three recent occasions. On the other hand, the dissenting opinion in the court's most recent opportunity for review should be examined carefully by any lawyer seeking to collect arrearages or wishing to make a record on the issue for appeal.<sup>14</sup>

The original case interpreting Act 525 of 1989 was *Sullivan v. Edens*.<sup>15</sup> In *Sullivan*, a mother tried to collect arrearages based on the ten-year statute of limitations. However, the Supreme Court of Arkansas held that title 16, chapter 56, section 129 of the Arkansas Code did not specifically repeal the prior statute of limitations, and the new statute did not operate retroactively to remove limitation on causes of action *already barred*.<sup>16</sup> Accordingly, the court found that the five-year statute of limitation applied to support payments due prior to the effective date of Act 525, and the ten-year statute of limitations applied to payments *accrued* after the effective date of the new Act.<sup>17</sup>

Following the *Sullivan* decision, the General Assembly attempted to enlarge the statute of limitations with the passage of Act 870 of 1991.<sup>18</sup> This Act amended title 9, chapter 4, section 105 of the Arkansas Code<sup>19</sup> by providing that any action may be "brought at any time up to and including five (5) years *from the date* the child reaches eighteen (18) years of age."<sup>20</sup> The Act also amended title 9, chapter 14, section 236 of the Arkansas Code such that an action could be brought "at any time up to and including five (5) years *beyond the date* the child for whose benefit the initial support order was entered reaches the age of eighteen (18) years."<sup>21</sup> Both statutes reflect that the sections applied to all actions pending as the date of passage of Act 870 and further "shall retroactively apply to all child support orders now existing."<sup>22</sup>

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14. Arkansas Dept. of Human Servs. v. Harris, 322 Ark. 465, 910 S.W.2d 221 (1995).

15. 304 Ark. 133, 801 S.W.2d 32 (1990).

16. *Sullivan*, 304 Ark. at 135, 801 S.W.2d at 33-34.

17. *Id.* at 135, 801 S.W.2d at 34.

18. Act of Mar. 29, 1991, 1991 Ark. Acts 2713.

19. ARK. CODE ANN. § 9-14-105 (Michie 1993).

20. ARK. CODE ANN. § 9-14-105 (Michie 1993) (emphasis added).

21. ARK. CODE ANN. § 9-14-236(c) (Michie 1993).

22. ARK. CODE ANN. § 9-14-105(f) & 9-14-236(e) (Michie 1993).

Act 870 was followed by *Johnson v. Lilly*,<sup>23</sup> which sought to use the 1991 statute of limitations. The mother filed her complaint on January 2, 1991, prior to the effective date of Act 870. When the complaint was filed, any cause of action against the father for arrearages on or before January 2, 1986, was barred.<sup>24</sup> The chancellor held that the General Assembly could revive the cause of action for those arrearages accruing before January 2, 1986, but the supreme court reversed.<sup>25</sup>

The court stated that it had long held that the General Assembly could amend the statutes of limitation affecting causes of actions *which are not yet barred*.<sup>26</sup> The court, however, also noted that, concurring with the majority of states, the General Assembly did not believe that the legislature could expand a statute of limitation so as to revive a cause of action already barred.<sup>27</sup>

The court also addressed the statute of limitations issue in *Green v. Bell*.<sup>28</sup> This case noted the distinction between statutes of limitations for support of children in paternity proceedings and divorce cases.<sup>29</sup> Prior to *Green*, the statute of limitations for support obligations of a putative father was three years.<sup>30</sup>

Both of these decisions predated Act 988 of 1985. Act 988 directed that the courts in paternity actions follow the same guidelines, procedures, and requirements applicable to child support orders entered in divorce actions.

The court then considered whether the directive in title 9, chapter 10, section 109 of the Arkansas Code would call into play Act 525 of 1989, which established a ten-year statute of limitations for enforcement of support. The court considered which statute of limitations would apply for living expenses paid by the maternal grandfather of the child in 1983.<sup>31</sup> Based upon either the old three-year statute of limitations traditionally applied to paternity cases, or the fact that the new ten year statute of

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23. 308 Ark. 201, 823 S.W.2d 883 (1992).

24. *Id.*

25. *Id.* at 203, 823 S.W.2d at 884.

26. *Id.* at 203, 823 S.W.2d at 885 (citing *Pinkert v. Lamb*, 215 Ark. 879, 224 S.W.2d 15 (1949)).

27. *Id.* at 203, 823 S.W.2d at 885 (citing *Wasson v. State ex. rel. Jackson*, 187 Ark. 537, 60 S.W.2d 1020 (1933); *Rhodes v. Cannon*, 112 Ark. 6, 164 S.W. 752 (1914); and *Couch v. McKee*, 6 Ark. 484, 1 Eng. 484 (1845)).

28. 308 Ark. 473, 826 S.W.2d 226 (1992).

29. *Id.* at 478, 826 S.W.2d at 229.

30. *Dozier v. Veasley*, 272 Ark. 210, 613 S.W.2d 93 (1981) and *Winston v. Robinson*, 270 Ark. 996, 606 S.W.2d 757 (1980).

31. *Green*, 308 Ark. at 478, 826 S.W.2d at 228-29.

limitations could not be applied retroactively, the court found it unnecessary to decide which statute of limitations would apply to paternity cases.<sup>32</sup>

*Chunn v. D'Agostino*<sup>33</sup> was the first case to interpret title 9, chapter 14, section 105 of the Arkansas Code following an action brought by children as opposed to a custodial parent. In *Chunn*, the plaintiffs were the natural children of the defendant. Their parents were divorced in 1973, and the children were subsequently adopted by their stepfather.<sup>34</sup> In 1991, the children sued their natural father for unpaid child support that had accrued prior to the entry of the decree of adoption. The trial court dismissed the action, stating that the child support action could not be pursued with respect to payments owed prior to 1984. The court so held because a five-year statute of limitations was in effect prior to 1984.<sup>35</sup> The chancellor relied upon *Sullivan v. Edens*<sup>36</sup> in holding that the revision could not increase the limitations period for a support claim which was already barred.<sup>37</sup> The court distinguished *Chunn* from *Sullivan* and *Johnson*, because the children, rather than the mother, brought the action.<sup>38</sup> The court noted that prior to 1989, there was no statutory authority for a child to pursue a claim. This authority was provided by Act 383 of 1989.<sup>39</sup> The *Chunn* court found that while the statute contemplates one support obligation that may be pursued by different persons at different times, the limitation period is the same for actions sought by any of the persons.<sup>40</sup> Citing *Sullivan* and *Johnson*, the court found that the statute of limitations could not be amended to extend the time to bring a claim which had been barred.<sup>41</sup> The court determined that the father could have properly assumed that the claim was barred. Thus, the father had a vested right to rely on the statute of

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32. *Id.*

33. 312 Ark. 141, 847 S.W.2d 699 (1993).

34. *Id.*

35. *Id.* at 142, 847 S.W.2d at 700.

36. 304 Ark. 133, 801 S.W.2d 32 (1990).

37. *Chunn*, 312 Ark. at 142, 847 S.W.2d at 700.

38. *Id.* at 143, 847 S.W.2d at 701.

39. *Id.* The applicable statute, ARK. CODE ANN. § 9-14-105, was further amended by Act 870 of 1991 to add the following provisions:

(e) Any action filed pursuant to this subchapter may be brought at any time up to and including five (5) years from the date the child reaches the age of eighteen (18) years of age.

(f) This section shall apply to all actions pending as of March 29, 1991, and filed thereafter and shall retroactively apply to all child support orders now existing.

ARK. CODE ANN. § 9-14-105 (Supp. 1995).

40. *Chunn*, 312 Ark. at 145, 847 S.W.2d at 701.

41. *Id.*

limitations as a defense, and such right could not be deprived by subsequent legislation.<sup>42</sup>

The next case in which an Arkansas court considered statutes of limitation was *Laroe v. Laroe*.<sup>43</sup> In *Laroe*, the parties divorced in 1980. The wife was awarded custody of the parties' four minor children, and the husband was ordered to pay child support of \$55.00 per week.<sup>44</sup> In 1993, the appellee wife brought suit to collect support for the years 1984 through 1993.<sup>45</sup> In awarding judgment to the appellee, the chancellor determined that the appellee was barred from collecting any delinquent child support that accrued prior to May 12, 1988, because of the five-year statute of limitation.<sup>46</sup>

As part of his appeal, the appellant argued that the appellee's claim to child support arrearages was barred by laches and the doctrine of unclean hands because the appellee delayed before pursuing the action.<sup>47</sup> In affirming the judgment, the court of appeals noted that the chancellor barred the appellee's claim for support for 1988. Because the appellee did not raise the issue on cross appeal, the court did not address the merits of the appellee's claim.<sup>48</sup> Had the appellee raised the issue on cross appeal, the court might have ruled differently.

In *Arkansas Office of Child Support Enforcement v. House*,<sup>49</sup> the court refused to consider the effect of Act 870 of 1991 when the issue was not raised in the lower court.<sup>50</sup> Citing *Johnson*, the court held that the chancellor was never given the opportunity to address the issue at trial. The court, therefore, affirmed the chancellor's decision applying a five-year statute of limitations.<sup>51</sup>

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42. *Id.* at 145, 847 S.W.2d at 701-02.

43. 48 Ark. App. 192, 893 S.W.2d 344 (1995).

44. *Id.* at 193, 893 S.W.2d at 345.

45. *Id.* at 194, 893 S.W.2d at 345.

46. *Id.*

47. *Id.* at 194, 893 S.W.2d at 346.

48. *Id.* at 196, 893 S.W.2d at 346. The court wrote:

We first note that, although appellee sought judgment for child support arrearages since 1984, the chancellor barred her claim to support before May 1988. Appellee has not cross-appealed this holding; therefore, we need not address it except to dispute appellant's argument that the time-frame included ten years. Furthermore, the supreme court has held that the mere fact that the appellant delayed eleven years in pursuing her right to obtain judgment for child support arrearage will not defeat her right to accrued support.

*Id.*; see also *Cunningham v. Cunningham*, 297 Ark. 377, 379, 761 S.W.2d 941, 942 (1988).

49. 320 Ark. 423, 897 S.W.2d 585 (1995).

50. *Id.* at 425, 897 S.W.2d at 566.

51. *Id.*

In *Arkansas Department of Human Services v. Harris*,<sup>52</sup> the Supreme Court of Arkansas again had the opportunity to address the effect of Act 879, but declined to do so because of the failure of the appellant to file an abstract properly indicating that the issue had been raised in the trial court. The dissenting opinion, however, by Associate Justice Robert L. Brown, gave a road map which practitioners should follow in determining what arrearages may or may not be barred.<sup>53</sup> This dissenting opinion, and the passage of time, may well clarify the issue.

In his dissent, Justice Brown noted that the supreme court had the opportunity to consider the issue concerning Act 870 on another occasion, but the issue was not addressed because it had not been precisely raised before the chancery court.<sup>54</sup> Justice Brown opined that the abstract did contain enough information to decide the issue.<sup>55</sup>

Justice Brown reviewed *Sullivan*, *Johnson*, and *Chunn*,<sup>56</sup> decisions subsequent to the passage of Act 525 of 1989 and Act 879 of 1991. He noted that the new expanded statute of limitation became effective with the enactment of Act 870 of 1991. He also explained that the Act included a specific provision for retroactive application, allowing the collection of any arrearages that had not been barred by the previous five-year statute of limitations.<sup>57</sup>

Justice Brown used the effective date of Act 870, March 29, 1991, as his benchmark.<sup>58</sup> Justice Brown explained that the prior limitation statute allowed recovery of arrearages for five years prior to the filing of the action. He reasoned that successful litigants would be permitted to recover

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52. 322 Ark. 465, 910 S.W.2d 221 (1995).

53. *Id.* at 469, 910 S.W.2d at 223 (Brown, J., dissenting).

54. *Id.* at 469, 910 S.W.2d at 223-24 (Brown, J., dissenting), *see also* *Arkansas Office of Child Support v. House*, 320 Ark. 423, 897 S.W.2d 565 (1995).

55. *Harris*, 322 Ark. at 470, 910 S.W.2d at 224 (Brown, J., dissenting). To support his contention, Justice Brown cited the following:

1. The Missouri decree stating the required child support of \$128.00 per month for the child.

2. The Missouri certificate for the divorce decree filed in Arkansas on March 19, 1993.

3. The answer filed by the defendant Harris admitting the matter was filed on March 19, 1993.

4. The order of the chancery court finding:

a. That a five year statute of limitations barred all child support accruing five years prior to March 19, 1993; and

b. That the minor child had reached his majority on November 26, 1988.

*Id.* (Brown, J., dissenting).

56. *Id.* at 470-71, 910 S.W.2d at 224-25 (Brown, J., dissenting).

57. *Id.* at 471, 910 S.W.2d at 224 (Brown, J., dissenting).

58. *Id.* at 471, 910 S.W.2d at 224-25 (Brown, J., dissenting).

arrearages from March 29, 1986, in an action commenced on March 29, 1991. Therefore, according to Justice Brown, an action for the period from March 29, 1986, to March 29, 1991, was not barred by the enactment of Act 870.<sup>59</sup>

Addressing the issue of retroactive application, Justice Brown explained that Act 870 permits an action for arrearages for the period between March 29, 1986, to March 29, 1991 because when Act 870 took effect the action was not barred by the five-year statute of limitations.<sup>60</sup> Justice Brown also noted that the arrearages that accrued prior to the five-year period were barred and could not be revived under Act 870. Since November 26, 1988 was the date the child in *Harris* reached majority, Justice Brown concluded the chancellor should have calculated past due support from March 29, 1986, to November 26, 1988.<sup>61</sup>

The most recent decision concerning Act 870 is the court of appeals decision in *Branch v. Carter*,<sup>62</sup> decided on June 12, 1996. The parties were divorced on July 19, 1983. The plaintiff received custody of the minor child, and the defendant was ordered to pay child support.<sup>63</sup> On May 18, 1994, the plaintiff filed a petition for collection of child support arrearages. The chancellor found that collection of delinquent child support that had accrued prior to July 19, 1986, was time-barred.<sup>64</sup> The plaintiff appealed, contending that support which accrued between July 19, 1986 and July 19, 1991, should not have been barred by the statute of limitations.<sup>65</sup>

The appellate court agreed, reversing the chancellor's decision. The court determined that the arrearage that accrued between July 19, 1985, and the date the 1989 act became effective was subject to the five-year statute of limitations because the 1989 act did not have retroactive application.<sup>66</sup> The court explained, however, that when the 1991 act became effective, *its provisions applied to all delinquent child support not barred under prior statutes of limitations on the date of its enactment*.<sup>67</sup> The court also stated that an action barred at the time Act 870 went into effect could not be revived by the Act.<sup>68</sup> The appellant could have brought an action for delinquent child support extending back to March 29, 1986, according to the

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59. *Id.* (Brown, J., dissenting).

60. *Id.* (Brown, J., dissenting).

61. *Id.* at 471-72, 910 S.W.2d at 225 (Brown, J., dissenting).

62. 54 Ark. App. 70, 923 S.W.2d 874, *aff'd*, 326 Ark. 748, 933 S.W.2d 806 (1996).

63. *Branch*, 54 Ark. App. at 71, 923 S.W.2d at 875.

64. *Id.*

65. *Id.*

66. *Id.* at 72, 923 S.W.2d at 875-76.

67. *Id.* at 72, 923 S.W.2d at 876.

68. *Id.*

court, because the action was not time-barred under prior law.<sup>69</sup> Therefore, the court concluded the 1991 act retroactively applied to all delinquent payments which accrued after March 29, 1986.<sup>70</sup>

#### IV. UNRESOLVED ISSUES

Even when considered in conjunction with the court's attempts at clarification, the current statutory scheme still leaves many questions unanswered, and some definite contradictions remain. Both title 9, chapter 12, section 314<sup>71</sup> of the Arkansas Code concerning divorce and annulment, and title 9, chapter 14, section 230 of the Arkansas Code,<sup>72</sup> concerning spousal and child support, provide that each payment for support ordered paid through the registry of the court becomes a *final judgment* as each support installment becomes due and remains unpaid.<sup>73</sup>

Title 16, chapter 65, section 501 of the Arkansas Code, the *scire facias* statute, provides that the lien on *any judgment* may be revived within ten years of its rendition, and may be continued for an additional ten year period, or for subsequent periods of revivor of ten years each. Does this mean that a judgment for child support installments can be indefinitely revived by a parent, child, or personal representative?

Likewise, it is interesting that while an action to establish paternity may be brought "at any time,"<sup>74</sup> and while title 9, chapter 10, section 111 of the Arkansas Code provides that the chancellor "*shall* give judgment for a monthly sum of not less than \$10.00 per month for every month from the birth of the child until the child attains the age of eighteen (18) years,"<sup>75</sup> our courts have consistently held that the entry of a past due amount of support in paternity actions is discretionary and that recovery rests "upon the equities in a particular case."<sup>76</sup> This issue was addressed in *Green v. Bell*,

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69. *Id.*

70. *Id.* at 72, 923 S.W.2d at 876.

71. ARK. CODE ANN. § 9-12-314(b) (Michie 1993).

72. ARK. CODE ANN. § 9-12-314(a)(1)-(2) (Michie 1993).

73. ARK. CODE ANN. § 9-14-230(f) (Michie 1993) provides:

Notwithstanding other statutes in conflict with this section, the liens authorized by this subchapter shall continue in full force for three years from the date when all children covered under the order reach majority or are emancipated or die without necessity or limitation of revivor under Section 16-65-117 or Section 16-65-501.

*Id.*

74. ARK. CODE ANN. § 9-10-102(b) (Michie 1993).

75. ARK. CODE ANN. § 9-10-111 (Michie 1993) (emphasis added).

76. *Ryan v. Baxter*, 253 Ark. 821, 824, 429 S.W.2d 241, 244 (1973).

when the court said "the question is simply what is fair,"<sup>77</sup> and most recently in *Arkansas Department of Human Services v. Hardy*,<sup>78</sup> and *Arkansas Department of Human Services v. Forte*.<sup>79</sup>

Also, in a recent case involving modification of a divorce decree, the court held that there were circumstances under which a court might decline to permit the enforcement of a child support judgment.<sup>80</sup> The court found that while there was a prohibition against the *remittance* of unpaid child support, there could be circumstances under which the court would decline to permit the enforcement of a child support judgment.<sup>81</sup>

Each case involving child support establishment or arrearages will have to be evaluated on its own factual situation. The first consideration is whether or not it is an action derived through a divorce action, a paternity action, or independent action for support. The second question is what is the applicable statute of limitation for those actions, and what sums may have been previously barred.

A practical suggestion would be to establish a timeline in each case delineating the time of the entry of the order, the applicable statute of limitation at that time, the date of the first arrearage, and the applicable statute of limitation at that time. Also, since the statute of limitations is a defense which must be affirmatively raised, it is always advisable to ask for all possible arrearages and to force a determination as to what amount may be barred.

## V. CONCLUSION

The repeal of title 16, chapter 56, section 129 of the Arkansas Code and the questions which remain unanswered prevent the reaching of a conclusive answer as to a consistent determination of the collectibility of child support arrearages. However, the current acts, the dissent in *Harris*, the decision in *Branch v. Carter* and time may well solve the problem, at least until we receive additional federal directives.<sup>82</sup>

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77. 308 Ark. 473, 826 S.W.2d 226 (1992).

78. 316 Ark. 119, 871 S.W.2d 352 (1994).

79. 46 Ark. App. 115, 877 S.W.2d 949 (1994).

80. *Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993).

81. *Id.* at 606, 855 S.W.2d at 955.

82. Note: This article covers decisions of the Supreme Court and decisions of the court of appeals delivered through June 12, 1996.